THE

ALL INDIA REPORTER

1950

[Vol. 37]

DONATED
BY
SHRI AMAR [illegible]
(1910-1990)
Former Advocate General,
Jammu and Kashmir.

ORISSA SECTION

WITH PARALLEL REFERENCES TO

(1) I. L. R. 1950 CUTTACK (2) 16 CUTTACK LAW TIMES
(3) 51 CRIMINAL LAW JOURNAL

* * *

CITATION : A. I. R. (37) 1950 ORISSA

—: o :—

PUBLISHERS
THE ALL INDIA REPORTER LTD.,
NAGPUR, M. P.

1950

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Printed [illegible] L. MELA RAM, at the All India Reporter Press, Nagpur, and Published by
D. V. CHITALEY, B.A., LL.B., Advocate, for the All India Reporter, Ltd.,
at Congress Nagar, Nagpur.

under husband,

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1950

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PUISNE JUDGES :

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THE

ALL INDIA REPORTER

1950

Orissa High Court

A. I. R. (37) 1950 Orissa 1 *[C. N. 1.]*

RAY C. J. AND PANIGRAHI J.

Banchhanidhi Samantrai — Defendant — Appellant v. *Lachminarain Agarwala — Plaintiff — Respondent.*

A. F. A. D. No. 31 of 1946, Decided on 25th January 1949, from decision of Addl. Dist. Judge, Cuttack D/- 20th December 1945.

(a) T. P. Act (1882), S. 110 — Applicability — Whether section applies to written lease only — *(Quære).* [Para 9]

Annotation : ('45-Com.) T. P. Act, S. 110 N. 1a.

(b) T. P. Act (1882), Ss. 110 and 105 — Applicability — S. 110 does not apply to tenancy not for a term — Lease from month to month is not lease for a term.

Section 110 does not apply to a tenancy which is not for a term. [Para 9]

Tenancy for a time means a tenancy that is determined on efflux of time. That is the test. So far as tenancies from month to month are concerned, they are to be terminated on notice to quit at the option of either the lessor or the lessee. Hence, a monthly tenancy is not one for a term. Section 110, therefore, does not apply. [Para 9]

Annotation: ('45-Com.) T. P. Act, S. 110 N. 1; S. 105 N. 31.

(c) T. P. Act (1882), S. 106 — Monthly tenancy — Notice to quit — Notice should expire on last date of month and not on first day of succeeding month.

In the case of a periodical tenancy, the notice to quit must expire with the expiration of the period of the original tenancy. Thus, where a monthly tenancy commences on the 1st of the month, the notice determining the tenancy should expire on the last day of that month and not on the first day of the succeeding month : (1924) 1 K. B 117 and A.I.R. (30) 1943 Bom. 306, *Rel. on*; A. I. R. (19) 1932 P. C. 279 and A. I. R. (31) 1944 Cal. 84, *Disting.* [Para 3]

Annotation : ('45-Com.) T. P. Act, S. 106 N. 17, 19.

(d) Houses and rents — Orissa House Rent Control Act (V [5] of 1947), Ss. 5 (a) and 13 — Eviction for non-payment of rent — Tenant not entitled to protection.

A tenant is not entitled to protection against eviction for non-payment of rent under S. 5. The tenant is protected from ejectment on any ground other than non-payment of rent or breach of the conditions of the tenancy, whether such ejectment is brought about by execution of a decree or otherwise. A landlord wishing to evict the tenant for non-payment of rent is not required to approach the Controller for exemption. [Para 4]

Section 13 has no application to such a case. [Para 5]

(e) Houses and rents — Orissa House Rent Control Act (V [5] of 1947), Ss. 5 and 13 — Orissa House Rent Control Order (1942), S. 13 — Tenancy determined by notice to quit — Tenant continuing in possession is tenant — (Per *Ray C. J.*; *Panigrahi J.* Contra.)

Per *Ray C. J.* (*Panigrahi J.* dissenting) : — The definition of the word 'tenant' makes it clear that the Act is intended for the protection of one who is continuing in possession at the time of the commencement of the Act even though his tenancy has terminated either on notice to quit or by a decree of the Court. [Para 11]

Per *Panigrahi J.* — The House Rent Control Order does not seek to protect, as it does not in express language protect, a tenant by sufferance or a person who is no better than a trespasser. It does not confer the status of a statutory tenant on a person who was at the time it came into force in forcible occupation of the leased premises after the tenancy had been terminated by notice to quit. [Para 5]

Nor does the later House Rent Control Act improve the position of the tenant who had already suffered a decree in ejectment and continued in possession at the time it came into force under the orders of the civil Court : A.I.R. (32) 1945 Pat. 385 and A.I.R. (32) 1945 Pat. 463, *Rel. on.* [Para 5]

M. S. Rao — for Appellant.

S. K. Mukherji — for Respondent.

Panigrahi J. — This is a second appeal by the tenant against whom a decree for ejectment has been passed in a suit by the respondent-plaintiff. The plaintiff's case was that the defendant was let into his house as a monthly tenant on a monthly rent of Rs 14, but that the defendant was highly irregular in the payment of rent necessitating the filing of two suits by the plaintiff, to recover arrears of rent. The defendant again fell into arrears and the plaintiff was, therefore, obliged to terminate the tenancy by the service of a notice to quit on the defendant. The defendant refused to accept the notice and hence the suit. The defendant's plea was that he is protected against eviction by the provisions of the House Rent Control Order and that he was willing to pay up all the arrears of rent. He also questioned the validity of the notice to quit and denied his liability to pay damages.

[2] The Courts below have concurrently found that the notice served on the defendant to quit, terminating the tenancy with effect from 10th August 1943, was a valid notice and satisfied the requirements of law. They also found that the House Rent Control Order came into force on 1st November 1943, i. e., after the suit, and therefore did not apply to the facts of this case, as the suit had been filed as early as 28th August 1943.

[3] In second appeal, Mr. M. S. Rao contends, on behalf of the appellant, that the notice (Ex. 2) terminating the tenancy is not valid as, according to the plaintiff's allegation, the tenancy commenced on the 11th of a month and the notice purports to terminate the tenancy with effect from 10th August 1943. Reliance is placed on S. 110, T. P. Act, which lays down that where the time limited by lease of immovable property is expressed as commencing from a particular day in computing the time, such day shall be excluded. His argument is that since, on the plaintiff's own showing, the tenancy commenced on the 11th of a month, the first day of the tenancy, namely, the 11th, has to be excluded from computation and consequently the tenancy would terminate on the 11th of the succeeding month. This argument appears to me to be fallacious. In the first place, S. 110, T. P. Act applies only to cases where there is an express agreement limiting the period of the lease from a particular day. In the case of periodic leases, such as weekly or monthly tenancies, it is well-settled that the tenancy terminates on the day with which the week or month ends. The leading case on the subject is *Queen's Club Gardens Estate* v. *Bignell*, reported in (1924) 1 K. B. 117 : (93 L. J. K. B. 107), Lush J. observed:

> 'A weekly tenancy is a tenancy by the week just as a quarterly tenancy is a tenancy by the quarter. If the week's notice to quit is not given so as to expire at the end of a particular week, but at some other time, then another week begins before the notice expires, and this must mean that another complete week has begun. The tenancy being by the week, I do not see how it is possible for either party to give a notice to quit to expire during the currency of the week. When a fresh week begins the tenancy continues for another week just as in the case of a quarterly tenancy, when a fresh quarter begins, the tenancy continues for another quarter."

This case has been relied on in *The Utility Articles Manufacturing Co.* v. *Raja Bahadur Motilal Bombay Mills, Ltd.* reported in I.L.R. (1943) Bom. 553 : (A. I. R. (30) 1943 Bom. 306). Beaumont C. J., in delivering the leading judgment in the case relied on the observation in the above case that the characteristic of a periodical tenancy is that as each period commences it is not a new tenancy; it is really an accretion to an old tenancy. . . . One result of that doctrine is that a notice to quit must always expire with the expiration of the period of the original tenancy. In other words, where a monthly tenancy commences on the 1st of the month, the notice determining the tenancy should expire on the last day of that month and not on the first day of the succeeding month. Reliance was placed by Mr. Rao on the Privy Council judgment reported in *Benoy Krishna Das* v. *Salsiccioni* reported in 59 I. A. 414 : (A. I. R. (19) 1932 P. C. 279). But this case does not really help the appellant. In that case there was a lease for four years from 1st June 1921. The tenants gave notice on 1st February 1928, terminating the tenancy and the notice stated that it was one month's clear notice to take effect from that date and possession would be given up on 1st March. It does not follow that the Privy Council applied the provisions of S. 110, T. P. Act to a monthly tenancy. All that they laid down was that, having regard to S. 110, the four year lease expired at midnight on 1st June 1925, so that the subsequent monthly tenancy began on 2nd June 1925, and could be determined by a notice expiring on the 1st day of the month. Reference was also made to a case reported in *Calcutta Landing and Shipping Co. Ltd.* v. *Victor Oil Co. Ltd.*, A. I. R. (31) 1944 Cal. 84 : (211 I. C. 503). All that was decided in this case was that S. 110 applies to both written and oral agreements; and it is significant that Mookherjee J. strikes a different note and holds that S. 110 does not apply to a verbal lease and is confined to written leases only. This case is no authority for the point debated before me, namely, whether the notice to terminate a periodical tenancy should terminate on the day with which the period ends or on the subsequent day. We have, therefore, no hesitation in holding that the notice that was served in this case is valid and had the effect of terminating the tenancy from 10th August 1943.

[4] The next contention urged on behalf of the appellant is that the House Rent Control Act of 1947 which holds the field now applies to the case before us. It may be observed that at the time the suit was pending in the Courts below the House Rent Control Order of 1942 was in force, but the word 'tenant' was not defined

in that Order. The Orissa House Rent Control Act of 1947 (Orissa Act V [5] of 1947) removes this lacuna, and defines 'tenant' as meaning

> "any person by whom or on whose behalf rent is payable for any house and includes every person who, from time to time, derives a title under a tenant or a person continuing in possession after the termination of his tenancy otherwise than under the provisions of of this Act."

Stress is naturally laid on the words "a person continuing in possession after the termination of his tenancy" and it is contended that the defendant fulfils the character of a tenant who continued in possession though the tenancy had been terminated. This contention, however, though valid, does not help the defendant in resisting the plaintiff's right to evict him. The operative section which protects tenant is S. 5, which, in sub-cl. (a), provides that

> "he shall not be liable to be ejected, whether in execution of a decree or otherwise, except for non-payment of rent or breach of the conditions of the tenancy."

Mr. Rao's contention is that, despite the existence of a decree for eviction, the tenant is protected under this sub-clause and that so long as he is willing to pay the rent he can continue to occupy the house. On a plain reading of the sub-clause, it appears to me that the tenant is protected from ejectment on any ground other than non-payment of rent or breach of the conditions of the tenancy, whether such ejectment is brought about by execution of a decree or otherwise. That this is the true construction of the sub-clause would be apparent from the use of the word "except". To me it appears that the only exception made in favour of the landlord is the failure of the tenant to pay rent or his committing a breach of the conditions of the tenancy. It was then pointed out that the second proviso to S. 5 indicates how a landlord may obtain exemption from the provisions of sub-cl. (a) in respect of any house. To seek relief under the proviso would be to beg the question because, as I read sub-cl. (a), the landlord incurs no disability to his right to evict the tenant if such right is founded on non-payment of rent. It is only in cases other than those excepted by the sub-clause, that he has to approach the Controller for exemption and not otherwise. This interpretation does no violence either to the language of the Act or the policy underlying the Act, which seeks "to prevent unreasonable eviction of tenants".

[5] Mr. Rao also referred to S. 13, House Rent Control Act, 1947, but in my opinion that section has no application to this case. All that S. 13 lays down is that if the landlord wants to evict a tenant on any of the grounds, specified in the second proviso to S. 5, he has to obtain the permission of the Controller by an order in writing before filing a suit. It has no application to a case where the right to evict is founded on non-payment of rent and this is certainly in consonance with the interpretation that I have put on S. 5 (a). This view has also been taken by the Patna High Court in a similar case and there is no reason to think that the terms of the Bihar Act are far different from the provisions of the Orissa Act. Section 13, Bihar Act lays downs :

> "No order for recovery of possession of any house shall be made so long as the tenant pays, or is ready and willing to pay rent to the full extent allowable by this order and performs the conditions of the tenancy."

The difference lies only in putting the same idea in affirmative language in the Orissa Act, which says that if a tenant does not pay rent or commits a breach of the conditions of tenancy he shall be evicted. In the case reported in *Firm Ganesh Das Ram Gopal* v. *Jamuna Das and others*, A. I. R. (32) 1945 Pat. 385 : (24 Pat. 449) the question was whether a tenant under S. 13 of the Bihar Order, included a person whose tenancy had been determined by a valid notice to quit. In this case also, the Bihar House Control Order came into operation after the notice to quit had been served on the tenant. Shearer J. observed :

> It would be doing . . . . extreme violence to the language to construe the word 'tenant' as including a person in the position of the defendant whose tenancy had not merely been determined but against whom a decree in ejectment had been passed and who, if he was still in possession of the house, was in possession merely because the Civil Court had stayed the execution of the decree. The word 'tenant' in S. 13 must, in my judgment, be confined to persons who are either tenants under a tenancy agreement or are statutory tenants by reason of the provisions contained in either S. 4 or in S. 12 of the Order itself."

I agree, if I may say so with respect, with this interpretation put on the word 'tenant' and would hold that the House Rent Control Order does not seek to protect, as it does not in express language protect, a tenant by sufferance or a person who is no better than a trespasser. Reference may also be made to another case reported in the same series at p. 463 (*Firm Matrumall Satnarain and others* v. *Mt. Rami*, (24 Pat. 454), where the retrospective character of the House Rent Control Order came up for decision and it was held that right of action already vested in a person cannot be deemed to have been taken away unless the language of the Legislature is explicit. It was held in that case that a person whose tenancy by agreement had been determined by a valid notice to quit, but, who, despite that notice, declines to vacate the premises, is not a tenant within the meaning of that word as it occurs in S. 13 of the Bihar House Rent Control Order. Having regard to the fact that the Orissa House Rent Control

Order came into force long after the tenancy had been terminated and after the suit in ejectment had actually been instituted, I have no doubt that the House Rent Control Order did not take away the right which had already accrued to the plaintiff to evict the tenant, nor did it confer the status of a statutory tenant on the defendant who was at the time a person in forcible occupation of the leased premises. Nor, as I have said, does the later House Rent Control Act improve the position of the tenant who had already suffered a decree of the Court. If he continued in possession at the time the Act came into force in 1947, it was under the orders of the Civil Court, and by no means could he claim the status of a 'tenant' within the meaning of the Act.

[6] Finally it was argued that the Courts below erred in awarding damages to the plaintiff. In so far as the relief claimed by the plaintiff is based on his right to recover damages, the appellant has just ground to complain. The plaintiff is certainly entitled to compensation for the occupation of the house by the tenant against the will of the landlord, but whether the remedy to be given to the plaintiff should be based on damages or compensation, it cannot be denied that he is entitled to be reimbursed for his having been kept out of possession of the house. Admittedly, the monthly rental is Rs. 14 and it is not disputed that the municipal assessment is based on the computation of the monthly rental at Rs. 20. The Courts below have therefore, awarded Rs. 20 per month as damages. Having regard, however, to the peculiar circumstances of this case, we think that the defendant can be relieved against a portion of the damages awarded by the Courts below. We accordingly fix Rs. 16 per month as a proper measure of the damages that the plaintiff can legitimately recover for his being deprived of the possession of his house. Mr. Rao also appealed to us to give his client some reasonable time to vacate the house, because it is not easy for the tenant to procure a house at short notice, the scarcity of housing accommodation being a notorious fact in all towns, and particularly at Cuttack. This is a fact which is not denied by the respondent. We have, therefore, decided to give time till 10th June 1949 to the appellant to vacate the house and surrender possession of the same to the plaintiff, on condition that rent at Rs. 16 per month is paid regularly to the plaintiff. It is represented to us that the defendant has already deposited in the Court below rent at the rate of Rs. 20 per month. The plaintiff shall be at liberty to withdraw from out of the deposits so made at the rate of Rs. 16 per month beginning with 10th August 1943 upto 10th June 1949, or an earlier date on which the defendant may vacate the house. If the defendant fails to vacate the house on or before the date fixed, viz., 10th June 1949, the plaintiff shall be at liberty to execute his decree and recover compensation at the rate of Rs. 16 a month until he actually gets possession. This will be in addition to the rent decree in favour of the plaintiff from 11th March 1943 to 10th August 1943 at the rate of Rs. 14 a month.

[7] The appeal is accordingly dismissed subject to the directions given above. Each party will bear his own costs in this Court, but the decree relating to costs of the Courts below shall stand.

[8] **Ray C. J.**—I agree. The questions that have engaged our attention at the hearing of this appeal, being of some general importance, I wish to add a few words. These questions are : (1) Whether the notice to quit served in this case was sufficient in law ; and (2) whether the tenant (appellant) was entitled to protection against eviction under the provisions of the Orissa House Rent Control Act, 1947 (Orissa Act V [5] of 1947).

[9] With regard to the first question, Mr. Rao's contention is based upon a construction of S. 110, T. P. Act. He submits that this section applies to the tenancy of the present case, which is not only a tenancy by oral lease, but also one not limited in time. Apart from the controversy whether this section applies to a written lease only or to both kinds of leases, I am certain that it does not apply to a tenancy which is not for a term. Mr. Rao wants to argue that if it is a monthly tenancy it is a tenancy for the term of a month. This contention is fallacious. Tenancy for a time means tenancy that is determined on efflux of time. This is the test. So far as tenancies from month to month are concerned, they are to be terminated on notice to quit at the option of either the lessor or the lessee. Under the circumstances, the tenancy in this case, not being a tenancy for a limit of time, S. 110 does not apply.

[10] Besides, the very basis of Mr. Rao's argument in its factual aspect is not to be found on the records. There is no evidence that at the time of the granting of the lease the commencement of the tenancy was at all expressed as between the parties. His basis is the calculation for rent according to the schedule attached to the plaint. There rent is claimed from the 11th of a month till the 10th of the 5th following month, and accordingly arrears of rent for five months were claimed. Mr. Rao wants to argue that this mode of computation suggests that the tenancy commenced on the 11th day of a British calendar month. This

argument, too, is fallacious. If 11th is included as one of the days for which rent is claimed, this 11th day cannot be claimed twice over by the landlord while calculating the duration of the term of the notice. If 11th is included within the month of the tenancy, the month must terminate on the 10th of the next month, the rule being that no particular day of a month should be twice included in the month of the tenancy. In this view, this contention must fail.

[11] As regards the second question, viz., the applicability of the provisions of Act XI [11] of 1947, I may take a slightly different view from that of my learned brother, but that has no bearing upon the conclusion that has been reached in my learned brother's judgment with which I entirely agree. According to me, even if a tenant has, in the eye of law, namely, the provisions of the Transfer of Property Act, become a trespasser by termination of the tenancy, and even if a decree has been passed against him for eviction, and even if the decree has been stayed from execution, yet he is entitled to protection under this Act unless, for reasons, which I am going to set out herein below, he is liable to be evicted. Having regard to the preamble of the Act, the language used in S. 5 (a), the provisos thereto, and the proviso to S. 13, it is clear that the Act aims at preventing unreasonable eviction of tenants. The Act, on the whole, does not propose to force the landlord to put up with tenants who are either undesirable or disloyal to the landlord and to the terms of the tenancy. The Act is named, the House Rent Control Act, the object being that the landlord should not be allowed to demand and exact unreasonably high rent holding out eviction as a threat. The only protection that has been given to the tenant is under S. 5 read with S. 13 of the Act. The definition of the word 'tenant' makes it clear that the Act is intended for the protection of one who is continuing in possession at the time of the commencement of the Act even though his tenancy has terminated either on notice to quit or by a decree of the Court. The only case that is excluded is the case of termination of a tenancy under the provisions of this Act. In the present case, the tenancy had terminated on a notice to quit and a decree for ejectment had been passed by the time the Act came into force and yet, according to the definition, he is a tenant within the meaning of the Act, for the purposes of S. 5 as well as of S. 13. According to S. 5 (a) a landlord is entitled to eject a tenant, as defined in the Act, on the ground of non-payment of rent or a breach of the conditions of the tenancy. In other words, the landlord's right to eject the tenant on any one of these grounds is not sought to be controlled by the provisions of this Act. Mr. Rao contends that notwithstanding the word 'except' the landlord requires the Controller's permission to eject a tenant even on any of these grounds. This, beyond all possibility of doubt, is a misconstruction. The proviso requiring the landlord to apply to the Controller is one which is intended to give the landlord an "exemption." The exemption will lose all its meaning if he were required by the Act to apply to the Controller for all suits or proceedings for ejectment without any distinction. The proviso itself indicates that the reasons, of which the Controller should make an enquiry, are those other than the reasons contained in the execution clause. As the landlord does not stand in need of any exemption, there being no prohibition from his prosecuting any suit or proceeding for ejectment, on grounds contained in the exception clause, he cannot be held to be under the necessity of approaching the Controller for an order of exemption. Mr. Rao seems to have misunderstood the words "any other good and sufficient reason" occurring in sub-cl. (ii) of proviso 2 to S. 5. There the words "any other good and sufficient reasons" must mean reasons other than those already excepted in S. 5 (a). He further argues that S. 13 also gives him protection inasmuch as it provides that the landlord cannot entertain a suit or proceeding for eviction of a tenant on grounds specified in proviso 2 to cl. (b) of S. 5 without the Controller's order in writing permitting him to institute such a suit or proceeding and without producing the same before the Court. Here, again, the position has been totally misconceived. This prohibition is confined to such grounds as are specified in proviso 2, namely, the grounds on which he can approach the Controller for exemption from the liabilities imposed upon him under S. 5 (a). If he suffers from no disability in relation to his right to eject on grounds of non-payment of rent and breach of the tenancy conditions, he does not require to apply to the Controller. The proviso to S. 13 throws a flood of light on the intention of the Legislature. The proviso says :

> "Where the tenant denies the title of the landlord or claims the right of permanent tenancy, the landlord shall be entitled to sue for eviction ...... and the Court may pass a decree for eviction on any of the grounds mentioned in S. 13 or S. 5 notwithstanding that the Court finds that such denial does not involve forfeiture of the lease."

[12] I will sum up the position to mean that where the tenant obeys the landlord in accepting his title, proves himself loyal to the conditions of the tenancy by fulfilling the same, and does not commit default in payment of rent, he is entitled to protection under the Act against the avarice of a greedy landlord. Nothing more

and nothing less than this has been intended, so as to fetter the right of the landlord in exercising his option to get rid of a vexatious tenant or one who is a habitual defaulter.

[13] In the course of his argument, Mr. Rao cited an illustration that if a tenant who has to pay rent on the 2nd of a particular month pays it, say, on the 3rd, he incurs the liability of ejectment, to the exclusion of the protection given under the Act. No doubt, as my learned brother observed, we are not to give an answer to a hypothetical question or to dispose of a hypothetical case, but to attribute a fair meaning to the terms occurring here, it is certainly necessary to take note of the point cited in Mr. Rao's illustration. Non payment of rent must be such as to give a reasonable landlord sufficient cause of annoyance so as to intend to get rid of the tenant. Coming to the facts of this case, it is very clear from the written statement of the defendant himself that there have been three suits against him, including the present one, in respect of this disputed tenancy. The first two suits were for recovery of arrears of rent : one was S. C. C. Case No. 253 of 1942 and the other No. 179 of 1943. Even after that, he did not become regular in payment of his arrears of rent. He was in arrears for five months before the institution of the suit. Therefore, this is a case of habitual default on the part of the tenant. Another argument that deserves notice is that 'non-payment of rent" occurring in the exception clause must be such, according to Mr. Rao, as would entail forfeiture of the tenancy. The very manner in which the words 'non-payment of rent' have been used, as something distinct from breach of conditions of the tenancy, makes it perfectly clear that this non-payment is not one of the conditions of the tenancy, as a ground for forfeiture. Had it been so intended, the language should have been certainly different from what it is here. Secondly, as has been pointed out by Mr. Rao, where non-payment of rent entails forfeiture of the tenancy and is made the cause of action for a suit in ejectment, the Court has got the discretion to relieve the defaulter against the hardship of forfeiture. In that case, the words "non payment of rent" occurring in S. 5 (a), if accepted as such non-payment which is a ground for forfeiture of the tenancy, the tenant will certainly be worse off under the Act, than he should be under the ordinary law, exclusive of the Act. That is just the reason why I say that non-payment of rent here is not that non-payment which entails forfeiture.

V.B.B. *Appeal dismissed.*

A. I. R. (37) 1950 Orissa 6 *[C. N. 2.]*

RAY C. J. AND NARASIMHAM J.

Govinda Mohapatra—Defendant 8—Appellant v. *T. Venkatakrishnayya, Plaintiff and others, Defendants—Respondents.*

Appeal from Original Decree No. 5 of 1944, Decided on 13th May 1949, from decision of Sub-Judge, Berhampore,* D/- 20th December 1943.

(a) Mortgage—Enforcement of—Liability is joint and several amongst mortgagors and subsequent transferees — Liability can be enforced in entirety against any of them by exonerating others — Fact that it cannot be enforced against some by virtue of Orissa Money-lenders Act, 1939, is no bar against its enforcement against others—Debt Laws — Orissa Money-lenders Act (III [3] of 1939), S. 2 (1), Exception 3—Contract Act (1872), S. 43.

Where the liability for the mortgage money is joint and several as against the mortgagors and the subsequent transferees, and as against the several mortgage properties in their hands, the fact that the liability cannot be enforced against some of them on account of a bar in law, e. g., by provision in the Orissa Money-lenders Act, will not exonerate others. It is also open to the mortgagee to enforce the entire mortgage liability against a part of the mortgage properties absolving the rest. It is an incident of liabilities which are joint and several : A. I. R. (29) 1942 P. C. 50, *Rel. on; Case law considered.* [Para 9]

Obiter:—There is nothing in the indivisibility of the mortgage which should prevent a mortgagee from realising the entire mortgage money from a part of the mortgage property. If there are other properties sold subject to the same mortgage, the remedy of the transferee of that property is by way of contribution. There is nothing in the language of the exception 3 to S. 2 (1), Orissa Money-lenders Act so as to compel the Court to apportion the mortgage liability as between the several purchasers at a sale "subject to mortgage." That question shall be governed by the general law which is not, in the least, abrogated or modified by the exception clause. There may be cases where such purchaser has undertaken or is to be deemed to have undertaken to a part only of the mortgage money proportionate to the property purchased. Such an undertaking is binding on the mortgagee only by consent or under prescribed circumstances but not always. In such a case it is only the proportionate amount which is exempted from the category of loan as defined in the Act. In such a contingency if the mortgagee wants to enforce the entire debt against a part purchaser of a mortgage property, his claim in excess of the proportionate amount might be subjected to reduction or scaling down under the Act. [Para 33]

Annotation: ('46 Man.) Contract Act, S 43 N 2.

(b) Debt Laws — Orissa Money-lenders Act (III [3] of 1939), Ss. 10, 2 (1), exception 3 — Auction-purchaser of mortgaged property — Whether debtor entitled to benefit under Act depends on whether he has or has not undertaken liability of paying off mortgage—Sale of mortgaged property "subject to mortgage" — When within mischief of exception 3 to S. 2 (1), stated — Tests laid down — Civil P. C. (1908), O. 21, Rr. 58 to 66.

The words "subject to mortgage" occurring in exception (3) of cl. (1) of S. 2, Orissa Money-lenders Act, govern "sale" used in the exception clause. The exception evidently means that the sale must have been "subject to mortgage." Every sale made subsequent to a mortgage is, "subject to mortgage," in the sense that the mortgagee's claim against the property

must take priority over the rights of the purchaser in the property purchased. But the phrase has a limited sense too, e. g., where the purchaser expressly or otherwise undertakes to redeem the mortgage with a part of the consideration of his purchase or when a court-sale takes place for a favourable price on account of its being subject to a binding condition that the purchaser shall have to pay off the mortgage money due at the time. The full and unlimited operation of the Orissa Money-lenders Act does aim at divesting the creditor of some of his remedies correspondingly with the result of divestment of his rights in order to relieve the debtors of the burdens of their debts. Like every other statute, it must be construed very strictly so as to avoid, in its application, such divestment unless it is so intended and, as well, so expressed clearly. In a case where on account of the sale the mortgagor or any of his representatives is relieved of the liability under the mortgage, it is not the intention of the Act, that the creditor should be disarmed in respect of his remedies against one who has to pay, if at all, in discharge of an obligation which, either by an agreement between the parties or by an order of Court having the like effect, he has undertaken. Where the ultimate incidence of mortgage liability still continues to lie on the mortgagor, notwithstanding a sale of the mortgage property, e. g., when he binds himself by an indemnity clause to secure the purchaser's title free from the encumbrance and where on account of such indemnity condition the purchaser is entitled to call upon the mortgagor to make good the loss that he suffers on account of paying off the mortgage in order to free his purchased property, a relief to such a purchaser under the Act is a relief to the mortgagor. In such a special case, the mortgagee is deprived, by the Act, of his open and free choice of enforcing mortgage against the subsequent purchaser for the full amount due under it irrespective of the consideration of the concommitant hardship, that accompanies such enforcement caused to the original debtor in respect of the loans originally advanced. Where the purchaser takes the property subject to encumbrance the vendor-borrower is under no liability of a debt, his liability being taken over by the purchaser. He is no longer entitled to debtors' relief with the consequence of divesting the creditor of his money. [Para 16]

The intention of the Legislature in enacting exception 3 to cl. (1) of S. 2 is to exclude the amount payable by a purchaser "subject to mortgage" from the benefits of the Money-lenders Act. In order to give effect to the intention the words ought to receive the widest possible meaning not altogether foreign to the language employed. In that view, the crux of the question is whether the auction purchaser has paid the full price of the property or has only paid the difference between the market price thereof minus the sum payable under the encumbrance. [Para 20]

The applicability of the exception clause does not require that the mortgagee should have been party or privy to the purchase subject to mortgage. The status contemplated is one emerging from an established relationship between the mortgagor and the purchaser at a sale either private or *in invitum*. The liability of the purchaser owes its existence to the purchase that he makes and the purchase money that he holds in trust for the mortgagee and not to any borrowing from him. The test always is whether the benefit under the Money-lenders Act if conferred upon a purchaser or an auction purchaser, as the case may be, would ultimately enure to the original debtor, namely, the judgment-debtor. [Para 29]

Whether an order of the executing Court mentioning in the sale proclamation that the attached property was to be sold "subject to mortgage" has the effect of so selling the property, so as to bring the sale within the meaning of the exception to S. 2 (1) or has the effect of selling it with notice of the mortgage, depends upon circumstances of the case and the construction of the order. The question always depends upon whether the existence of the mortgage and the amount due under it have been judicially determined. The question is always one of construction, whether what was seized by the executing Court and ultimately sold was only the equity of redemption. It may as well be an order purporting to be one passed while settling the terms of sale proclamation under O. 21, R. 66. The test is whether the matter has been judicially determined as between the parties then before the Court and like as to any other order of Court, a third party shall stand out of it but not the parties themselves nor anybody deriving interest from them: *Case law discussed.* [Paras 28 & 31]

Annotation: ('44-Com.) Civil P. C, O 21 R 66 N 11.

P. V. B. Rao — for Appellant.

P. C. Chatterji, R. K. Das, G. C. Das and D. V. Narsing Rao — for Respondents.

Ray C. J. — This is defendant 8's appeal in a suit for enforcement of a mortgage dated 27th July 1926 for a consideration of Rs. 12,000 executed by defendants 1 and 2 and their father late Narain Gantayat. The aforesaid mortgage was executed in full discharge of a prior mortgage dated 16th December 1911 for a consideration of Rs. 8000. The latter consideration was made up of cash advances from time to time under pronotes and the interests that accrued due thereon. It is undisputed that out of the consideration of Rs. 12,000, Rs. 6000 represented interest accruing due on the pronotes and the prior mortgage bond, the balance being the amounts advanced in cash. Defendants 1 and 2 are the primary mortgagors. Defendants 3, 4 and 5 are the sons of defendant 1. Defendants 6 and 7 are sons of defendant 2. Defendant 8, the present appellant is a purchaser of Schs. B-1 and B-2 properties subject to the mortgage. Defendants 9 to 12 are also subsequent purchasers of certain minor items of mortgage properties. Defendants 13 and 14 are two cosharers of defendants 1 and 2 being in possession of certain items of the mortgage properties who set up a paramount title. The mortgagor defendants have subsisting interest in and are in possession of a substantial portion of the mortgage properties not affected by the subsequent purchases of defendants 8 to 12.

[2] The plaintiff claimed recovery of rupees 22,514 as mortgage money, either from all the defendants or in the alternative from defendant 8 alone particularly on the ground that his auction purchase, to be set out in greater detail, presently, was "subject to the mortgage".

[3] None of the defendants resisted the suit by way of attacking either the validity or the execution of the mortgage. The main defence was that the plaintiff having been paid Rs. 13,000

was not entitled to recover anything as he was not entitled to more than double the amount actually advanced. Other minor defences have lost their significance as they have not been pressed before us having been set at rest by the decree under appeal. The plaintiff's suit has been dismissed against all but decreed in full against defendant 8.

[4] As already stated, the issue, main if not the only, between the plaintiff and the defendant 8 is whether the latter is a purchaser at a sale in execution of a decree of a Court of the part of the properties subject to the mortgage, the purchase having been made prior to the coming into force of the Act, and as such, if entitled to the benefits available to a debtor under the Orissa Money-lenders' Act. This is the only issue with which we are concerned in this appeal. The pleadings of the parties in relation to this issue are as follows: Paragraph 6 of the plaint alleges the circumstances and the conditions under which the appellant came to purchase a part of the mortgage properties. The paragraph reads thus:

> "Subsequent to the suit mortgage bond and some payments thereon one Sadhu Gantayatani obtained a compromise decree in a suit for partition O. S. 42/29 on the file of the Subordinate Judge's Court at Berhampur against defendants 1 and 2 and their late father Narayan Gantayat and some other members of the family. For realising the amount due under the money portion of the said compromise decree the said Sadhu Gantayatani attached and brought the lands of the mortgagors in the village of Dhobadi to sale in E. P. 43/35 on the file of the Ganjam District's Court and defendant 8 her cousin brother, purchased in court auction the properties mentioned in Schs. B-1 and B-2 hereto annexed for Rs. 5500 subject to the suit mortgage bond amounting to Rs. 15,000 and took delivery thereof. All this was done on the decree-holder's representation and defendant 8 was really conducting the proceedings on behalf of the decree-holder (Sadhu Gantayatani) who is his cousin sister."

Paragraph 9 of the plaint as amended reads:

> "The plaintiff instituted this suit for the recovery of Rs. 22,514 from defendant 8 and the properties purchased by him in court auction as described in schedules B-1 and B-2 he having purchased the same subject to the payment of the whole of the suit mortgage debt in court auction in E. P. 43 of 1935 on the file of the District Court of Ganjam. Defendant 8 and the properties purchased by him are, therefore, liable to pay the entire suit amount both in law and in equity. If for any reason the Court finds that such a decree cannot be passed on the ground of indivisability of the mortgage or otherwise, the plaintiff submits that a decree may be passed including the remaining mortgaged properties of the suit."

The prayer in the plaint as cast in para. 13 thereof is in accord with the aforesaid averments, in paras. 6 and 9. In answer thereto, the appellant in his written statement avers as follows:

> "It is true that this defendant purchased the properties mentioned in Schs. B-1 and B-2 at court auction as alleged in para. 6 of the plaint but the allegation that Rs 15,000 was due under the suit mortgage bond at the date of sale or that this defendant knew the actual amount due by then is denied. The allegation that he was conducting the proceedings on behalf of Sadhu Gantayatani is not correct. The plaintiff represented to this defendant that more than double the amount advanced by him had been repaid by the mortgagors and that interest only was due on the bond and this defendant was accordingly pursuaded to bid for the property. Even after the auction sale the plaintiff offered to return the suit document if he was paid Rs. 7000 in full discharge of the suit debt. But the defendants did not agree. The present claim is highly speculative and is purposely inflated without giving credit to several other payments made by the mortgagors and in collusion with them to deprive this defendant of the properties purchased by him."

After several other averments, the defendant claimed protection under the Orissa Money-lenders Act, and contended that the plaintiff was not entitled to compound interest as claimed in the suit. In this state of pleadings, it is contended by Mr. G. C. Das, the principal respondents' counsel that the appellant was not entitled to avail of the contention that he now urges, namely, that his purchase was "not subject to mortgage". This submission carries some force, supported, as it is, by para. 6 of the written statement already referred to. But the paragraph, read with the latter portion of the written statement, cannot be held free from an amount of ambiguity. The parties, however, joined as issue as the one emerging out of the averments and counter-averments set forth above, in the following terms:

> "3. Whether the suit in so far as it seeks to recover the suit mortgage amount from defendant 8 and the properties purchased by him as shown in Schs. B-1 and B-2 annexed to the plaint, he having purchased the said properties subject to the payment of the amount due under the suit mortgage is one in which defendant 8 can seek relief under the provisions of the Orissa Money lenders Act?"

For the purpose of determination of this issue, the supplementary issue 10 was also framed. "10. Is the plaintiff a money-lender within the meaning of the Orissa Money-Lenders Act?"

[5] It was pointed out in course of argument, in further support of the submission of the respondents' counsel, that on account of absence of denial of the position that his purchase was subject to mortgage, in his written statement, defendant 8 did not press issue 8 the only issue relevant to this point. This submission, however, is wrong. As I have already pointed out, issues 3 and 10 are the relevant issues in relation to this part of the parties' case. Issue 8 arose out of the objection embodied in para. 5 of the appellant's written statement.

> "The plaintiff cannot substitute the Schs. B-1, B-2 and C for properties mortgaged to him and throw the entire burden of the mortgage-debt on a portion of the mortgaged property."

The circumstances relating to this issue are that the mortgage was executed by defendants 1 and 2 and their father in respect of their undivided alleged ¼th share of certain villages. During the subsistence of the mortgage, the widow of one of the cosharers, Sadhu Gantayatani, brought a suit for partition of the family properties, and on partition Schs. B-1, B-2 and C properties of the plaint fell to the share of the mortgagors in lieu of their alleged share already mortgaged to the plaintiff. The plaintiff thereupon wanted to enforce his mortgage against the aforesaid properties as substituted security. As these properties were less in extent and value, than the properties mortgaged, the appellant, as well as, other defendants raised the issue 8 which was subsequently abandoned. The abandonment, therefore, does not amount to the appellant's withdrawal from the contest that his purchase was not subject to mortgage in the sense contemplated in Exception 3 of S. 2 (i), Orissa Money-Lenders Act. The appellant's contention in this Court therefore cannot be said to have been concluded by the pleadings. The fact that the purchase was made *apparently* "subject to mortgage" is not so much denied as that the position therein indicated was not the one contemplated in the exception.

[6] Mr. P. V. B. Rao, the learned counsel for the appellant, in presenting his appeal, has formulated three contentions: (i) The Court below has found that the mortgagee's claim as against the mortgagors has been fully satisfied and that the suit against them has been dismissed; in the circumstances, a decree for recovery of the mortgage money by sale of a part of the mortgage properties purchased by the appellant is not permissible under the law, the mortgage-debt being one and indivisible; (ii) The validity and the subsistence of the mortgage, and the amount due thereunder, as it stood at the date of the auction sale, were not determined under O. 21, R. 62, Civil P. C. hence notification of the mortgage, and the mortgage amount of Rs. 15,000 in the sale proclamation will not make the sale "subject to mortgage" within the mischief of Exception 3 Cl. (i) of S. 2, Orissa Money-lenders Act (Orissa Act III [3] of 1939); and that (iii) conceding that the defendant 8's purchase was at a sale of the mortgage properties "subject to mortgage" within the exception clause, it would except only the proportionate amount as mentioned in the said clause payable in respect of the properties purchased; in that view, the decree, as passed for the entire mortgage-money by sale of Schs. B-1 and B-2 properties irrespective of the ratio it bears to the entire mortgage properties in value in the hands of the appellant, is not sustainable.

[7] I shall deal with the contentions in the order in which they have been stated.

[8] *Point No. (1)*—The Court's finding which is referred to in the contention is:

> "21. It is not disputed that an amount much in excess of the original loans advanced has been realised and as such under S. 10, Orissa Money-lenders Act, plaintiff is not entitled to realise anything else on the basis of the suit mortgage subject however to the question whether the subsequent purchasers, namely, defendant 8 and defendants 9 to 12 can plead for reliefs under that Act. As against the non-transferees that is the members of the mortgagor's family the claim has therefore to be found as already fully satisfied and as such the suit shall be dismissed against them."

[9] It may be noted that there is slight inaccuracy in the expression of the finding. What has been intended to be found is that the amount in excess of twice the original amount advanced having been realised, the Court could not pass a decree against the non-transferee-defendants for the claim advanced in excess thereof. The finding has, no doubt, been unhappily phrased but we are concerned with the substance and not the form. The substance of the finding is that under S. 10, Money-lenders Act, the Court cannot pass a decree against the original debtors for recovery of any claim in excess of twice the amount originally advanced. There is nothing in law that the liability which is joint and several as amongst several debtors can be fully enforced against some to the exclusion of others. A finding to that effect does not involve inconsistency or repugnancy, particularly when such a finding is warranted in law. But for the Money-lenders Act and but for the fact that defendant 8 by his purchase, 'subject to mortgage," undertook, as it were, to pay the entire mortgage dues, the liability for the mortgage-money was joint and several as against the mortgagors and the subsequent transferees, and as against the several mortgage properties in their hands. That the liability cannot be enforced against some of them on account of a bar in law will not exonerate others. Similarly, it is open to the mortgagee to enforce the mortgage liability against a part of the mortgage properties absolving the rest. It is an incident of liabilities which are joint and several. The question has been set at rest by their Lordships of the Privy Council in the case of *Shah Ram Chand* v. *Prabhu Dayal*, 69 I. A. 98: (A.I.R. (29) 1942 P. C. 50). The position may be made clear by an illustration. Say, A, B, C and D incurred certain loan in course of one transaction so that their liabilities were joint and several. It is discovered that A was not *sui juris* at the relevant time The debt does not freeze as a whole. The creditor's suit against all of them can be validly dismissed against A and decreed against the rest. The decree, in the instant case, does

not differ in principle from the illustration above.

[10] Besides the Privy Council case already referred to, the decision of a Division Bench of Madras High Court (Wadsworth and Sastri JJ.) in the case of *R. Srinivasa Thatachariar* v. *Sivasubramania Chettiar* reported in A.I R. (30) 1943 Mad. 196: (I. L. R. (1943) Mad. 665) is in point. Mortgage properties in this case, had been purchased separately by defendants 22 and 18 of whom the former was an agriculturist. The original mortgagor whose interest in the mortgage properties ceased was a non-agriculturist. On the application of the agriculturist defendant, the decree as against him was scaled down and the same was not scaled down as regards the other defendant. The former deposited the decretal amount as scaled down and contended that he should be allowed to redeem the entire mortgage, the decree being entered as satisfied so as to enable him to sue for contribution from the other defendant. His contention having been negatived in the Court below, the matter was finally agitated in the High Court. The effect of the lower Court's order was characterised by his Lordship Patanjali Sastri J., as splitting up of the decree in order to give effect to the provision of the Act (Madras Agriculturists' Relief Act IV [4] of 1938) so as to benefit only the agriculturist-debtors but not so as to affect the remedies of the creditors against such other debtors as were not agriculturists. This position was upheld by his Lordship as against the contentions, that the mortgage was one and indivisible and that it cannot be held discharged as against one and undischarged and hence enforceable against another: and that it did not matter if in giving effect to the Act in favour of an agriculturist, a non-agriculturist was also benefited. The authorities relied upon by the appellant were *Arunachalam* v. *Seetaram*, I.L.R. (1941) Mad 930 : (A. I. R. (28) 1941 Mad. 584); *Nachiappa Chettiar* v. *Ramachandra Reddiar*, A. I. R. (29) 1942 Mad. 527 : 203 I. C. 417) and *Marina Ammayi* v. *Mirza Baker Beg Sahib*, A. I. R. (28) 1941 Mad. 557 : 200 I. C. 245). I consider, worth quoting the observations of Patanjali Sastri J., by way of refuting the aforesaid contention :

> "Although it has been held by this Court that the liability of a purchaser of a part of the hypotheca who is an agriculturist to pay the mortgage money out of the property purchased is a 'debt' within the meaning of the Madras Agriculturists' Relief Act, it cannot be said that he stands in relation to the mortgagee in the same position for all purposes as the original mortgagor who borrowed the debt. In the case of the latter, if he pays the scaled down amount, the contractual relation of debtor and creditor is put an end to and no part of the debt can subsist thereafter, with the result that the property which under the mortgage contract, is charged with the due payment of that debt becomes into whosoever hands it may have passed, freed from the burden of the charge. The decisions referred to above proceed on this principle. But when a purchaser of part of the hypotheca, being an agriculturist, pays the scaled down amount of the debt, there is no obvious reason why the debt should be regarded as wiped out even as against the mortgagor, or a person deriving title from him, who is not an agriculturist; for the Agriculturists' Relief Act is clearly intended to benefit only agriculturists debtors and it nullifies the rights of creditors and overrides the general law only to the extent necessary for giving effect to its provisions and no further."

* * * *

> "Be that as it may, we cannot agree that the mortgagee's right to recover the full amount of the debt from the properties in the hands of defendant 18 should be nullified in order to safeguard the appellant's possible right of recovering contribution from defendant 18. It may be, that in certain circumstances the relief provided in the Agriculturists' Relief Act is of *no practical benefit to an agriculturist debtor but the latter cannot claim in seeking such relief that the creditor's rights should be prejudiced to a greater extent than the provisions of the Act clearly warrant.*"

[11] With these observations, their Lordships did not consider that the principle of the decisions relied upon for the appellant should be extended to cases like the one where the mortgagor *is not* an agriculturist and the question arises between purchasers of different portions of the hypotheca some of whom are and others are not agriculturists. Mr. Rao, however, relied upon this decision as laying down a principle that when the borrower is freed from the debt, no other debtor by virtue of the purchase of equity of redemption can be made liable. This contention overlooks the specific provision of the Orissa Money-lenders Act which expressly discriminates one against the other.

[12] The next case, in point, is that of *C. S. Ramier* v. *B. N. Srinivasiah*, A. I. R. (28) 1941 Mad. 204 : (I. L. R. (1941) Mad. 336). In this Wadsworth and Patanjali Sastri JJ., upholding their earlier views that the representative of a puisne mortgagee was entitled to be regarded as a debtor under S. 7 and to scaling down of the decree under S. 19 of the Act, observed :

> "It is argued by Mr. Ramaswamy Aiyangar for the decree-holder that the right of an agriculturist judgment-debtor to scale down a decree should not be allowed to enure for the benefit of a non-agriculturist judgment-debtor, a proposition with which we are in agreement. But we find it difficult to accede to the further contention that, the mortgage being one and indivisible, it is wrong in theory and difficult in practice to scale down the decree against the agriculturist judgment-debtor, while leaving it unamended as against the non-agriculturist judgment-debtors. The theoretical argument is based on the absence from S. 19 of any words excluding the application of the general law governing mortgages. But S. 19 is only the machinery section. The substantive provisions are contained in S. 7 which says :
>
> Notwithstanding any law .... or decree of Court to the contrary, all debts payable by an agriculturist

at the commencement of this Act, shall be scaled down . . . .

Having regard to our previous decisions, we must hold that the applicant is a judgment-debtor and that the decree debt is payable by him. It follows that this debt is to be scaled down, notwithstanding the decree and notwithstanding the provisions of the general law which prevent the person who acquires a partial interest in the hypotheca from denying the liability of his interest to satisfy the whole of the mortgage debt. We are unable to accept the contention that a debt which is payable by an agriculturist falls outside the purview of the Act merely because it is also payable by a non-agriculturist and it seems to us obvious that the mere fact that the applicant has sub-mortgaged his interest to a non-agriculturist will not deprive the applicant of any benefits to which he may be entitled under the Act as a person liable to satisfy the decree."

[13] This decision countenances decrees for different amounts against different judgment-debtors liable under one mortgage according as one is entitled to the benefits under the Relief Act and the other is not. Their Lordships directed modification of the form of the decree resulting in splitting the decretal amount into two parts, one being the amount payable by the puisne mortgagee and the other payable by the other non agriculturist-judgment-debtors. It will be observed from the last portion of the observation that even though a debt was payable both by an agriculturist and by a non-agriculturist what was payable by the former was a debt liable to be scaled down though what was payable by the latter would not be so. The case, very strongly relied upon by Mr. P. V. B. Rao is that of *Marina Ammayi* v. *Mirza Baker Beg Sahib*, A. I. R. (28) 1941 Mad 557: (200 I. C. 245). It was a redemption suit by an agriculturist mortgagor with whom were impleaded as co-plaintiffs the purchasers of the portions of the hypotheca who held reserved with them a part of the consideration money for payment to the mortgagees. The debt was scaled down in accordance with the provisions of S 19 read with S. 8 of the Act and redemption was decreed subject to payment thereof. The mortgagee contended, in the High Court, that some of the debtors, namely, purchasers of portions of the mortgage properties whose purchase was "subject to mortgage" were non-agriculturists and that the Court should not have entered full satisfaction of the debt even as against them as they were not entitled to the benefits of the Act. The case of *Ramier* v. *Srinivasiah*, A.I.R. (28) 1941 Mad. 204: (I. L R (1941) Mad. 336), was cited in support of the contention; but it was distinguished on the ground that as the mortgagors who were entitled to redeem the mortgage, as a whole, were agriculturists, the relief of redemption could not be denied to them In answer to the contention that the non agriculturists debtors were to be benefited as a result, the reply given was that the mortgagors were entitled to get a refund of the portions of the purchase money which the purchasers, as a result of the scaling down of the decree, would not be required to pay to the mortgagee, thus the total benefit being rendered to the agriculturists and not necessarily to the non-agricultutists. They however, disapproved of the lower Court's observation that there could not be any partial amendment of a decree under the Act with regard to some only of the judgment-debtors who were agriculturists leaving alone the others on the basis of the decision in *Ramier's case*, (A.I.R. (28) 1941 Mad 204: I.L.R (1941) Mad. 336). This case, however, is not an authority against splitting up a decree into two parts so as to give the benefits of the Act to some of the judgment-debtors and to deny the same to the others. Mr. Rao, however, contends that according to this decision, the purchaser-judgment-debtors would share the same fate as the mortgagors and that, in that event, the suit having been dismissed against the mortgagors in the instant case, it should have been dismissed against all. This, however, is not the *ratio decidendi* of the decision. Even if it be so, I find it somewhat difficult to reconcile it with the decisions already quoted with which, with great respect, I am in entire agreement. In my judgment, in a case where a subsequent purchaser should, by the terms of his purchase, undertake to pay the mortgagee, he becomes the principal debtor primarily liable to pay the mortgagee and it is his status that ought to determine whether the *debt* should be scaled down or otherwise. To my mind it appears that the logic of indivisibility of a mortgage has been pushed too far in some of the Madras decisions herein referred to. It is optional with the mortgagee to release a part of the mortgage properties without any consequent alteration of the fundamental right to hold the rest of the property liable for the entire debt. As pointed out by Sir G. Rankin in *Shah Ramchand* v. *Prabhu Dayal*, 69 I. A. 98 : (A. I. R. (29) 1942 P. C. 50), this release does not free the released property from the liability of contribution under S. 82, T P. Act. The utmost that the Relief Act can achieve is to free it from contribution if the debtor is an agricultutist and accordingly allow compulsory abatement of a part of mortgagee's claim.

[14] The next case relied upon is that of *Arunachalam Pillay* v. *Seetaram Naidu*, (I.L.R. (1941) Mad. 930 : A. I. R. (28) 1941 Mad. 584). That was a case in which a non-agriculturist purchased the equity of redemption in court auction. The mortgagor, was however, an agriculturist. The decree was scaled down at the instance of the mortgagor to the benefit of respondent 12, the aforesaid purchaser. It was argued

for the appellant (decree-holder) that inasmuch as all the mortgage properties were in the hands of respondent 12 who was a non-agriculturist and as a decree was sought only against such properties, the Act had no application and the decree for sale for the full amount due under the mortgage ought to have been passed against respondent 12. Reliance was placed upon the case of *Ramier* v. *Srinivasiah*, A. I. R. (28) 1941 Mad. 204 : (I. L. R. (1941) Mad. 336). That case was distinguished only on the ground that, that was a case where the mortgagor was not an agriculturist. Comparing the *raison deter* of this case with that of *Srinivas Thatachariar* v. *Sivasubramania Chettiar*, A I.R. (30) 1943 Mad. 196: (I. L. R. (1943) Mad. 665), it will be apparent that Patanjali Sastri J. had since changed his view. Besides (this), *Aurunachalam Pillay's case*, (I. L. R. (1941) Mad. 930 : A. I. R. (28) 1941 Mad. 584), can be explained on the ground of applicability of S. S, Relief Act to the facts of that case which provided for a statutory discharge of the debt. This case, however, is no authority which would be relevant to the instant case which is governed by the special provisions of the Orissa Money-lenders Act. The basic conception under the Act is that the liability of a purchaser "subject to mortgage" is not to be deemed to arise out of a loan within the meaning of the Act. It was not followed by Sastri J. in the case of *Srinivas Thatachariyar* v. *Sivasubramania Chettiar*, A.I.R. (30) 1943 Mad. 196 ; (I. L. R. (1943) Mad. 665) in which the debt was allowed to be split up so as not to affect creditor's remedies against non agriculturist-debtors vis-a-vis the agriculturist ones.

[15] The next case relied upon on behalf of the appellant is that of *Nachiappa Chettiar* v. *Ramachandra Reddiar*, A. I. R. (29) 1942 Mad. 527: (203 I. C. 417). That case was decided on the theory that if the debt is scaled down at the instance of an agriculturist-mortgagor, no decree for a higher amount can be passed against non-agriculturist-purchasers, "subject to mortgage", mainly on account of the defect in the general law of splitting up of the mortgage or the debt. This case too is beside the point in consideration of the special provisions of the Orissa Money-lenders' Act. I should, however, observe with very great deference to the learned Judges who decided this case that a purchaser subject to mortgage places himself in the position of a debtor to the complete effacement of the mortgagor whose interest in the property thereby ceases. The creditor should not be made to lose the benefits of his rights under the mortgage against the mortgage property in the hands of a non-agriculturist who is entitled to no protection under the Act. It should be noted that within the four corners of the Madras Agriculturists' Relief Act, there is no room for distinction between a real and genuine debtor and a speculator-purchaser. Within it the purchaser of a mortgage property is as good a debtor as a mortgagor, provided he is an agriculturist. Under the Orissa Money lenders Act, however, the purchaser of a mortgage property is a debtor entitled to the benefits or not according as he has undertaken the liability of paying off the the mortgage or otherwise. In cases where he takes the liability to redeem the mortgage off the shoulders of the original debtor, the mortgagor for consideration he holds the money, as it were, for being handed over to the mortgagee. He is thus saddled with a liability the source of which is not money borrowed but property purchased. Basically he cannot be held entitled to a debtor's relief. Where however the subsequent purchaser has to pay with the result that he fulfils the indemnity condition of the mortgagor and is in the ultimate end entitled to call upon the mortgagor to compensate him for the payment to mortgagee in order to secure his purchase free from mortgage, his liability must be scaled down to the ultimate benefit of the original debtor in respect of his undertaking to indemnify. Respective operations of the Acts will call forth widely different considerations and no analogy can be drawn between the two. The statutes cannot be called *pari materia*, the matters dealt with having widely divergent boundaries. Those decisions of the Madras High Court, which proceed on the assumption that under the general law the mortgage debt is one and indivisible and cannot be so split up as to enable the mortgagee to get a decree for higher amount as payable under the mortgage against some judgment-debtors than as against others, are not only in conflict with certain decisions of that very Court already noticed but that they overlook the general law, as propounded by their Lordships of the Privy Council in *Shah Ramchand* v. *Prabhu Dayal*, 69 I. A. 98 : (A. I. R. (29) 1942 P. C 50), according to which the mortgagee can enforce the entire mortgage debt against a part of the mortgage properties in the hands of one of the debtors liable under the mortgage and release the rest. He can select his own debtor. Acting upon these considerations, I hold that the contention No. (i) is unsubstantial and cannot be acceeded to. So long and so far the general law of mortgage governing relation between the mortgagee, the mortgagor and anybody deriving title from the latter not free from the burden of mortgage has not been trenched upon by the Special Act relating to money-lending and money-lender, it must be given its full operation.

[16] *Point No. 2.*—This concerns us with the meaning that has to be attached to the words "subject to mortgage" occurring in exception (iii) of cl. (1) of S. 3, Orissa Money-lenders Act. It may be pointed out here that the learned Subordinate Judge is wrong in his observation that the words "subject to mortgage" govern "properties" and not "sale" used in the exception clause. The exception evidently means that the sale must have been "subject to mortgage." Here one has to bear in mind that every sale made subsequent to a mortgage is "subject to mortgage" in the sense that the mortgagee's claims against the property must take priority over the rights of the purchaser in the property purchased. But the phrase has a limited sense too, e. g., where the purchaser expressly or otherwise undertakes to redeem the mortgage with a part of the consideration of his purchase or when a court sale takes place for a favourable price on account of its being subject to a binding condition that the purchaser shall have to pay off the mortgage money due at the time. The full and unlimited operation of the Money-lenders Act does aim at divesting the creditor of some of his remedies correspondingly with the result of divestment of his rights in order to relieve the debtors of the burdens of their debts. Like every other statute, it must be construed very strictly so as to avoid, in its application, such divestment unless it is so intended and, as well, so expressed clearly. In a case where on account of the sale in question, the mortgagor or any of his representatives is relieved of the liability under the mortgage, it is not the intention of the Act, that the creditor should be disarmed in respect of his remedies against one who has to pay, if at all, in discharge of an obligation which, either by an agreement between the parties or by an order of Court having the like effect, he has undertaken. As I have already stated, the cases where the ultimate incidence of mortgage liability still continues to lie on the mortgagor, notwithstanding a sale of the mortgage property e. g., when he binds himself by an indemnity clause to secure the purchaser's title free from the encumbrance and where on account of such indemnity condition the purchaser is entitled to call upon the mortgagor to make good the loss that he suffers on account of paying off the mortgage in order to free his purchased property a relief to such a purchaser under the Act is a relief to the mortgagor. In such a special case, the mortgagee is deprived by the Act, of his open and free choice of enforcing mortgage against the subsequent purchaser for the full amount due under it irrespective of the consideration of the concommitant hardship, that accompanies such enforcement caused to the original debtor in respect of the loans originally advanced. It appears very clear to me that the words "subject to mortgage" are used in the limited sense already adverted to. The relative position between a vendor and purchaser of mortgage property at a sale "subject to mortgage" has been authoritatively laid down in the case of *Izzat Un Nisa Begam* v *Pertab Singh*, 31 ALL. 583: (36 I. A. 203 P. C.) That decision arose out of a suit by the vendor against the purchaser to recover the amount due on mortgages subject to which the sale was effected, which mortgages had since been declared invalid, as vendor's unpaid purchase money. Their Lordships nonsuited the plaintiff holding

> "On the sale of property subject to encumbrances the vendor gets the price of his interest whatever it may be whether the price be settled by private bargain or determined by public competition together with an indemnity against the encumbrances affecting the land. The contract of indemnity may be express or implied. If the purchaser covenants with the vendor to pay the encumbrances, it is still nothing more than a contract of indemnity. The purchaser takes the property subject to the burden attached to it. If the encumbrances turn out to be invalid, the vendor has nothing to complain of. He has got what he bargained for. His indemnity is complete. He cannot pick up the burden of which the land is relieved and seize it as his own property."

It follows that the vendor-borrower is under no liability of a debt, his liability being taken over by the purchaser in the case illustrated above. He is no longer entitled to debtors' relief with the consequence of divesting the creditor of his money. This case, however, has been cited by Mr. P. V. B. Rao in support of his contention as to the meaning of the words "subject to mortgage." Relying upon this, he wants to contend that notification in the sale proclamation of a sale that a property was to be sold 'subject to mortgage" does not necessarily create an estoppel as against the auction-purchaser from challenging the validity of the notified mortgage. The case, at any rate, does not appear to me to have decided the point. The view, contended for, had been expressed in the High Court by Burkitt J., but their Lordships of the Privy Council decided the limited case before them approaching it from a different angle of vision. The narration that the encumbrances notified were found to be invalid is not sufficient to warrant the contention. The invalidity might have been due to illegality. Nobody is estopped by his own statement or conduct as against a statute in law. The decision, therefore is of no help to the appellant's contention; but as I have already discussed, it illuminates and buttresses the point of view taken by me as above. I have no hesitation in holding that in the circumstances of this case, which I am going to set out presently in greater detail, the appellant's purchase was "subject to mortgage" within the meaning of the exception, under interpretation.

[17] The circumstances are as follows: The disputed properties along with certain others had been mortgaged to the plaintiff on 27th July 1926. During the currency of the mortgage, Sadhu Gantayatani secured a decree for money against the mortgagors in a partition suit. In execution of that decree, she attached mortgage properties and brought them to sale. The sale, however, attracted no bidders. Thereafter, she filed a fresh execution petition on 26th August 1935 (Ex 7). In this petition, she prayed:

> "That the Hon'ble Court be pleased to attach under O. 21, R. 54, Civil P. C., the lands specified in the schedules attached hereto, subject to the mortgage, dated 27-7-26 of Tadeipalli Venkuta Krishnaya Pantulu for the realisation of the amounts specified . . . . and pay the plaintiff the proceeds thereof."

Later in the execution case initiated with the aforesaid petition, the decree-holder said in a petition:

> "The second reason is that since the plaintiff applied for sale of the lands subject to the mortgage of T. V. K. P. and since the details of his dues on account of principal and interest have not been specified in the previous E. P. 72/34, purchasers were not forthcoming to purchase the properties. For these reasons, the sale of the properties in E. P. 72/34 could not be done."

and prayed,

> "for sale in auction for Rs. 700 relating to her decretal dues subject to the mortgage of T. V. K. P. for Rs. 15,000 of the lands comprising the aforesaid lot Nos. 1 to 5." (Exhibit 7 (d) dated 3rd December 1935 read with Ex. 7 (c).)

[18] Exhibit 7 (b) is the order disposing of the aforesaid applications passed by the District Judge on 9th December 1936. It appears therefrom that the subject-matter of the petition was adjudicated upon in the presence of decree-holder and the judgment-debtors who were represented by a pleader. The upset price of Rs. 700 was fixed by the Judge in consideration of the fact that the sale was "subject to mortgage" for Rs. 15,000. The learned Judge describes the petition, the subject of his decision, as one by decree-holder under O. 21, R 66 and S. 151, Civil P. C. In pursuance of the order the terms of the sale proclamation (Ex. 7a) were settled. There are two parts of the sale proclamation, one purports to be a notice of the sale, date, hour and place thereof, and the other, conditions of sale. The notice portion contains,

> "the property will be put up for sale in the lots specified in the schedule. The sale will be of the property of the judgment-debtors above named as mentioned in the schedule subject to mortgage dated 27th July 1926 of T. V. K. of Chatrapur for a sum of Rs. 12,000. The liabilities and the claims attached to the said properties have been ascertained from the Office of the Sub-Registrar. . . . ."

Amongst the *conditions of sale* the fourth condition is of particular significance. It is,

> "this property or part thereof will be sold in auction subject to the above-named mortgage or date month year 19 and subject to all claims under the above written mortgage. Condition No. 7 directed the attention of the bidders to certain documents mentioned therein subject to the further condition"

whether the purchaser is or has not inspected them. Accordingly he will be deemed to have given up the objections thereto by bidding. In the schedule to the said proclamation, it was stated,

> "the lands covered by lots 1 to 5 have been mortgaged to Rai Bahadur T. V. K. Pantulugaru of Chatrapur for Rs. 15,000. In E. P. 43 of 35 and E. A. 162 of 35, it was ordered that the sale will be made subject to the mortgage dues of Rs. 15,000 for Rs. 700. The sale will be held according to the order."

[19] Before proceeding to construe the effect of the execution proceedings it has to be noted that the appellant auction-purchaser was himself conducting the execution proceedings on behalf of the decree-holder being her near relation. In this background it has to be considered whether the said auction-purchaser can be allowed to urge that the property was not sold "subject to mortgage." Equitably his position is in no way different from the decree-holder auction-purchaser. His repayment of the mortgage loan shall be in discharge of a lien upon the obligation imposed upon him by the purchase.

[20] Mr. P. V. B Rao, however, very strongly contends that the question raised by him is one of law and he cannot be held estopped from raising the same. But shortly, his contention is that the order of the District Judge in pursuance whereof it was mentioned in the sale proclamation that the attached property was to be sold "subject to mortgage" was of an administrative and interlocutory character being one passed under O. 21, R. 66 as distinguished from O. 21, R. 62 of the Code. Such an order, he contends, has been unanimously held not to have the effect of selling the property "subject to mortgage" but selling it with notice of mortgage. Pushed to its logical conclusion, the position contended for is that the auction-purchaser is free to challenge the validity, genuineness and existence of the mortgage and the amount payable thereunder. Approached from this standpoint, he urges, the sale at which the appellant purchased was not one "subject to mortgage" within the meaning of the exception clause. This contention, to my mind, is not strictly relevant to the issue and does not carry conviction having in view the intention of the Legislature and the language employed by them in enacting 'the exception.' The intention is to exclude the amount payable by a purchaser "subject to mortgage" from the benefits of the Money-lenders Act. In order to give effect to

the intention the words ought to receive the widest possible meaning not altogether foreign to the language employed. In that view, the crux of the question is whether the auction-purchaser has paid the full price of the property or has only paid the difference between the market price thereof minus the sum payable under the encumbrance. The order of the District Judge though passed in ascertaining the value of the property was one which made allowance for the margin of Rs. 15,000 representing the extent of the liability which the auction-purchaser should have had to discharge in order to make good his title, in fixing the upset price at Rs. 700. Besides, the exhibits already referred to, the fact of the subsistence of the mortgage and the amount of Rs 15,000 payable thereunder were also notified by the auctioneer to the bidders and the same has been mentioned in the sale warrant (bid sheet-Ex. 7 (e)). After the sale, there was a proceeding under O. 21, R. 90 of the Code by one judgment-debtor on the ground, *inter alia*, of insufficiency of the upset price and the price fetched. To this proceeding, the decree-holder as well as the auction-purchaser were parties. It was still open to the auction-purchaser to resile from the sale on the ground that the judgment-debtor had no saleable interest or in other words no marketable right of any value. The petition of the judgment debtor was rejected by an order of the Court (Ex. 7k). This later proceeding fortifies the position that the auction-purchaser was fully alive to the responsibility that he had purchased "subject to mortgage" and that the particulars which according to Mr. Rao were merely for the purpose of information and could be the subject-matter of further consideration were determined judicially in the presence of the auction-purchaser. The contention of the appellant must, therefore, be considered in the light of these circumstances. Before proceeding to deal with the authorities cited by the appellant's learned counsel, I should refer to a decision of the Patna High Court, directly in point, that is, *Govind Dani* v. *Purushottam Mahapatra*, 9 Cut. L. T. 42 : (A. I. R. (30) 1943 Pat. 430). The facts of the case except with regard to immaterial details were on all fours with the facts of the instant case. The ratio of the decision was:

> "The vendee (in that case the auction-purchaser) having undertaken to repay the mortgage debt and having as a consideration for this undertaking obtained the advantage of not having to pay the vendor the full price of the property, the Legislature has not seen fit to relieve him in respect of this undertaking."

[21] His Lordship Agarwala J. (as he was then) has illustrated the position by way of elucidating the Legislature's intention by a trite instance at page 45, col. 1 of the Report. His Lordship concludes his judgment with the observation:

> "If the contention of the appellant in this case were accepted it would amount to the terms of the contract between the parties being altered and the benefit of the alteration would not be going to the person for whose advantage the Legislature enacted it but to the advantage of another, who, in most cases, is merely a speculative purchaser."

[22] Mr. P. V. B. Rao, however, urges that the decision is not an authority for the proposition inasmuch as their Lordships have not considered the meaning of the words "subject to mortgage" in the light of the decisions cited by him, nor as it does not appear from the report if the subsistence of the mortgage was determined in the execution proceedings by an order either under O. 21, R. 62 or 66.

[23] Mr. Rao first contends on reference to the certificate of sale (Ex. D) that it does not contain any mention of "subject to mortgage" and, therefore, this is not a sale "subject to mortgage." He refers us to a decision of the Full Bench of the Bombay High Court in the *Nagindas Jeychand* v. *Halalkore Nathwa*, 5 Bom. 470 (F.B.). Westropp C. J. while considering whether a sale certificate had been adequately stamped *ad valorem*, observed:

> "We are not prepared to hold that the mere mention of a mortgage claimed in the proclamation of sale would warrant a reply in the affirmative to the question of the Subordinate Judge whether a certificate of sale granted to the purchaser of property sold by public auction by our Courts, and which property is proclaimed, under S. 287 (corresponding to O. 21, R. 66) Civil P. C., to be encumbered with the mortgage right of a third party, should be charged under Art. 16 of Sch. 1 (Indian Stamp Act I [1] of 1879), with a stamp duty for a consideration equal to the amount for which the auction purchaser purchases the property only, or for a consideration equal to that amount plus the amount of the mortgage to which the property is liable."

The facts of the case bear no analogy to the present one. Besides, the basis of this decision was a circular order of the Bombay High Court as will appear from the observation quoted below:

> "It would, we think, be a wholly erroneous practice to charge stamp duty on the amounts of claims against the property mentioned only in the proclamation of sale; inasmuch as, by the circular orders of the Court the proclamation of sale must contain an express intimation that the Court does not warrant the title of the judgment-debtor or any other claimant specified in the proclamation to any lot set forth in it or any interest therein or charge or claim thereon."

The decision cited is not in point. In the case of *F. F. Christian* v. *Prasad Raut*, 4 Pat. 760: (A. I. R. (12) 1925 Pat. 615), it was held

> "'there is nothing in the Code of Civil Procedure, 1908, which makes a certificate of sale conclusive as to the property sold. . . . . .' Where, therefore, the petition of execution, the writ of attachment and the sale proclamation are clear and unambiguous, and discrepancy between the description of the property con-

tained in these documents and that which occurs in the sale certificate can have no effect."

[24] In the instant case, the execution petition, the sale proclamation, the sale warrant and the order of the Court are clear and unambiguous enough to show that what was intended to be sold and was "in fact" sold was the property "subject to mortgage" liability of Rs. 15000. Non-mention of "subject to mortgage" in the sale certificate, in view of the provisions of O. 21, R. 94 which requires to mention only the properties sold but not details of the rights and incidents therein is of no consequence.

[25] Mr. Rao has cited a large number of authorities to establish the distinction between an order under O. 21, R. 62 and an order directing the particulars to be cited in a sale proclamation under O. 21, R. 66. His submission is that the present order is of the latter kind and has not the consequence of effecting the sale "subject to mortgage." The authorities cited by him lend ample support to that contention and in the face of a large number of them it is too late in the day to doubt their correctness. I have considered each one of them and I do not think it worthwhile to deal with it at length. The true question before us is one of construction of the order, in question. In my opinion, the order of the Court purporting, as it does, to adjudicate upon the decree-holder's prayer to sell the property "subject to mortgage" is of such a character as would compel the judgment-debtors in whose presence the order was passed to bring a suit within the period of limitation as provided in Art. 11, Limitation Act, to have it set aside under O. 21, R. 63 of the Code. Decisions are not unanimous that all orders passed at the stage of settling the terms of proclamation are administrative and not judicial. According to the rule, the sale proclamation is required to contain particulars of two different kinds. Those indicated in sub-r. 2 (a), (b), (c) and (d) are of one kind and in R. 2 (e) another. Those required under R. 2 (e) are for the purpose of intending purchasers' information while the former ones must be those that are required to be stated and from their very nature have to be stated with an amount of accuracy amounting to certainty. "Any incumbrance to which the property is liable" is what from the very language of the rule would be a certain and definite particular. The only limit that can be put to its finality subject to the result of a suit, is that it does not affect a third party's interest. In that sense, in the facts of the present case, the mortgagee would be entitled to challenge the order so far as and, if at all, it goes against his interest; but neither the decree-holder nor the judgment-debtor and, for the matter of that, the auction-purchaser whose title is relatable to the attachment and sale effected in the execution proceedings. To hold otherwise would amount to suffer a prejudice to the mortgagee. Mr. Rao contends that the order would have had the desired effect had that been passed on a motion of claim or objection by the mortgagee under O. 21, R. 58. But if the parties to the execution acknowledged and gave effect to the mortgagee's rights, he had no cause of action for such a motion. He has, by the conduct of the parties, been lulled into a sense of security. To a certain extent I am supported by some decided cases in this view of mine. I would in this connection refer to a decision of the Rangoon High Court in the case of *Mauny Aung Myint* v. *Maung Tha Hmat*, 9 Rang. 367 : (A.I.R. (18) 1931 Rang. 310). It was held there that when the Subdivisional Judge directed that the existence of a mortgage and of the decree based thereon should be mentioned in the sale proclamation he was in fact passing an order against the decree-holder such as is contemplated in R. 63. The mortgagee's application that his mortgage should be mentioned in the sale proclamation to the effect that the property was to be sold "subject to mortgage" was considered to be such a claim as is contemplated under O. 21. R. 58. Carr J. observed :

> "I note that in Mulla's C. P. C. in the notes to R. 62 under the head 'subject to mortgage,' the learned author says: 'The Code clearly makes a distinction between a case in which the property is expressly sold subject to a mortgage and a case in which notice to mortgage is given in the proclamation or sale. The former is provided for by the present rule and the latter by R. 66 below.' With all respect for the learned author I am unable to agree that the Code makes any such distinction. Rule 66 (2c) requires that the proclamation shall specify as fairly and accurately as possible any incumbrance to which the property is liable. I direct special attention to the use of the words 'is liable.' There is nothing whatever in the rule to suggest that the proclamation should specify any incumbrance to which the property is merely *alleged to be liable*. Having regard to these provisions my view is, as I have already said, that the Court should investigate all claims to the possession of a mortgage or a charge or other encumbrance over the attached property before allowing mention of such encumbrance in the sale proclamation."

With great respect I am in entire agreement with this view.

[26] The decision in the case of *Kalidas Chowdhury* v. *Prasanna Kumar Das*, 47 Cal. 446 : (A.I.R. (7) 1920 Cal. 354) affords a sound and compelling guidance in the matter of solution of the problem before us. In short, the facts of that case were that a mortgagee decree holder commenced an execution proceeding. The sale was proclaimed in due course. But the mortgagor judgment-debtor preferred an objection, inter alia, that the property described as the 5th

lot in the sale proclamation was under a prior mortgage, but it had not been mentioned. Two of the decree-holders presented a petition praying that the property, in question, might be put to auction upon declaration that it was subject to a mortgage for Rs. 1900 held by .... The Subordinate Judge delivered judgment directing that the property mentioned be sold on declaration that it was subject to the mortgage mentioned. *The sale was held on the same day.* Under these circumstances the question arose whether it was open to the decree-holders auction purchasers to contend that they have taken the property free of the mortgage. It was held that they were bound by the doctrine of estoppel and could not take up a position inconsistent with what they adopted in the execution Court. It was further held

> "if a person purchases an estate subject to a mortgage whether under a voluntary conveyance or under 'sale *in invitum*' he cannot be held to deny the validity of the mortgage subject to which he made his purchase."

[27] At p. 457 of the Report, his Lordship Mukherji J. considered the distinction between Rr. 62 and 66 of O. 21 of the Code and on construction of the execution proceedings before him held:

> "The language used in the petition of the decree-holders and the order of the execution Court may well lend support to the contention that the decree-holders agreed to have the property sold as subject to a genuine mortgage. They had not suggested that the purchaser should buy the property merely with notice of a mortgage claimed, subject to such risk as the notice might involve with liberty to contest the mortgage and to redeem it only if it was established to be really a subsisting mortgage.'

[28] The ratio of this decision applies *mutatis mutandis* to the present case. The facts are almost identical except that in the present case the decree-holder rather than the judgment-debtor prayed to sell the property subject to mortgage and the judgment-debtor though contesting the proceeding on other grounds did not take up a contrary position or in other words consented to an order that the sale should be subject to a genuine mortgage for Rs. 15,000 then due. The judgment-debtor, in the present case, was vitally interested in the matter as, but for the mortgage, the sale could have fetched much higher price which should have gone to wipe out the debt or reduce it considerably to the removal of risk of sale of their other properties mortgaged. In the case of *Gurdit Singh* v. *Hakumat Rai*, A.I.R. (19) 1932 Lah. 56: (135 I.C. 201), where the mortgage decree-holder had asked the Court to sell the property subject to a charge whereon the Court had passed orders for selling it subject to the incumbrance, it was held by Bhide J. that it was perfectly clear that the judgment-debtor's interest in the property was sold subject to that charge. In the case of *Debi Das* v. *Rupchand*, 49 ALL. 903: (A.I.R. (14) 1927 ALL. 593), an application by the holder of a mortgage to the executing Court that his mortgage *might be notified in the sale proclamation* in respect of a property which was already subject to an attachment was considered to be one which attracted the provisions of O. 21, R. 63. In this case Asworth J. distinguishes an order under R. 62 from an order under R. 66 by saying that the words 'as fairly and accurately as possible' in the latter rule clearly indicate that this entry of an incumbrance in the sale proclamation cannot prejudice the rights of a third person. His Lordship is of opinion that any investigation into the existence of an incumbrance should fall within the purview of R. 62 and will be final as between the parties subject to the result of a suit without any prejudice to the rights of a third person even though the object of it was to notify the encumbrance. In the case of *Vellu Padayachi* v. *Arumugum Pillai*, 38 M.L.J. 397: (A.I.R. (7) 1920 Mad. 191), Spencer J., while construing an order passed on a petition purporting to be under O. 21, R. 66 of the Code, said:

> "We must look at the substance of the application. It was one to have it recognised by the Court that the property about to be sold was subject to an encumbrance."

All these precedents do bear me out that mortgagee concerned is not a necessary party to the proceedings under review nor need it be that it should be in terms of one under O. 21, Rr. 58-62. It may as well be an order purporting to be one passed while settling the terms of sale proclamation under O. 21, R. 66. The test is whether the matter has been judicially determined as between the parties then before the Court and like as to any other order of Court, a third party shall stand out of it but not the parties themselves nor anybody deriving interest from them. In consideration of what I have said above and relying upon the decisions cited therein, I am of opinion that properly construed the order of the District Judge though passed on a petition purporting to be under O. 21, R. 66 and S. 151, Civil P. C., was none the less an expression of a judicial adjudication. It may be, in the context of the circumstances, construed as one under O. 21, R. 62. As shown above, it is not necessary that the mortgagee himself should come forward to advance a claim under O. 21, R. 58. The adjudication may be called for either by a claim or by an objection to the attachment. In the present case, it was an objection propounded by the decree-holder and was decided judicially. The order, therefore, cannot be brushed aside as a pure administrative order but is a judicial order binding upon the parties before the Court and their privies, namely, the decree-holder, the judgment-debtor and the auction-purchaser who purchased a right not higher than that of the judgment-debtor. To quote Mukherji J. of the Calcutta High Court (*Debendra Nath* v. *Abdul Samad*, 10 C. L. J. 150 at pp. 164 and 166: (1 I.C. 264).)

> "does it then make any difference if the purchaser acquires title not by a private sale but by a sale held in execution of a money decree? In our opinion, it does not. That this view is correct cannot of course be disputed where the sale *is made expressly subject to the mortgage or where only the equity of redemption is seized and the purchaser bids only the value of such equity.* But it cannot be limited to this class of cases; the purchaser at the execution sale is bound by the same rule of estoppel as the judgment-debtor on the principle that the former has purchased merely the right title and interest of the latter and does not consequently occupy a position of greater advantage . . . . We must therefore hold upon the decision of the Judicial Committee in *Mohammed Mozufer* v. *Kishori Mohun*, 22 Cal. 909 : (22 I. A. 129 P. C.) that the execution purchaser of the interest of the mortgagor is as much bound by the rule of estoppel not to dispute the validity of the mortgage as the mortgagor himself."

[29] Had the order been prejudicial to the mortgagee, who was not a party to the proceeding giving rise to it, he could dispute it collaterally and not necessarily by a suit. But the judgment-debtor, if he wishes to dispute the order as against the title traceable to the attachment and sale, he must, under the provisions of O. 21, R. 63 of the Code, have to do it by a suit within the prescribed time limit. In this case the auction purchaser cannot contend against the judgment-debtor who is no other than the mortgagor that it is the mortgagor and not he who is liable to redeem up the mortgage. I have, therefore, no hesitation in holding that the appellant is a purchaser "subject to mortgage." Mr. Rao invites us to decide the question by the test whether it was not open as between the mortgagee and the mortgagor-judgment debtor. I am not prepared to answer this hypothetical question as it does not arise in the case. The question *hypothesised* may have to be considered on widely different considerations one of which is that the question had never been adjudicated upon between the mortgagee and either the judgment-debtor or the auction purchaser. I shall reserve my opinion on this aspect of the question. We are here limited to the much narrower question as to whether the question is still open or closed as between the judgment-debtor and the auction-purchaser. The applicability of the exception clause of the Orissa Money-lenders Act does not require that the mortgagee should have been party or privy to the purchase subject to mortgage. The status contemplated is one emerging from an established relationship between the mortgagor and the purchaser at a sale either private or *in invitum.* It is quite indifferent whether the mortgagee is a party or not. The liability of the purchaser owes its existence to the purchase that he makes and the purchase money that he holds in trust for the mortgagee and not to any borrowing from him. The test always is whether the benefit under the Money-lenders Act if conferred upon a purchaser or an auction purchaser, as the case may be, would ultimately enure to that of the original debtor, namely, the judgment-debtor.

[30] I shall now proceed to consider a few of the decisions. Reliance has been placed upon *Daso Polai* v. *Narayana Patro*, A. I. R. (20) 1933 Mad. 879 : (57 Mad. 195) in which Madhavan Nair J. (as he was then) observes :

> "The Code makes a clear distinction between a case where the property is sold subject to a mortgage as under O. 21, R. 62 and a case in which the notice of an alleged encumbrance is given in the proclamation of sale as under O. 21, R. 66. In the former case the Court is satisfied of the existence of the mortgage and sells only the judgment-debtor's equity of redemption and the purchaser has to redeem the mortgage. In the latter case, the purchaser buys the property with notice of the mortgage subject to such risks as the notice might involve, in other words, the executing Court does not decide whether the mortgage subsists or not and the purchaser is not precluded from questioning the validity of the mortgage."

[31] There is nothing to dispute the correctness of this proposition. The question always depends upon whether the existence of the mortgage and the amount due under it have been judicially determined. The question is always one of construction, whether what was seized by the executing Court and ultimately sold was only the equity of redemption. The next case referred to is that of *Shib Kunwar Singh* v. *Sheo Prasad Singh*, 28 ALL. 418 : (3 A. L. J. 200). This too is of more or less an academic interest in view of the facts of this particular case. The present case is not a case of merely notifying the mortgage but is one of selling only the equity of redemption "subject to mortgage." In the same chain of reasoning Mr. Rao has invited our attention to the cases reported in *Mohit Narain Jha* v. *Thakan Jha*, 4 Pat. 731 : (A. I. R. (12) 1925 Pat. 600 S. B.) and *Sivagmi Achi* v. *Subrahmania Ayyar*, 27 Mad. 259 : (14 M. L. J. 57 F. B.) for the proposition that orders passed under O. 21, R. 66 are not final as between the parties being merely interlocutory orders and are not appealable. The reason for such view as given by Dawson Miller C. J. in the case of *Sourendranath Mitra* v. *Mritunjay Banerji*, 5 P. L. J 270 : (A. I. R. (7) 1920 Pat. 249), affords the key. According to his Lordship, the position will be different if an order determines, even under O. 21, R. 66, the rights of the

parties with regard to the all or any of the matters in controversy. In this view, the present case is clearly distinguishable from those cited by Mr. Rao. He has also relied on *Fakeer Bux* v. *Chutturdaree*, 14 W. R. 209 at p. 210 : (12 Beng.L.R. 513n). This does not go to help him in any extent. Couch C. J. attached importance to what "in fact" had been sold in that case.

[32] By "in fact" his Lordship meant whether the sale was so subject by the contract of sale and not that there was merely a legal right existing which might be capable of being enforced. If it lays down anything it is that there exists a distinction between the two positions as formulated. We are also of the same opinion. But what is the position here has been decided by us on the basis that there has been a contract of sale by which the appellant is bound.

[33] *Point 3.* — The last contention, as formulated, does not arise for consideration in view of the conclusion already reached. The sale was "subject to liability of the entire mortgage money that was then due." There is nothing wrong in law if a subsequent purchaser purchases a part of the mortgage property with an undertaking to redeem the entire mortgage. As a contract it is perfectly valid. Purchase at an auction sale is also a form of contract. The auction purchaser by his bid offers to make the purchase at the price proposed by him subject to the conditions laid down in the sale notice and when the bid is knocked down and the sale is confirmed the offer is accepted. As I have already said there is nothing in the indivisibility of the mortgage which should prevent a mortgagee from realising the entire mortgage money from a part of the mortgage property : *vide Shah Ramchand* v. *Prabhu Dayal*, 69 I.A. 98 : (A. I. R. (29) 1942 P. C. 50). If there are other properties sold subject to the same mortgage, the appellant's remedy is by way of contribution. There is nothing in the language of the exception clause so as to compel the Court to apportion the mortgage liability as between the several purchasers at a sale "subject to mortgage". That question, if it arises, shall be governed by the general law which is not, in the least, abrogated or modified by the exception clause. There may be cases where such purchaser has undertaken or is to be deemed to have undertaken to part only of the mortgage money proportionate to the property purchased, such an undertaking is binding on the mortgagee only by consent or under prescribed circumstances but not always. In such a hypothetical case it is only the proportionate amount which is exempted from the category of loan as defined in the Act. In such a contingency if the mortgagee wants to enforce the entire debt against a part purchaser of a mortgage property, his claim in excess of the proportionate amount might be subjected to reduction or scaling down under the Act. Such a hypothetical case is not before us nor are we called upon to decide it. This contention therefore fails.

[34] Lastly, it is contended that it is a fit case in which the Court should reduce the plaintiff's claim so far as the interest claimed is usurious. It has been found by the trial Court, and not controverted before us, that the plaintiff had originally advanced Rs. 6000 in cash. The rest of the mortgage money, subject to which the property was sold, represented interest thereon. Interests that accrued on the promissory notes were capitalised in the first mortgage bond. Such capitalised amount also bore interest which was included in the sum of Rs. 12,000 adopted as the principal money of the mortgage bond, in suit. Under the circumstances, the plaintiff's claim does include interest upon interest upon principal. In view that the purchase was subject to payment of Rs. 15,000, the Court in exercise of its discretion to relieve the debtor of the mischief of usurious loans cannot go behind it. It would be oppressive, however, to allow interest to run on the principal money of Rs. 12,000 since the date of the auction purchase. That would be allowing interest upon interest. Since that date the interest should run on Rs. 6000 as principal. Subject to this modification the plaintiff's claim will be decreed.

[35] In consideration of what I have said above, the appeal is dismissed and the decree of the Court below is upheld subject to such modification as to calculation of interest as is indicated above. In the circumstances of the case, the appellant shall be liable to pay costs of the contesting respondents other than the minors. There shall be one set of hearing fee.

[36] **Narasimham J.** — I agree with my Lord the Chief Justice.

R.G.D. *Order accordingly.*

A. I. R. (37) 1950 Orissa 19 *[C. N. 3.]*

JAGANNADHADAS AND NARASIMHAM JJ.

Brajraj Ramanuj Das — Plaintiff — Appellant v. *Ajiman Nisa Bibi — Defendant — Respondent.*

Second Appeal No. 34 of 1945, Decided on 28th April 1949, from decision of Sub-Judge, Puri, D/- 21st September 1944.

(a) Reperian rights — Ferry — Origin and incidents of.

It is recognised law in India, unlike that in England, that a man may set up a ferry on his own property and take toll from strangers for carrying them across, and may acquire such a right by grant or by user over the property of others. Private ferries are also recognised though not elaborately provided for in the Bengal Ferries Act of 1885. [Paras 7 & 8]

Private ferries may be of two categories: (1) those which originate from proved or presumed Crown grants; (2) those which arise otherwise than by a Crown grant In the case of public ferries, S. 16, Bengal Ferries Act enjoins that no rival ferry can be run within a distance of two miles from the limits thereof. In the case of a private ferry which originates in a Crown grant and which is known as a ferry franchise, no exact limits are prescribed, but it has been held that the grantee is entitled to a monopoly of his line of ferry and has a cause of action against any one who carries either in that line or in another line of ferry so near as to make it an alternative way of carrying between substantially the same points. [Para 8]

A private ferry which does not originate in a Crown grant, may arise in one of two ways. (1) The owner of a property may set up a ferry on his own property and take toll from strangers for carrying them across; (2) a person not the owner of the property may acquire over another's property a right to ply a ferry and take tolls, either by grant or by prescription. That this last kind of right, which is unknown to English law, can be acquired by prescription in India, is well settled. There has been some doubt whether a private ferry franchise referable to a Crown grant can be acquired by prescription, the better and accepted view being that such a right cannot be acquired by prescription: 19 Cal. 253 (P. C); (1916) 1 A. C. 57 and 18 Cal. 652, *Rel. on*; A. I. R. (9) 1922 Bom. 245; A. I. R. (22) 1935 All. 481; 39 Cal. 53 and 9 I. C. 846 (Cal.), *Ref.* [Para 8]

In the case of the exercise of the right of ferry as part of the right of the proprietor over the bed and banks and the landing places of the water-course, it is no more than an incident of his ownership; and he is free to give it up whenever he chooses. On the other hand, he cannot complain of a neighbouring owner running a rival ferry on his own land in exercise of his own right. This is in accordance with the well-known principle that the mere exercise of one's proprietary right without infringement of another's right is not actionable. In the case also of a person who obtains a ferry right over the property of another by grant or prescription, it is equally clear that he cannot complain of competition by a neighbouring owner of property. But the question whether the owner of the servient tenement itself or persons deriving title from him can set up a rival ferry in competition is one which has never been raised or decided. It may as well be contended in such a case that the right of the owner of the ferry being traceable to a presumed grant from the owner of the servient tenement that owner can do nothing to derogate from his own grant and that, therefore, such owner and persons claiming under him can be restrained from competition: 1895 A. C. 587 and 1898 A. C. 1, *Rel. on*; *Case law referred.* [Paras 8]

(b) Grant—Crown grant—Ferry franchise—Presumption of—Existence of right may be presumed from long user even if land over which it is exercised does not belong to Crown or grantee.

It is no objection in law to the grant of ferry franchise that the land over which the franchise has been granted does not belong to the Crown or to the grantee. From the actual later user of the ferry franchise for a sufficient period an easement right to the use of the ghats and landing places or a dedication of the same to the public may be presumed: 18 Cal. 652, *Ref.* [Para 10]

(c) Grant — Crown grant — Ferry franchise — Interruption in enjoyment — Effect — Facts set out sufficient to raise presumption of Crown grant — Proof of interruption does not negative presumption — Franchise continues until opposing party can show grant in itself.

If the facts set out are enough to raise a presumption of Crown grant, proof of interruption does not, in law, negative it. Neither a mere non-exercise of the ferry right nor the running of an opposition ferry for some time extinguishes the ferry franchise created by a Crown grant. The franchise continues as long as the grant continues and until the person who sets up an opposition ferry can show a Crown grant either actual or presumptive in himself: 18 Cal. 652, *Rel. on.* [Para 13]

(d) Grant — Crown grant — Ferry franchise — Presumption of—Evidence of long user except for short period — Devolution of right from original holders to present holders not established—Effect — In circumstances of case, held regrant in favour of present holders should be presumed.

Documentary evidence set out in a case left no reasonable doubt that ferrying right at a certain ghat was exercised by the Khandayets of Rendhagarh from 1833 to 1940 with some interruption in the period from 1882 to 1898. For about 50 years prior to 1882, Khandayet *K* and his predecessors were exercising the right; from 1898, Khandayet *A* was exercising it for 40 years up to the date of suit disputing it. There was no indication that during these periods anybody else was exercising the right of ferrying at the ghat side by side. It was contended that even if a ferry franchise grant in favour of Khandayet *K* may be presumed, the same could not be presumed in favour of Khandayet *A* who was not shown to have succeeded to the rights of original Khandayet nor had made out a fresh grant:

Held, that neither the fact that there has been an interruption in the exercise of the ferry right by the successive Khandayets, nor the fact that the exact mode of devolution of the right from the one Khandayet to the other has not been made out on the evidence, is any ground for not treating the evidence relating to the exercise of the ferry right from 1832 to 1940 as a whole for the purpose of determining whether or not it is enough to support the presumption of a Crown grant:

Held further, that even if the Khandayeti right of the original Khandayet was terminated and along with it his ferry right, it is reasonable to infer that when the Khandayeti right was granted to *A* the ferry right also would have been granted to *A* on account of the fact that he was the Khandayet. The ferry right so granted would, in the absence of any indication to the contrary, be of the same kind and of the same amplitude as that of the ferry right of the original Khandayet. [Para 13]

(e) Grant — Crown grant — Ferry franchise — Right acquired by prescription and by Crown grant—Distinction—Long exercise of ferry right—Proof of recognition of right by Government officials and existence of public obligation — Acquisition of ferry franchise by lost Crown grant may be presumed—Competitive ferry cannot be allowed.

The distinction between a proprietary right of ferry acquired by prescription or grant by private individuals and a ferry franchise obtained as a Crown grant is this that while in the former case the ferry is worked for mere personal profit and may be abandoned at any time at the option of the owner thereof, a ferry franchise is granted and taken for the public convenience and the grantee undertakes a public obligation which he must continue to discharge so long as he holds the franchise. [Para 15]

Where the evidence in the case clearly established the facts that a ferrying right at a certain ghat was exercised by the Khandayets of Rendhagarh from 1832 to 1940 except for a certain period between 1882 to 1898, that the ferrying right of the Khandayets was clearly recognised by responsible Government officials

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in whom by S. 4 of the Regulation VI [6] of 1819 and by Ss. 7 and 8, Bengal Ferries Act, 1885, the control of public ferries had vested, and that the exercise of the right had throughout been burdened with an obligation in favour of the public, it was held that these facts clearly supported the presumption of a lost Crown grant of a monopolistic ferry franchise in favour of the Khandayets, with the result that no person could claim a right to carry any ferry at or near the place which would have the effect of being a competitive ferry affecting the Khandayet's income: *Case law discussed.*

[Paras 14, 15, 16]

S. N. Sen Gupta and S. Misra — for Appellant.

R. N. Sinha — for Respondent.

Das J.—The plaintiff is the appellant in this second appeal. The dispute relates to a ferry right across the river called variously as "Harachandi, Sunnamuhi, Kania or Deshi." The river flows through a village called Narasinghpatna in the Sadar Sub-Division of Puri and the ferry claimed is situated in this village. The portion of the river bed in this village is 50 acres and 90 decimals in extent consisting of plot Nos. 63 and 471 in the Anabadi Khata No. 104 of the village. The plaintiff who is the Mahant of Pandit Muth of Puri is the recorded proprietor of the village Narasinghpatna including the two plots Nos. 63 and 471. The defendant is the owner of the Khandayati Jagir of Rendhagarh in which is included the village Sipasurubili which lies to the west of the river adjacent to the plots Nos. 63 and 471. For a few months in the year, that is, during the rainy reason and high floods, the river is not fordable at this place and passengers who have to cross from one side to the other have to be ferried across by boat. It is said that this crossing is part of the highway from the Ganjam side to Puri and is in use by the pilgrims from the south to Puri and by the villagers from the Puri side to Chilka area. In the current settlement of 1928, the Khewat Part I, dated 12th January 1928, marked as Ex. H shows the plaintiff as the proprietor of plots Nos. 63 and 471 (River) of Anabadi Khata No. 104 with a note against plot No. 63 that Sk. Md. Asghar ferries across the river by boat during the flood season at the river ghat. Sk. Md. Asghar is the husband of the present defendant. The plaintiff's case is that this settlement entry has been fraudulently obtained and that he himself, as the owner and proprietor of the bed and the banks and the landing ghats on either side of the river, has the right to the ferry and that he and his ancestors have been plying the ferry all along for the convenience of the public. He admits in his plaint that the defendant's ancestor Sk. Md. Asghar was also plying boats across the river at times, but that it was for his own convenience since he was the proprietor of the neighbouring village of Sipasurubili, (implying thereby that Sk. Md. Asghar was not plying boats for the public as such). The plaintiff has accordingly brought this suit for declaring his exclusive right to the ferry across the river in the village Narasinghpatna and for negativing any such right in the defendant and for a permanent injunction restraining the defendant from obstructing the plaintiff from the exercise of his right to the ferry. In the alternative he prays that his independent right to ply the ferry may be declared even though the defendant may be proved to have a right. In the trial Court various other questions relating to the *locus standi* of the plaintiff to maintain the suit and objections based on limitation, estoppel, and a previous decision under S. 145, Criminal P. C., were all raised, but they were not agitated before the lower appellate Court nor are they reiterated by either party before us. Both the trial Court as well as the appellate Court found against the plaintiff on the question of his right to the ferry and have held that the defendant has made out a right to the ferry in question as a Crown grant and therefore to a monopoly for the exercise of this right of ferry at this place. In the lower appellate Court as appears from para. 6 of the judgment of the learned Judge, the ferry right of the defendant does not appear to have been any further assailed, but what was challenged was the alleged right to a monopoly in the exercise of the ferry right so as to prevent the plaintiff from setting up a rival ferry in exercise of his proprietary right in the bed and banks and ghats of the river. In this Court also the only question argued is as to the claim of the defendant to exercise his right to the ferry so as to prevent the plaintiff from setting up a rival ferry.

[2] Though both the Courts below have concurrently found as a fact the existence of this right in favour of the defendant, we have heard full arguments, since the question whether on the facts proved, a Crown grant may be presumed so as to exclude the plaintiff from setting up a rival ferry is a question of law.

[3] That there has been a regular ferry service during the rainy reason of each year across this river at this place for over a hundred years past, appears to be abundantly clear from the evidence and is not seriously disputed. The earliest document on record is Ex. C-1 dated 24th May 1872. It is a lease of the ferry right at Narasinghapatna ghat for five years, executed by one Ananta Mahanti in favour of then Khandayat of Rendhagarh, one Kulamani Routray. Exhibit C is another lease (counterpart) dated 20th July 1877 of the same ferry right for a period of seven years, executed by the Khandayet in favour of one Pani Biswal. Both the leases recite that the ferry-right belongs to the Khandayet and

that the actual exercise of that right for the periods specified therein has been leased out by the Khandayet to the persons specified in the lease at certain annual payments. The next document on record is Ex. D, dated 19th July 1882. It purports to be a parwana issued by the Police Chief to the then Khandayet Kulamani Routray. It notices that it has come to the knowledge of the Police Chief that the Khandayet has appointed certain persons as boatmen to ply the boats for passengers and to take the Dak, etc., across the river at the ghat at Narasingpatna and orders that he should also be personally present and smoothly perform the work without neglect. There appears to have been some other documentary evidence of earlier period relating to the exercise of this right by the then Khandayet which is now no longer available. Exibits A-1 and A-2 notice the existence of those earlier documents. Exhibit A-1, a report of the officiating Collector, dated 5th April 1898, shows that there were parwanas of the date 1832, which were marked as Exs. A, B and C before him and which show that orders were issued to the Khandayet by the then Magistrate's office to make suitable arrangements for the crossing at the ferry. The said Ex. A-1, also shows that another document marked Ex. D therein, dated 4th December 1851, recognised the right of the Khandayets to the ferry after a regular judicial inquiry by the then Deputy Collector Nilamani Brahma. The existence of this last document has also been noticed in Ex. A-2. Exhibit A-1 states also:

> "There can be no question that long before the existence of the Mahants of Narasinghpatna this ferry along with the highway from Ganjam to Puri used by pilgrims to Jagannath was placed in charge of the Khandait and Paiks under him,"

and

> "It is clear that since the British occupation of Orissa the ferry was in the undisputed charge of the Khadait."

Exhibit A-2 similarly states:

> "It appears that since the time of British conquest of the district, the disputed ferry along with the highway from Ganjam to Puri was placed in charge of the Khandayet of Rendha."

There can be no doubt on a consideration of the documents now marked as C and C-1 and D and A, and A-2, corroborated by reference to the old documents noticed in Exs. A-1 and A-2 and the statements made therein as set out above, that at least from the year 1832 to the year 1882, the ferry right was recognised as belonging to the Khandayet and that it was being exercised by him. It would appear, however, that there was a break thereafter. For some reason, which is not clear, the ferry was for some time in charge of the Mahant who was the plaintiff's predecessor. This appears from the report, Ex. A-1. In that report the Collector notices that in a register under the Ferries Act, filed before him, an entry under date 22nd October 1888, shows the ferry in the Mahant's name. It would also appear from the said Ex. A-1 that in the year 1883, the Khandayet, Kulamani Routray was punished by the Assistant District Superintendent of Police for an unlawful assembly in connection with this ferry. Whether as a result of this punishment the Khandayet was superseded and the Mahant placed in charge of the ferry and whether such supersession was temporary or permanent, does not appear clearly. It does appear, however, that sometime between 1883 and 1898, the Khandayati right itself had changed hands and that one Sk. Md. Asghar, the husband of defendant 1 became the Khandayat of Rendaghar. How this came about is not clear from the pleadings or the evidence on record. In 1898 by petition dated 1st February 1898, the said Sk. Md. Asghar represented to the Collector about his right to the ferry and complained against the Mahant. The Collector, as appears from the order dated 3rd February 1898, also marked as A (1), was inclined to hold that the ferry belongs to the Khandayet, but ordered the Khasmahal Deputy Collector to report on the representation. Presumably as a result of that order, one Mr. J. N. Gupta, Officiating Collector, enquired officially into the matter and held that since the British occupation of Orissa upto the year 1880 or thereabout, the ferry was in the undisputed charge of the Khandayet and that both as a matter of right and for the public convenience, the ferry should be kept in charge of the Khandayet and his rights entered in the settlement papers. Shortly thereafter, troubles appear to have arisen between the then Mahant and the then Khandayet, Md. Asghar, which led to proceedings under S. 145, Criminal P. C., relating to this ferry. The District Magistrate decided in favour of the Khandayet and declared the Khandayet to be in possession of the ferry and referred the Mahant to a civil suit by his order dated 2nd September 1898, Ex. 2. The Mahant admittedly has not filed any such civil suit until the present suit was filed in 1941 and presumably the Khandayet has been in possession ever since. In the register of private ferries, maintained in the District of Puri, by virtue of rules framed under S. 22, Bengal Ferries Act, an entry under date 26th July 1926 shows the Jagirdar, Md. Asghar as the owner of Narasinghpatna Ghat and the period of the season during which the ferry is to ply every year as June to August or September. When the current settlement proceedings were in progress in the year 1928, an objection was raised by the Jagirdar, Md. Asghar, against the noting of plot Nos. 63 and 471 as belonging to the Mahant. After hearing both parties, the settlement officer allowed the objection of the Jagirdar by adding a note in the remarks column of plot No. 63 that Sk. Md. Asghar is enjoying the right of holding the ferry. This note is found in the settlement Khewat, marked as Ex. H as already noticed. Nothing further is heard about the dispute until the year 1940, when again on account of trouble between the Mahant and the successor of Md. Asghar, there was an inquiry by the Sub-Divisional Magistrate and an order by him against the Mahant under S. 144, Criminal P. C. restraining him from plying any boat at the disputed ghat. This suit was accordingly filed on 7th July 1941.

[4] From the above narration of facts which may be gathered from the documentary evidence set out, there can be no reasonable doubt that the actual ferrying at this ghat across the river has been exercised by the Khandayet of Randhaghar at least from the year 1833 right upto the date of suit with some interruption for a few years in the period from 1882 to 1898. For about 50 years or more prior to 1882, Kulamani Routray and his predecessors were exercising the right. For over 40 years from 1898, Md. Asghar and his successor have been exercising the right. There is no indication or suggestion that during these periods anybody else was also exercising or claiming to exercise the right of ferrying at this ghat, side by side. The Mahant appears to have started the theory of joint right or a competitive right to ply also his own boats in the proceedings which led to the order under S. 144, Criminal P. C. in 1940 as evidenced by Ex. A. He reiterates the same position in his present plaint with the further modification that the defendant's right is confined to ply boats for his own convenience with reference to the ownership of his neighbouring village of Sipisurbali.

[5] On these facts which cannot be controverted on the evidence, the Courts below have come to the conclusion that the defendant's right must be presumed to be referable to a crown grant and that therefore the defendant has a right to a monopoly of the ferry right to the exclusion of the plaintiff and everybody else.

[6] It is convenient at this stage to notice an objection raised by the counsel for appellants to the use made of the statements in Exs. A-1 and A-2. It is said that A-2 is an order under S. 145, Criminal P. C. and that it is not admissible except for the limited purpose of showing that the successful party thereunder was in possession at the time and that the statements therein are not admissible. *Dinomoni* v. *Brojomohini*, 29 Cal. 187 : (29 I. A. 24 P. C.) and *Ram Parkash* v. *Anand Das*, 43 Cal. 707 : (A.I.R. (3) 1916 P. C. 256) are cited in support of this position. It is also said that the reference to the old documents in Ex. A-1 is in the nature of secondary evidence of the contents of those documents and hence not admissible and *Surendra Nath* v. *Kamakhya Narain Singh*, A. I. R. (17) 1930 P. C. 45 : (123 I. C. 145), is cited in support of it. There can be no doubt, however, that A-1 and A-2 are admissible in evidence under S. 13, Evidence Act as instances in which the right in dispute has been recognised; and that the statements therein relating to the facts relevant to this case are admissible under S. 35, Evidence Act. That the narrative and the statements in official reports are admissible is clearly recognised in *Martand Rao* v. *Malhar Rao*, 55 Cal. 403 : (A. I. R. (15) 1928 P. C. 10) and that even a statement in a judgment may be brought in under S. 35 is recognised in *Collector of Gorakhpur* v. *Ran Sundar Mal*, A. I. R. (21) 1934 P. C. 157 : (56 ALL. 468). There can, therefore, be no serious objection to the actual use made in this case of Exs. A-1 and A-2 and the statements therein. See also *Baldeo Das* v. *Gobind Das*, 36 ALL. 161 at p. 164 : (A. I. R. (1) 1914 ALL. 59).

[7] It is now necessary to deal with the main point raised by the appellant in this case, namely, that the facts proved on the above evidence are not enough to raise a presumption of crown grant of the ferry right. Before doing this, however, it is desirable to consider briefly the law relating to ferry rights in India. That law is governed by two Acts, the Bengal Ferries Act (Bengal Act I [1] of 1885) and the Northern India Ferries Act (Central Act XVII [17] of 1878). The Bengal Act applies and continues to apply to North Orissa. That Act was preceded by Regulations 19 of 1816 and 6 of 1819 and Bengal Act I [1] of 1866 which have all been repealed. The earlier history has been fully set out in *Nityhari Roy* v. *Dunne*, 18 Cal. 652 at pp. 660 and 661. The Bengal Ferries Act of 1885 deals with public ferries, that is, ferries which under the provisions of that Act are run directly by the Government authorities or by lessees from Government. There is no doubt, however, that the customary law in India, unlike that in England, recognises private ferries. This has been noticed in *Lachmeswar Singh* v. *Manowar Hossein*, 19 Cal. 253 at p. 262 : (19 I. A. 48 P. C.), wherein their Lordships say as follows :

> "It is recognised law in India that a man may set up a ferry on his own property and take toll from strangers for carrying them across, and may acquire such a right by grant or by user over the property of others."

[8] Private ferries are also recognised though not elaborately provided for in the Bengal

Ferries Act of 1885. Section 22 of the said Act provides thus:

> "The Commissioner may from time to time make rules for the maintenance of order and for the safety of passengers and property at private ferries situated in his division."

Under this section, rules have been framed which are published in the Calcutta Gazette, Part I B, dated 21st March 1888, which are still in force. These rules provide for the registration of private ferries and for certain safety regulations. It would appear from the case law on the subject that private ferries may be of two categories: (1) those which originate from proved or presumed crown grants; (2) those which arise otherwise than by a crown grant. In the case of public ferries, S. 16, Bengal Ferries Act enjoins that no rival ferry can be run within a distance of two miles from the limits thereof. In the case of a private ferry which originates in a crown grant and which is known as a ferry franchise, no exact limits are prescribed, but it has been held as follows:

> "The grantee is entitled to a monopoly of his line of ferry and has a cause of action against any one who carries either in that line or in another line of ferry so near as to make it an alternative way of carrying between substantially the same points. The other line may be such that the circumstances render it in the main little more than a competitive route for those who would naturally proceed by the old ferry. If so there is a cause of action for disturbance against any one who abstracts passengers by setting up the second ferry." See *Hammerton* v. *Earl of Dysart*, (1916) 1 A. C. 57 at p. 76: (85 L. J. Ch. 33).

A private ferry which does not originate in a crown grant, may arise in one of two ways as indicated by the Privy Council in *Lachmeswar Singh* v. *Manowar Hossain*, 19 Cal. 253: (19 I. A. 48 P. C.). (1) The owner of a property may set up a ferry on his own property and take toll from strangers for carrying them across; (2) A person not the owner of the property may acquire over another's property a right to ply a ferry and take tolls, either by grant or by prescription. That this last kind of right, which is unknown to English law, can be acquired by prescription in India, is well settled, as laid down in *Lachmeswar Singh* v. *Manowar Hossain*, 19 Cal. 253: (19 I. A. 48 P. C.). There has been some doubt whether a private ferry franchise referable to a crown grant can be acquired by prescription. But since the case in *Nityhari Roy* v. *Dunne*, 18 Cal. 652, the better and accepted view is that such a right cannot be acquired by prescription: See *Shama Durgaji* v. *Gangadhar Narayan*, 46 Bom. 952: (A. I. R. (9) 1922 Bom. 245) and *Ram Sakal* v. *Nageshar*, A. I. R. (22) 1935 ALL. 481: (57 ALL. 757) and *Abhoy Charan* v. *Dwaraka Nath*, 39 Cal. 53: (11 I. C. 180) and *Abdul Khoyrat* v. *Hemchandra*, 9 I. C. 846 (Cal.). In the case of a crown grant-ferry the right to be monopoly has been maintained on the ground that,

> "the right of ferry-man involves an obligation to keep up the services of the ferry for the benefit of the public. The ferry-man has undertaken a public burden in consideration of the crown's grant of the right to take tolls, and he would have a legitimate grievance if the public, while enjoying the benefit of the obligation were allowed to destroy the consideration for which it was undertaken": See *Hammerton* v. *Earl of Dysart*, (1916) 1 A. C. 57 at p. 85: (85 L. J. Ch. 33).

In the case, however, of the exercise of the right of ferry as part of the right of the proprietor over the bed and banks and the landing places of the water-course, it is no more than an incident of his ownership; and he is free to give it up whenever he chooses. On the other hand, he cannot complain of a neighbouring owner running a rival ferry on his own land in exercise of his own right. This is in accordance with the well known principles recognised in *Bradford Corporation* v. *Pickles*, 1895 A. C. 587: (64 L. J. Ch. 759) and *T. F. Allen* v. *W. C. Flood*, 1898 A. C. 1 at p. 118: (67 L. J. Q. B. 119) that the mere exercise of one's proprietary right without infringement of another's right is not actionable. In the case also of a person who obtains a ferry right over the property of another by grant or prescription, it is equally clear that he cannot complain of competition by a neighbouring owner of property. But the question whether the owner of the servient tenement itself or persons deriving title from him can set up a rival ferry in competition is one which so far as I am aware has never been raised or decided. It may as well be contended in such a case that the right of the owner of the ferry being traceable to a proved or presumed grant from the owner of the servient tenement that owner can do nothing to derogate from his own grant and that, therefore, such owner and persons claiming under him can be restrained from competition. The following cases have been cited before us as dealing with the various principles relating to ferry rights. *Kishoree Lall Roy* v. *Gokoolmanee*, 16 W. R. 281; *Lutafut Hossein* v. *Md. Moonen*, 22 W. R. 269; *Luchmessur Singh* v. *Lelanund Singh*, 4 Cal. 599: (3 C. L. R. 427); *Parmeshari Proshad* v. *Md. Syud*, 6 Cal. 608: (7 C. L. R. 504); *Nityhari Roy* v. *Dunne*, 18 Cal. 652; *Lachmeshwar Singh* v. *Manowar Hossein*, 19 Cal. 253: (19 I. A. 48 P. C); *Jwala Singh* v. *Abdul Razak*, A. I. R. (2) 1915 ALL. 270: (29 I. C. 692); *Dhanpat Pandey* v. *Pratap Singh*, A. I. R. (18) 1931 ALL. 587: (53 ALL. 764) and *Shama Durgaji* v. *Gangadhar Narayan*, A. I. R. (9) 1922 Bom. 245: (46 Bom. 952).

[9] In the light of the above principles, the plaintiff would not be entitled to the declaration

that he claims, if the defendant is able to make out on the evidence that her right is traceable to a crown grant proved or presumed. Admittedly no actual grant is available or is produced and the only question is whether from the facts, the presumption of a lost crown grant can be reasonably made.

[10] It is suggested that since the bed of the river, the banks on either side and the ghats and the landing places relating to this ferry admittedly belong to the plaintiff by virtue of a settlement with the Government, no grant by the Crown of a ferry right in respect of the same, derogating from his title can be presumed. In the first place there is no evidence to show that the settlement with the plaintiff's predecessor granting Narasingpatna Mouza to him with the bed and banks of the river has been made earlier than the time when the ferry right began to be exercised by the Khandayets and when the ferry right may be presumed to have been granted to him. On the other hand it appears from Ex. A-1 that the ferry was in charge of the Khandayet long before the Mahants of Narasingapatna came into existence. It also appears from Ex. A-2 that in the old settlement measurement papers marked as Ex. 3 in those proceedings that the river Kania was measured in numbers 10, 11 and 22 and an area of 399 mans, 9 gunts and 11 biswas was entered as Nadee Jalkar Government and Zamindar Khandayet and that it was only in respect of the other plots that the Achari Mahant was noted as being in charge. This would also indicate that the ferry right existed at a time when the river bed did not belong to the Mahant and that the settlement of the river bed with the Mahant must have been later. The settlement of Narasingapatna with the Mahant must, therefore, have been subject to the pre-existing rights. In any case, it is no objection in law to the grant of ferry franchise that the land over which the franchise has been granted does not belong to the Crown or to the grantee. From the actual later user of the ferry franchise for a sufficient period an easement right to the use of the ghats and landing places or a dedication of the same to the public may be presumed. (See *Nityahari Roy* v. *Dunne*, 18 Cal. 652 at pp. 659, 660).

[11] It is next suggested that the evidence which is relied upon, will only show that the Khandayet has been working the ferry for the periods specified above not in his own right but on behalf of the Government and that the ferry all along was only a Government ferry and that no ferry franchise was granted to the Khandayet. It has been pointed out that in Ex. A-1, the order of the Collector Mr. Lee dated 3rd February 1898 states "I shall give the ferry to the Khandayet" and that in the same exhibit, the order of the officiating Collector, Mr. Gupta, dated 5th April 1898, refers to the ferry as "having been placed in charge of the Khandayet and the Paiks under him." in the earlier days and that his own order is that the ferry "should be kept in charge of the Khandayet." It has also been pointed out that in Ex. A-2, dated 29th August 1898, in the order of the District Magistrate under S. 145, Criminal P. C., it is stated that "all the documentary evidence shows that the ferry belongs to the Government" and "is in charge of the Khandayets". It is also pointed out that even if the Collector had the power to grant the ferry as contemplated in his order dated 3rd February 1898, there is no subsequent order at all showing that there was any such grant. Having regard, however, to the entire documentary evidence in the case, much stress cannot be laid upon the somewhat loose use of the words and phrases above noticed in some of the documents. It appears from the documentary evidence already noticed that the right of the Khandayet to the ferry has been throughout recognised. As already stated, in a document dated 4th December 1851, the then Deputy Collector, Nilamani Brahma, after a regular judicial inquiry appears to have recognised the right of the Khandayet to the ferry. The leases, Exs. C and C-1 specifically refer to the right of the Khandayet to the ferry and the exercise of that right. Even the documents, Exs. A-1 and A-2, stray passages in which have been seized upon on behalf of the appellant, when read as a whole, clearly recognise the right of the Khandayet and do not show that he was exercising the right merely as the *ad hoc* agent of the Government. The very fact that in the year 1926, there is an entry in the ferry register, Ex. G, shows that this ferry was not treated as a public ferry belonging to the Government. As the very heading of that document shows, it was a register of private ferries. Even as early as in 1888, there appears to have been a note about this ferry in the ferry register of 1888, as appears from A-1. Though there is nothing in the record to show that this register was a register of private ferries, it may be presumed to be such, because the rules framed under the Bengal Ferries Act contemplate a register only of private ferries. It, therefore, appears that even a early as 1888 this ferry was not treated as a public ferry belonging to the Government. On the whole inspite of some stray phrases here and there in the documents suggesting otherwise, it is reasonably clear that the ferry in question has been throughout only a private ferry belonging to the Khandayet and not a public ferry belonging to the Government and temporarily placed in charge of the Khandayet as the Gov-

ernment agent from time to time. It must also be noticed that even were it otherwise, the plaintiff would have no right to run a rival ferry within a two mile-limit as provided in S. 16, Bengal Ferries Act.

[12] It is next urged that, in view of the break in the exercise of the right of ferry from 1882 to 1898 or some portion thereof, the degree of continuity in the exercise of right which is requisite to give rise to the presumption of a crown grant of the ferry franchise is lacking. It is also further argued that even if a ferry franchise grant in favour of the original Khandayet may be presumed, the same cannot be presumed in favour of the present Khandayets who are not shown to have succeeded to the rights, if any, of the original Khandayets and in whose favour a fresh grant has not been made out.

[13] It is no doubt true that there has been some interruption in the exercise of this ferry right by the Khandayet for some time between 1882 to 1898, though as already stated whether this interruption lasted for only a few years in that period or for the whole of the period is not clear. However that may be; if the facts set out are enough to raise a presumption of crown grant, proof of interruption does not, in law, negative it. It has been held that neither a mere non-exercise of the ferry right nor the running of an opposition ferry for some time extinguishes the ferry franchise created by a crown grant. The franchise continues as long as the grant continues and until the person who sets up an opposition ferry can show a crown grant either actual or presumptive in himself (See *Nityahari* v. *Dunne*, 18 Cal 652 at p. 654). As regards the question whether there has been a continuity of the ferry right from the original Khandayet, Kulamani Rautray to the new Khandayet, Md. Asghar, it is no doubt true that evidence is wanting as to how the right of Kulamani Rautray came to be held by Md. Asghar. If it was by some process of devolution or transfer no difficulty arises. Assuming however that the Khandaiti right of the original Khandayet was terminated and there was a fresh grant of the Khandayati right by the Government to Md. Asghar, it would equally follow that there must have been a fresh grant of the ferry right also, though probably the ferry right was not either a part of or appurtenant to the Khandayati right (at any rate there is no proof that it is so). The evidence and the history show that the ferry right was granted to the Khandayat because he was the Khandayat. As appears from Maddox Settlement Report, p. 288, the Khandayat held his land on a Jagir tenure with the duty of patrolling the sandy wastes on the foreshore. The ferry in question was the connecting link in the high-way on both sides of the river which the Khandayet had the duty to patrol. The defendant in her written statement, para. 13, says that the Khandayat had the duty of protecting the ghats and the roads and the public from the ravages of pirates and dacoits. The parwana Ex. D, already referred to, corroborates it. Exhibits A-1 and A-2 also indicate the same. Even if, therefore, the Khandayati right of the original Khandayat Kulamani Rautray, was terminated and along with it his ferry right, it is reasonable to infer that when the Khandayati right was granted to Md. Asghar, the ferry right also would have been granted to Sk. Md. Asghar on account of the fact that he was the Khandayat. The ferry right so granted would, in the absence of any indication to the contrary be of the same kind and of the same amplitude as that of the ferry right of the original Khandayat, Kulamani Rautray. Indeed, it appears from the order of the Collector, Mr. Lee, dated 3rd February 1898 and of Mr. Gupta, dated 5th April 1898 (Ex. A-1) that the right of Md. Asghar, the new Khandayat, was recognised on the ground that the ferry right belonged to the original Khandayat. Whatever the nature of the right of the original Khandayat may have been, the same must be taken to have been either continued or regranted. It therefore appears to me that neither the fact that there has been an interruption in the exercise of the ferry right by the successive Khandayats, nor the fact that the exact mode of devolution of the right from the one Khandayat to the other has not been made out on the evidence, is any ground for not treating the evidence relating to the exercise of the ferry right from 1832 to 1940 as a whole for the purpose of determining whether or not it is enough to support the presumption of a crown grant.

[14] The question then remains whether on this evidence, the presumption drawn by the Courts below of a crown grant of ferry franchise in favour of the Khandayat is justified. It is urged by the learned counsel for the appellants that this long exercise of the right can only support the acquisition of a prescriptive ferry right and not of a ferry franchise which can only be acquired by crown grant. It has been urged that in the entire documentary evidence there is no suggestion of any Government grant having been ever made. It is pointed out that in *Nityahari* v. *Dunne*, 18 Cal. 652, the inference of a crown grant has been based on the fact that the Government on various occasions have acknowledged the ferry right in the particular case as part of the settlement of the Zamindari right and that, therefore, by virtue of the permanent settlement, the ferry franchise must be deemed to have been a crown grant. It is urged

that in the present case, there is no proof that the ferry franchise was comprised in the settlement between the Zamindar and the Khandayat as part of the Khandayati right which was settled upon defendant 1's husband or his predecessor. As already pointed out, however, though there is no proof that the ferry right was a part of or appurtenant to the Khandayati right, it has invariably accompanied it. The Government officers on two different occasions, when the matter came up for consideration, recognised it on that footing and acknowledged it. The Deputy Collector, Nilamani Brahma, appears to have recognised the right of the original Khandayat by his order dated 4th December 1851, after a regular judicial inquiry as stated in Ex. A 1. The Collector, Mr. J. N. Gupta, after a departmental and quasi-judicial enquiry recognised the right of the succeeding Khandayat Md. Asghar by his order dated 5th April 1898. Both these orders separated by 37 years and in favour of two different Khandayats are clear and unequivocal recognition or acknowledgment by responsible Government officials of the right of the Khandayat to the ferry. Having regard to the length of the exercise of the right and the above formal recognition by Government officers in whom by S. 4 of Regn. 6 of 1819 and by Ss. 7 and 8, Bengal Ferries Act of 1885, the control of public ferries is vested, it is reasonable to presume a lost crown grant. In *Shama Durgaji* v. *Gangadhar*, A. I. R. (9) 1922 Bom. 245 : (46 Bom. 952), the presumption of a crown grant has been drawn from recognition of the right by Government officers.

[15] That the grant to be presumed in the circumstances of this case, is a crown grant of a monopolistic ferry franchise, also follows from the fact that the evidence shows the exercise of this right to have throughout been burdened with an obligation in favour of the public. The lease deeds, Exs. C and C-1 specifically recite that the people on Government duty and the Government Daks are to be carried across the river free of fare "as usual". The parwana, Ex. D, shows that the Khandayat, in connexion with the exercise of the ferry right, was under the orders of the Police Chief, and the order, Ex. A-1, shows that the ferry right of the Khandayat was recognised "for the public convenience." The oral evidence of D. W. 1 and D. W. 4 shows that even upto date the defendant's ferry is used to carry Dak across free of any charge. As has been pointed out above, the distinction between a proprietary right of ferry acquired by prescription or grant by private individual and a ferry franchise obtained as a crown grant is this that while in the former case the ferry is worked for mere personal profit and may be abandoned at any time at the option of the owner thereof, a ferry franchise is granted and taken for the public convenience and the grantee undertakes a public obligation which he must continue to discharge so long as he holds the franchise. Since the actual exercise of the ferry right in this case is shown to be in a manner which strongly suggests the existence of a public obligation, this in itself, is a weighty circumstance to support the presumption of a crown grant.

[16] I have, therefore, no doubt in this case that on the facts proved, the presumption drawn by the Courts below of the existence of a ferry franchise relating to the disputed ferry across the river Harchandi in Narasinghpatna, in favour of the first defendant on the basis of a lost crown grant is fully justified. This inference is justified whether the evidence is taken with reference to the entire period from 1832 to 1940, or confined to the later period of 1898 to 1940, but explained with reference to the user of the earlier period. It would, therefore, follow that the plaintiff has no right to carry any ferry at or near the places in question which will have the effect of being a competitive ferry resulting in diminution of defendant 1's income from the exercise of her ferry right.

[17] I may also add that even apart from any presumption of lost crown grant giving rise to the inference of a ferry franchise in favour of defendant 1, there can be no doubt on the evidence that at least a right of private ferry in the nature of an easement in favour of defendant 1's husband can be presumed. Such a right would be based on the presumption of a lost grant by the plaintiff or by his predecessors. As already stated, I am unable to see, as at present advised, why in such a case the plaintiff should not be held to be under an obligation not to compete with the grantee and thereby derogate from his own presumed grant. None of the cases cited before us are against the view though they do not deal with it. It is, however, unnecessary to pursue this matter further, since I have come to the clear conclusion in agreement with the Courts below that on the facts of this case, a crown grant can reasonably be presumed.

[18] It only remains to consider the suggestion made by learned counsel for the appellant that the plaintiff's right to run a ferry in the exercise of his proprietary right in the bed and banks of the river and for the sole purpose of conveying his own servants and other persons coming on his business should be declared. The case in *Luchmessur Singh* v. *Lelanund Singh*, 4 Cal. 599 : (3 C.L.R. 427), undoubtedly supports him. This, however, is not the prayer in the

plaint. The plaintiff has only asked for the declaration to run the ferry either exclusively or competitively, vide plaint para. 11 Ga and Gha, and not for declaration of a right to run the ferry limited to his own personal purposes and uses. We are not called upon in this case either to decide the exact limits of defendant's exercise of the ferry franchise, nor the limits of the plaintiff's right to maintain a ferry for his own personal use. It would, therefore, be unsafe in this litigation to make any positive declarations in respect of either of them. The plaintiff having failed to make out his exclusive or competitive right to run the ferry this appeal fails and the suit must be dismissed with costs throughout.

[19] **Narasimham J.** — I agree and have nothing to add.

D.R.R. *Appeal dismissed.*

A. I. R. (37) 1950 Orissa 28 *[C. N. 4.]*

JAGANNADHADAS AND NARASIMHAM JJ.

Ramamohan Das—Defendant — Appellant v. *Basudeb Dass—Plaintiff—Respondent.*

Second Appeal No. 65 of 1945, Decided on 18th April 1949, against judgment and decree of Dist. Judge, Ganjam-Puri, Berhampur, D/- 8th November 1944.

(a) Hindu law—Religious endowment — Muth — Chela—Initiation — Requisite religious ceremonies —Usage is deciding factor—Affiliation—Presumption — Initiation and treatment as chela proved — Requisite ceremonies have been performed may be presumed.

For determining the ceremonies requisite for valid initiation as Chela of a Muth, the deciding factor is usage. [Para 10]

Where initiation as a Chela by the defendant is found as a fact, and the treatment as a Chela for a period of nearly 10 years has been satisfactorily established, in the absence of any clear evidence of usage, every presumption arises in law that all the requisite ceremonies, whatever they might be, have been duly performed. The Chela's rights, if any, are not to be defeated by a meticulous examination of the oral evidence about what exactly happened long ago and by an elaborate consideration of what are the ceremonies strictly requisite according to the Sastras, without any reliable evidence how far the requisites of the Sastras have been adopted into the usage of the institution: 7 Beng. L. R. 216 (P. C); 24 Bom. 473; 27 All. 271 (P. C).; A. I. R. (8) 1921 Cal. 647 and A. I. R. (14) 1927 P. C. 185, *Ref.* [Para 10]

(b) Hindu law—Religious endowment — Muth — Chela — Right of discarded Chela to maintenance out of Muth properties—No specific right in favour of individual Chela can be recognised apart from terms of endowment or usage.

The Hindu law texts and the commentaries do not recognise the right of a Chela to maintenance against his Guru. [Para 13]

The right of a Chela to be maintained out of the Muth properties and his right to enforce it by suit against the Mahant, must be founded on the terms of the foundation of the endowment itself, if available, or on usage which is presumptive evidence of the terms of the foundation, or on inference from the concept as to the holding of the property of religious institutions by head thereof which again is the growth of usage. [Paras 14, 15]

Any legal obligation to provide for the maintenance of a disciple or a Chela out of the property and legally enforceable right in the Chela against the head of the Muth does not follow from the bare concept relating to the holding of the property of the Muth by the Mahant apart from any clear evidence of uage: *Case law referred.* [Para 20]

While the head of a Muth is bound to maintain his disciples, and the proper maintenance of disciples is a legitimate expenditure of the Muth property and its income, no specific right in favour of individual disciples or Chelas can be recognised apart from usage. The head of the Muth may be answerable for not maintaining any disciple or disciples in the same way as he would be if he violates the observance of any of his other duties relating to the management of the properties in his charge. But the only remedy of a discarded Chela during the life-time of a Mahant may be nothing more than the enforcement of the constructive trust, if any, on which the Mahant may be said to hold the property and not the enforcement of an individual right. This view may involve some hardship to individual discarded Chelas, who give up all connections with their natural families in expectation of being maintained from the Muth. This might appear to be anomalous in the present state of administration of Muths where old Shastraic idealism appears to be fast disappearing. These considerations, however, can have no bearing upon what the Courts must find to be the law in this behalf: 10 Mad. 375 and 33 Mad. 265, *Considered*; *Case law discussed.* [Para 22]

A recent compromise decree under which the Mahant agrees to pay maintenance to another Chela cannot be any evidence of the usage in question. [Paras 16, 25]

S. K. Ray — for Appellant.

B. Das and P. Misra — for Respondent.

Das J. — The defendant is the appellant in this second appeal. The suit relates to an institution called Sri Biranchi Narayan Muth at Buguda, Ghumsur Taluk, Ganjam District. As appears from the connected Civil Revisions Nos. 159/47 and 8/48 which have been heard with this appeal there appears to be some reasonable doubt whether this institution is a Muth or a temple. But so far as this appeal is concerned, it has proceeded on the assumption put forward by the plaintiff in his plaint that it is a Muth. This has not been traversed by the defendant in his written statement. The plaintiff's case is that the defendant is the Mahant of the Muth and that he is his duly constituted Chela and that his residence in the Muth has been made impossible by the wrong conduct of the defendant and that he is denied even food and raiment and that he has had to leave the Muth in 1930. He accordingly asserts a right to be maintained out of the Muth funds and brings the suit against the defendant as the head of the Muth for recovery of maintenance past and future. The suit is of 1934 and has had a chequered career. It was decreed by the then Subordinate Judge of Berhampur in 1936 who held that the plaintiff was entitled to get a maintenance of Rs. 20 p.m.

for the future from the date of the suit and arrears of maintenance at Rs. 10 p.m., for three years prior to the suit. On appeal to the learned District Judge, the then District Judge on 31st August 1937, recorded what he considered to be a compromise between the parties to the effect that the plaintiff should get maintenance at Rs. 7 8-0 P.M. from the date of the suit and Rs. 5 p.m. for past arrears. On second appeal, it was found that the advocates who purported to compromise were not duly empowered to do so. The District Judge's decree was accordingly set aside and the appeal was remanded to the District Court for fresh disposal. On remand the learned District Judge after rehearing the appeal, felt that it was necessary to frame an issue for ascertaining whether the essential formalities required for the valid initiation ceremony were gone through when the plaintiff was initiated. He accordingly set aside the decision of the Subordinate Judge in favour of the plaintiff given in 1936, and remanded the case on 3rd February 1942 to the trial Court for disposal, according to law. After remand the plaintiff has examined one additional witness, P. W. 6. The defendant has re-examined himself and his original fifth witness and has also examined three additional witnesses, D. Ws. 6, 7 and 8. In addition, the plaintiff has elicited some answers from the defendant on interrogatories, the answers being on dates 27th October 1942 and 28th February 1943. At the original trial the following issues were framed:

(1) Whether the plaintiff was duly constituted and initiated as a Chela of the defendant? (2) Whether the plaintiff has been initiated into Sanyasgrahan and has adopted the ascetic order from that date? (3) Even if he has been initiated into Chelaship, whether the plaintiff is entitled to claim maintenance from the defendant? (4) Whether the plaintiff is guilty of any conduct disentitling him to any maintenance? (5) What if any is the right of maintenance to be allowed to the plaintiff?

[2] After remand of the suit to the trial Court, the following additional issues were framed on 24th March 1942 presumably in pursuance of the District Judge's order of remand.

(1) To which sect of the Vaishnavites does the defendant belong? (2) What are essential ceremonies that are according to the custom and practice prevailing in the Muth of the defendant, required for the valid initiation of a Chela in the said Muth? (3) Whether the said ceremonies were performed in the case of the plaintiff?

[3] It is not disputed that the plaintiff was brought by the defendant to his Muth in the year 1914, when he was a boy of about 7 years and very shortly thereafter he executed a will Ex. 2, dated 16th April 1915, whereby he announced his intention of making him his Chela and nominating him successor to the Muth in due course. It is also not disputed that since that date the plaintiff has been under the care of the defendant and that his Upanayan was performed in the Muth in February 1918. It has been found as a fact, that the Upanayan was performed by the defendant himself though the defendant denied this. The plaintiff claims that on the very day on which the Upanayan was performed, he was formally initiated by the defendant as his Chela and was treated as such ever since. The defendant denies this and says that he did nothing to make him a Chela, but that he kept him only on probation after Upanayan and that he later on found his character and behaviour to be bad and that accordingly on 22nd May 1929, he executed a registered will, Ex. 3, cancelling his previous will dated 16th April 1915. In the years 1929 and 1930, there were criminal proceedings between the parties including security proceedings No. MC 24/29 on the file of the Sub-Divisional Magistrate, Chatrapur, against the plaintiff wherein he was ordered on 25th July 1930, to execute a bond for keeping the peace for six months. Since 1930 the plaintiff has not been living in the Muth. The main question that the defendant has raised is that the plaintiff has not been initiated by him as his Chela and that the various ceremonies requisite to constitute the defendant a duly adopted Chela of his were never gone through. This raises the questions: (1) Whether in addition to performing the Upanayan of the plaintiff, the defendant did purport to go through any formal ceremonial with a view to constitute the plaintiff his Chela; (2) what are all the cermonies necessary to constitute a person Chela of the defendant's Muth; (3) whether the ceremonies actually gone through were sufficient to constitute the plaintiff the defendant's Chela.

[4] On the first question as already stated, the defendant's case is that beyond Upanayan, no other ceremony took place. It is the plaintiff's case that the Upanayan took place in the morning and after its close, an additional ceremony for the initiation of the plaintiff as a Chela was performed by the defendant. The trial Court both before and after remand, as well as the appellate Court after remand, have rejected the story of the defendant that he did not perform the Upanayan of the plaintiff and hence also held that an additional ceremony for initiation the plaintiff as a Chela was performed by the defendant. These facts have been found concurrently by the lower Courts and are no longer open to challenge. The only question therefore is whether the initiation of the plaintiff as a Chela of the defendant is invalid owing to the absence of any of the requisite formalities and ceremonies.

[5] That this was the main, if not the only point in controversy after the remand appears also from the judgment of the Subordinate Judge who says:

> "Whatever may be the nature of the defendant's contention in the early stage of this litigation, it was contended by him before the District Judge in appeal and also contended before me after remand that the rituals followed at the plaintiff's initiation are not sufficient to constitute him a valid Chela."

[6] On this part of the case, the defendant's contention is that to constitute a valid Chela of the suit Muth, the following ceremonies are essential: (1) Tapta Chakrankitam; (2) Biraja Homa; (3) Praisha Mantram. It is also contended that all these ceremonies should be performed only after the person attains the age of discretion. It is the case for the defendant that none of these ceremonies were performed for the plaintiff who, at the time of his Upanayan, was of age of about 12 and had not attained the age of discretion. The case for the plaintiff is that all the customary religious rites were performed and that he was validly made a Chela.

[7] It is necessary to state at this stage that admittedly the defendant and his Muth belong to Sri Ramanuj Vaishnavite cult called Sri Sampradaya and that the Mahant and the Chela are of ascetic celibate order. The points of controversy centre round what all is necessary for making the parties concerned a devout Sri Vaishnavite and a regular Sanyashi. It is said that out of the three formalities mentioned above, the first is necessary to render the respondent a devoute Vaishnavite and the second and third are necessary to initiate the person into the true order of orthodox Sanyasis. There has been considerable discussion before us on these matters with reference to the textual authorities and the text books of reputed authors and with reference to the actual evidence in the case. The learned Subordinate Judge after remand has, on a consideration of all the relevant material, arrived at a definite finding that the plaintiff's Panchasamskar has been validly gone through, though there was lack of hot impress (Tapta-Chakrankitam) in his case, that Biraja Homa was performed at the plaintiff's initiation and even if it be assumed that it was not, its non-performance does not invalidate his Sanyasgrahan. He also held that though the plaintiff was made a Chela at the young age of 12, it did not invalidate his affiliation to the Mahant as his Chela. He accordingly passed a decree in favour of the plaintiff in the same terms as that originally passed. On appeal, the learned appellate Judge held that if the plaintiff has to prove that he has been initiated into the ascetic order as founded by Shankar and Ramanuja, it is to be concluded that the plaintiff has failed to prove that he has been so initiated into the Sanyas order. But he held that there was no proof that the defendant's Muth was of the orthodox Sanyashi order of Sri Ramanuja. His categorical findings are (1) that the defendant belongs to Sri Sampradaya (of Ramanuja); (2) that he does not belong to the (orthodox) Sanyas order of Sri Ramanuja; (3) that there is absence of tangible evidence leading to the growth of usage or custom obtaining in defendant's Muth for the valid initiation of Chelaship; (4) that some ceremonies were performed on the day on which the plaintiff's Upanayan was performed and the ceremonies which were so performed were the essential ceremonies for the affiliation of the plaintiff in the Muth and his initiation as the Chela of the defendant. On these findings the learned Subordinate Judge concurred with the trial Court in maintaining the original decree for maintenance passed in favour of the plaintiff by the Subordinate Judge before remand.

[8] The learned counsel for the appellant argues that on the findings of the appellate Judge the suit should have been dismissed. He points out that the plaintiff in his plaint has stated that he was initiated into Sanyas and adopted the ascetic order from his boyhood and that is also his evidence in Court. Therefore, it is said that once it is found, as the learned appellate Judge did that the plaintiff failed to prove the performance of essential ceremonies requisite for the orthodox Sanyashi order he was bound to fail. He also contends that the Courts below have failed to find clearly on evidence, what are all the essential ceremonies requisite to constitute the plaintiff a valid Chela which was the main purpose of the remand to the trial Court. He further contends that in view of the interrogatories served by the plaintiff on the defendant on 5th October 1942 as to whether he belonged to the Achari sect of Sri Vaishnavite cult and the answer of the defendant that he belonged to the Visishta-adwaita creed of Sri Ramanuja sect of Sri Vaishnava cult and the case of the plaintiff himself in the plaint that he was initiated into Sanyas, the learned appellate Judge was not competent to find that the defendant's Muth did not belong to the orthodox Sanyasin order of Sri Ramanuja.

[9] Having regard to the history of the institution there can be no doubt that the finding of the learned appellate Judge that there is absence of tangible evidence leading to the growth of usage or custom in this Muth for valid initiation into Chelaship is perfectly correct. This Muth is one of very recent origin having been founded by Sri Srikar Bhanj, the then Raja of Ghumsur in the early part of 19th century. From the hands of Sri Srikar Bhanj it passed to one Sri

Govind Das and then to the hands of Sri Ram Mohan Das Babaji, the present defendant. Thus there have been only two successions and there have not been enough occasions for any clear and indisputable evidence of usage. The defendant in his evidence admits that his Muth is of the same category as that of Uttarparswo Muth and some other Sri Sampradaya Muths of Puri and Ganjam. The Mahant of Uttarparswo Muth has been examined as D. W. 8 after remand and he categorically says: "We are not Sanyasis as we do not enter into Gruhasthasram. We are perpetual Brahmacharis." Another witness, D. W. 6, the Mahant of Bisamgiri Muth in Sannakhimedi estate, Ganjam District, who also belongs to Sri Sampradaya of Ramanuja cult says as follows:

> "I call myself a Sanyasi because I do not live a married life. I have not adopted that Sanyas Diksha which the heads of our order whom we call Swamis (i. e. in South India) have taken."

If the plaintiff's averment in the plaint that he was initiated into the Sanyasi order is understood with reference to the consciousness of the persons of his class as appears from the evidence of D. Ws. 6 and 8, extracted above, there is no reason to pin him down by assuming that his case itself was that the suit Muth was of the orthodox Sanyasi order of Sri Sampradaya or that he must be taken to have asserted that he underwent all the ceremonies requisite for the orthodox Sanyasis of Sri Sampradaya. It cannot, therefore, be said that the Court below had found a case which was at variance with any case of the plaintiff or with his evidence. Further, though no doubt the defendant has asserted in answer to interrogatories and in his evidence that he belongs to the (orthodox) order or Sanyasis of Ramanuja cult, his witnesses, D. Ws. 6 and 8, who are Mahants of the same order with him do not support him as pointed out above. Even with reference to the requirements or otherwise of Tapta Chakrankita (hot impress), the Courts below have discussed the evidence on the side of the defendant itself and have held from that evidence that in respect of the Muths of the class to which the defendant's Muth belongs, Tapta Chakrankitam did not appear to be essential or at any rate that the lack of Tapta Chakrankitam did not invalidate the initiation. The evidence of D. Ws 6 and 8 itself amply supports it. As regards the objection arising with reference to the age of the defendant at the time of the alleged initiation, it is amply clear from the evidence noticed by the Courts below that the defendant himself and other Mahants of his class have been initiated at an equally early age. The defendant himself has been initiated at the age of ten as he admits.

[10] It is no doubt true that the Courts below have not specifically and categorically found what are all the exact ceremonies requisite for valid initiation as a Chela and we have been invited to do so and to judge on the merits of the plaintiff's case on the evidence with reference to the same. We are, however, not prepared to enter into any elaborate consideration of the mere Shastraic requirements, because the ultimate deciding factor is usage and there has been yet no sufficient scope for any usage in this institution to have developed in this behalf as already pointed out. Besides, as pointed out at the outset, in view of the concurrent findings of both the Courts below that there has been a distinct ceremony of initiation of the Chela performed, apart from Upanayan, the only question is whether all the requisite ceremonies have been performed whatever they may have been. In the first place, the defendant who himself has been found to have performed the initiation and who for a period of ten years thereafter treated him as his Chela cannot now be permitted to come forward and say that the requisite ceremonies for which he was responsible have not been performed. On the performance of Upanayan, there has been a change of the gotra of the plaintiff to Achyut gotra of the defendant and the plaintiff has been given the name of Basudev Das Babaji in substitution for his original name, Banamali, as has been found by the Courts below on the evidence. The assumption of the name Babaji indicating an ascetic order is significant. He was admitted into a school by the defendant and got educated by him. Exhibit A, an order of the Schools Inspector and Ex. B, a licence issued by the licensing authority clearly show that he was treated by the public authorities as the Chela of the defendant under the care of the defendant, presumably with the knowledge and consent of the defendant, if not on his initiative. There is thus ample evidence of the defendant having treated the plaintiff as his Chela until he chose to repudiate him in 1921. His statement that though he performed his Upanayan, he only kept him on probation without making him a Chela has been rejected by both the Courts below and is obviously false. He admits that he himself was made a Chela when he was ten years old soon after his Upanayan. There is therefore no reason to think that any period of probation after Upanayan would have been contemplated by him in respect of his own Chela. In a case of this kind therefore where initiation as a Chela by the defendant is found as a fact, and the treatment as a Chela for a period of nearly 10 years has been satisfactorily established, in the absence of any clear evidence of usage, every presumption

arises in law that all the requisite ceremonies whatever they might be, have been duly performed. The plaintiff's rights, if any, are not to be defeated by a meticulous examination of the oral evidence about what exactly happened so long ago as in 1918 and by an elaborate consideration of what are the ceremonies strictly requisite according to the Sastras, without any reliable evidence, how far the requisites of the Sastras have been adopted into the usage of the institution. It is well settled that under similar circumstances, a like presumption in favour of the performance of requisite ceremonies is permissible in cases of adoption and marriage. (See *Rajindra Nath* v *Jagendra Nath*, 14 M. I. A. 67: (7 Beng. L. R. 2162 P. C.): *Chiman Lal* v. *Ramchandra*; 24 Bom 473: (Bom. L. R. 163); *Achal Ram* v. *Kazim Hussain*, 27 ALL 271: (32 I. A. 113 P. C.), *Jagannath Marwari* v. *Mt. Chandni Bibi*, A. I. R. (8) 1921 Cal. 647 : (67 I. C. 31); *Andrahennedige Dinohamy* v. *Wiketunge Liyanapatabendige Balahamy*, A. I. R. (14) 1927 P. C. 185 : (104 I. C. 327).

[11] In this view of the matter, I have no hesitation in finding in agreement with the Courts below that the plaintiff must be taken to be the validly adopted Chela of the defendant.

[12] It has been argued that the affiliation of a Chela to a Mahant in a religious institution is different from the adoption of a son where secular property is involved as pointed out by the Privy Council in *Kartar Singh* v. *Dayal Das*, A. I. R. (26) 1939 P. C. 201 : (I. L. R. (1939) Kar. P. C. 350). That is no doubt so, but there is no difference on principle with reference to the presumption as to the performance of ceremonies. The presumption arises on account of similar facts raising similar considerations applicable to both. In both, the boy concerned is legally cut off from the natural family and all blood relationship as such ceases, and great injustice might result if strict proof of ceremonies is required after considerable lapse of time when there is clear and cogent evidence of treatment. I am, however, far from saying that such a presumption necessarily arises in every case or that it is irrebuttable. It has also been pressed on my attention that the performance of Biraja Homa and the imparting of Mula Mantra by the Guru to the disciple is of the essence of the affiliation of a Chela according to the Sastras and that the Sastaric requirements are not to be whittled down by lack of evidence or by presumptive proof since a question of status is involved. Cases in *Baldeo Prasad* v. *Arya Pritinidhi Sabha*, A. I. R. (17) 1930 ALL. 643: (52 ALL. 789), *Jaganath Gir* v. *Sher Bahadur Singh*, A. I. R. (22) 1935 ALL. 329 at p. 333: (57 ALL. 85), *Brahmdeo* v. *Rama Nand*, A. I. R. (20) 1933 Pat. 70 : (141 I. C. 775), *Ramdhan* v. *Dalmir*, 14 C. W. N. 191 : (2 I. C. 385) and *Gauri Shankar* v. *Niadar Singh*, 18 C. W. N. 59: (A. I. R. (1) 1914 Cal. 228), have been cited. But it will be found on an examination of these cases that they proceed on the consideration of the evidence of usage available in those cases. It has also been urged, relying upon *Ramdhan* v. *Dalmir*, 14 Cal. W. N. 191: (2 I. C. 385), that mere initiation as a Chela is not the same thing as the final affiliation of a person as a Chela and that there is ordinarily a period of probation between the two. It is, therefore, contended that from the finding of initiation in this case, the final affiliation as a Chela cannot be inferred. That, however, is a case where the usage of the insititution showed that a period of probation was required and where initiation was admitted on both sides and the necessity for a period of probation was pleaded and found. The defendant in this case denies altogether that there was any initiation and does not plead that there was to be a period of probation after initiation. He only pleads, in paragraph 4 of his written statement, that he kept the plaintiff in the Muth on probation before making him a Chela to see his behaviour and character and to consider whether he would be fit to be made a Chela of the defendant. Admittedly, the plaintiff who was a close relation of the defendant was brought into the Muth in 1914 and it must be assumed on the defendant's pleading that he was on probation from then. The Upanayan and the alleged initiation took place in 1918. As already pointed out, in view of the fact that in the defendant's case itself his affiliation as a Chela admittedly took place shortly after the Upanayan without any period of probation intervening, there is no reason to think that any further period of probation after Upanayan was necessary or contemplated by the defendant in the case of the plaintiff.

[13] The next question for consideration is whether the plaintiff is entitled to be maintained out of the Muth properties and whether he can enforce the right by suit against the Mahant. The Courts below have held, relying on the passages in certain reported cases and the observations in Mayne's Hindu Law (9th Edition), that the plaintiff is so entitled. The matter, however, requires closer examination. It is rather remarkable that there is no passage in Hindu Law texts which directly or inferentially indicates any right of a disciple or a Chela to maintenance against his Guru. There appears also to be no reported case directly in favour of the existence of such a right either with reference to the general law or on the ground of usage. At any rate,

no Sastraic texts in this behalf and no direct reported cases have been brought to our notice and such investigation into the matter, as we have been able to make, has not disclosed any. The only textual authority dealing with the position of ascetics and disciples in relation to property appears to be a text of Yagnyavalkya.

> "The heirs to the property of a hermit, of an ascetic, and of a student in Theology, are, in order (that is, in the inverse order), the preceptor, a virtuous pupil and a spiritual brother belonging to the same hermitage."

This text has been noticed and commented upon by all the important commentaries such as Mitakshara, Vira Mitrodaya, Saraswati Vilasa, Smriti Chandrika and Mayukha. In Mitakshara commenting on this text, there is a discussion as to how there could be any question of succession to an ascetic's property since acquisition or accumulation of property has been prohibited to him by the Sastras and since he is not entitled to any share in his natural family by virtue of his renunciation. He answers the same and points out that according to certain other texts, the hermit may make a hoard of things sufficient for a day, a month, six months or a year and in the month of Aswin, he should abandon the residue of what has been collected. He further explains that the ascetic too has clothes, books and other requisite articles according to a text in Veda, and that it was therefore proper to explain the partition or inheritance of such property. These various commentators, while therefore, recognising the right of succession by the disciple to the property of an ascetic do not contemplate that the disciple has any right to be maintained out of such property during his lifetime. Indeed, such an idea might well be inconceivable with reference to the rigour of the Sastras and the ideal of renunciation that both the Guru and the disciple were expected to maintain. Holding of large and extensive property by Sanyasis and other religious heads such as Mahants of Muths is of much later origin and the application of the above texts to succession to such property must be taken to have been the result of the growth of usage, for the text, in terms, refers only to limited property, which the law vested in the ascetic as his personal property and which constitutes his personal belongings.

[14] The right to maintenance of a Chela, if any, must, therefore, be founded either on evidence of usage relating to the right of maintenance specifically, or on inference from the concept as to the holding of the property of religious institutions by heads thereof which again is the growth of usage.

[15] It is now well-settled that the rights and liabilities in relation to property endowed in religious institutions must either be gathered from the terms of the foundation of the endowment itself, if available, or by usage which is presumptive evidence of the terms of the foundation. This has been laid down in a series of Privy Council cases commencing from *Greedharee* v. *Nando Kishore*, 11 M. I. A. 405 at p. 428 : (8 W. R. 25 P. C.); *Mutturamalinga Sethu Pathi* v *Peria Nayagam Pillai* 1 I A. 209 : (3 Sar. 341 P. C.); *Rajah Vurmah Valia* v. *Ravi Vurmah Kunshi Kutti*, 4 I. A 76 : (1 Mad. 235 P. C); *Janoki Debi* v. *Gopalacharjia Goswami*, 10 I. A. 32 : (9 Cal. 766 P. C.); *Genda Puri* v. *Chatar Puri*, 13 I. A. 100 : (9 ALL. 1 P. C.); *Ram Parkash Das* v. *Anand Das*, 43 I. A. 73 : (A. I. R. (3) 1916 P. C. 256) and the other cases. In *Ram Parkash Das* v. *Anand Das*, 43 I. A. 73 at p. 76 : (A. I. R. (3) 1916 P. C. 256), their Lordships say, dealing with a question of succession to the office of a Mahant, as follows:

> "The question as to who has the right and office of mahant is one, in their Lordships' opinion, which according to the well-known rule in India, must depend upon the custom and usage of the particular math or asthal. Such questions in India are not settled by an appeal to general customary law; the usage of the particular math stands as the law therefor."

In *Janoki Debi* v. *Gopalacharjia Goswami*, 10 I. A. 32 at p. 37 : (9 Cal 766 P. C.). Their Lordships in answer to a contention that in the absence of prescribed rules or usage, the ordinary law of inheritance applies, held

> "that when, owing to the absence of documentary or other direct evidence, it does not appear what rule of succession has been laid down by the endower of a religious institution, it must be proved by evidence what is the usage."

[16] The first question therefore that has to be considered on this part of the case is whether the plaintiff has proved any usage of this institution or of this class of institutions which enables him to plead that he has a right to be maintained from the properties of the Muth and that it can be enforced against the Mahant. The defendant in his written statement denies that the plaintiff has any claim for maintenance. There is no evidence at all on the side of the plaintiff that there is any usage in this institution or in this class of institutions that the Chelas have any enforceable right of maintenance. None of his six witnesses speak to it. On the other hand, D. W. 8, the Mahant of Uttarparswa Muth at Puri, examined for the defendant says categorically in chief examination: "In our Sampradaya a Chela has no right of maintenance" and in cross-examination says :

> "The sishyas have no right as such to be maintained from Muth property. As long as the Chelas reside in the Muth, they take meals in the Muth. Without any fault a Chela cannot be driven out or be denied food. A Chela who is intended to be the successor is given food and clothing and educated at the Muth expenses."

This is not enough to constitute any sufficient proof of usage. It has been, however, pointed out that in answer to interrogatories served on the defendant, namely, "Is it not a fact that the High Court passed a decree for maintenance at Rs. 10 per month in favour of Chela Narayan Das?", the defendant stated on 28th February 1943.

> "I consented to a decree by the High Court if the Chela Narayan Das resides in the Muth and behaves properly, he may be maintained by the Muth."

This is relied upon as proof of the requisite usage. This, however, refers only to a second Chela who has been taken by the same defendant after the trouble with the present plaintiff arose. This is quite recent and purports to have been based upon the consent of parties and cannot therefore be taken as any evidence of established usage. It is obvious, therefore, that the plaintiff's claim to maintenance cannot be supported on the ground of specific proof of usage relating thereto.

[17] It is then necessary to consider whether such a claim can be supported with reference to the incidents of holding of endowed property by heads of Muths. The respondent's advocate relies upon certain passages in reported cases. In *Gnana Sambanda Pandara Sannadhi* v. *Kandasami Tambiran*, 10 Mad. 375 at p. 388, it is stated as follows:

> "Thus, the ascetic who originally owned little or no property, came to own the Matam under his charge and its endowments, in trust for the maintenance of the Mutt, for his own support, for that of his disciples, and for the performance of religious and other charities in connection with it, according to usage."

In *Kailasam Pillai* v. *Nataraja Tambiran*, 33 Mad. 265: (5 I. C. 4 F. B.), one of the learned Judges, Sankaran Nair J. at p. 286 deals with the relations subsisting between the Pandara Sannadhis and Tambiran (corresponding to Mahant and Chela). He points out that a Chela at initiation formally makes himself a slave of the Mahant (in some Muths) and says that so far as the corpus of the property is concerned, each head of the Muth must pass on to his successor the immovable property which he received from his predecessor unencumbered and unalienated. As regards the income the learned Judge says at p. 286:

> "It seems clear, therefore, that treating them as a spiritual family all the members are entitled to be maintained out of the income; and as such membership is sought for and obtained to attain religious merit, the members are also entitled to receive religious education."

The learned counsel for appellant relies on this passage to show that the maintenance of a chela is a matter of right and it is presumably relying on this passage that Mayne's Hindu Law in its 9th Edition at P. 627 stated that "The Head of a Muth will almost invariably be under the legal obligation to support his disciples." It has also been pointed out that the Privy Cauncil in *Vidya Varuthi Tirthaswamigal* v. *Baluswami Ayyar*, 48 I. A. 302: (A. I. R. (9) 1922 P. C. 123) referred to another passage in the judgment of Sankaran Nair J. in the same case at P. 287 which is to the same effect and is as follows:

> "It is also true in my opinion that he is under a legal obligation to maintain the mutt, to support the disciples and to perform certain ceremonies which are indispensable. That will only be a charge on the income in his hands and does not show that the surplus is not at his disposal."

[18] It is noticeable that in the 10th Edition of Mayne's Hindu Law, the passage relating to the legal obligation of the head of the Muth to maintain the disciples appears to have been omitted. The passage above referred to in *Kailasam Pillai* v. *Nataraja Tambiran*, 33 Mad. 265: 15 I. C. 4 (FB) is itself based upon the observations in *Gnana Sambanda Pandara Sannadhi* v. *Kandasami Tambiran*, 10 Mad. 375 at P. 388, already noticed which does not speak either of the right of the disciple to be maintained or of the legal obligation of the head of the Muth to maintain the disciples, but refers only to the purposes for which the head of the Muth holds the property endowed for the Muth and mentions the maintenance of disciples of the Muth as one of such purposes "according to usage." The learned Judge in *Kailasam Pillai* v. *Nataraja*, 33 Mad. 265: (5 I. C. 4 (F. B.) was not considering any question of the legal right or the legal obligation relating to the maintenance of disciples from Muth properties and was only considering whether the head of the Muth can be said to be holding the property as a trustee. While mentioning the powers of the head of the Muth regarding the income of an endowed property the learned Judge states that the surplus of the income (after its utilisation for purposes according to usage) remains in the hands of the head of the Muth for being utilised for the spiritual advancement of himself and his disciples and his people and that his discretion in the matter is unfettered and that he is not accountable to any one. His Lordship only incidentally refers to the obligation to maintain disciples and in doing so he, with respect, goes beyond *Gnana Sambanda Pandara Sannadhi* v. *Kandasami*, 10 Mad. 375, from which he derives support. It is not clear from what the learned Judge has said taking his remarks as a whole, whether the learned Judge was inclined to hold that the Chela (Thambiran) had any enforceable right to be maintained. It would, indeed, appear that the learned Judge was not thinking in terms of an enforceable right, because, he notices earlier that on initiation, the

Chela makes a gift of his body, soul and wealth to the head of the Muth and styles himself a slave of the latter. Though as pointed out in *Gnana Sambanda Pandara Sannadhi* v. *Kandasami*, 10 Mad. 375, at P. 475, this cannot have the effect of rendering a Chela a slave in law, becasue law has abolished slavery since 1843, the conception that in religious parlance, the disciple is in the position of a slave to his Guru, seems to indicate that he could not have been contemplated, by any usage, as having an enforceable legal right to maintenance againt his Guru.

[19] What then is the position of the Mahant in relation to the endowed property and can the right to maintenance be inferred therefrom. In *Sammantha Pandara* v. *Sellappa Chetti*, 2 Mad. 175, it is stated as follows:

> "The property belonging to a Mattam is in fact attached to the office, and passes by inheritance to no one who does not fill the office. Though it is in a certain sense trust property, the superior has large dominion over it, and is not accountable for its management nor for the expenditure of the income, provided he does not apply it to any purpose other than what may fairly be regarded as in furtherance of the objects of the institution."

In *Gnana Sambanda Pandara Sannadhi* v. *Kandasami*, 10 Mad. 375 at p. 386, it was stated that the ascetic head of the Muth owned the Muth in his charge and its endowments in trust for certain purposes according to usage. In *Vidyapurna Tirthaswami* v. *Vidyanidhi Tirthaswami*, 27 Mad. 435: (14 M. L. J. 105), the learned Judges were inclined to hold that he was a life-tenant. In *Kailasam Pillai* v. *Nataraja*, 33 Mad. 265: (5 I. C. 4 (F.B.)) it was held that it cannot be predicated of the head of the Muth whether he is a life-tenant or a trustee and that the question in each case must be determined upon the conditions on which endowments were given or which may be inferred from the long established usage and custom of the institution. The Full Bench, however, recognised that the head of the Muth has a very large discretion as to the disposal of the surplus income of the Muth after meeting expenses according to usage and that he is not ordinarily amenable to the correction of Courts in respect of such surplus, except where the trust in relation to the particular endowment is clear and speific. The Privy Council in *Ram Parkash Das* v. *Anand Das*, 43 I. A. 73: (A. I. R. (3) 1916 P. C. 256) referred to the head of the Muth as having the assets of the institution vested in him as the owner thereof in trust for the institution, but recognised that large administrative powers are undoubtedly vested in the reigning Mahant and clearly pointed out that such questions must be settled by the usage of the particular Muth, which is the law therefor. The whole question of the position of a Mahant of Muth in relation to its endowments has been fully and elaborately discussed by the Privy Council in *Vidya Viruthi* v. *Balusami*, 48 I. A. 302: (A. I. R. (9) 1922 P. C. 123) where the entire case-law on the subject has been fully reviewed. It was therein held that the head of Muth cannot be held to be a specific trustee in the legal sense. His position is stated as follows at p. 311:

> "Colleges and monasteries under the names of math were founded under spiritual teachers of recognised sanctity. These men had and have ample discretion in the application of the funds of the institution, but always subject to certain obligations and duties, equally governed by custom and usage.................. Called by whatever name, he is only the manager and custodian of the idol or the institution. In almost every case he is given the right to a part of the usufruct depending again on usage and custom. In no case was the property conveyed to or vested in him, nor is he a "trustee" in the English sense of the term, although in view of the obligations and duties resting on him, he is answerable as a trustee in the general sense for mal-administration."

[20] Such being the position of the head of the Muth in relation to the endowment of the Muth, it seems to me that no legal obligation to provide for the maintenance of a disciple or a Chela out of the property and no legally enforceable right in the Chela against the head of the Muth follows from the bare concept relating to the holding of the property of the Muth by the Mahant apart from any clear evidence of usage.

[21] This conclusion also appears to me to follow from a consideration of the basis of the right to maintenance under the general Hindu law. It is well-settled that the right to maintenance under general Hindu law arises from three sources. It arises on account of the personal relationship between the parties, such for instance, as the obligation of the husband to maintain his wife, or the father to maintain his minor children or the obligation of the son to maintain his aged parents. It arises also by virtue of relation to property, i. e., by virtue of some kind of inchoate right in property: For instance, the widow of a person who dies possessed of separate property or of a share in undivided family property, has a right to maintenance in lieu of a share therein, and similarly also disqualified heirs. The obligation to maintain may also arise against a person by virtue of possession of assets of the deceased person in favour of a person whom the deceased was morally bound to maintain out of the property during his lifetime: see *Rangammal* v. *Echammal*, 22 Mad. 305: (9 M. L. J. 14). Apart from these three recognised sources for the right of maintenance under the general law, the right to maintenance

out of the property must depend upon usage. That this is so, has been laid down by the Privy Council even with reference to the maintenance of junior members in an impartible estate: *Venkatamahipathi Gangadhara Rama Rao* v. *Raja of Pittapur*, 41 Mad. 778 : (A. I. R. (5) 1918 P.C. 81) and *Commr. of Income-tax, Punjab, N. W. F. and Delhi Province, Lahore* v. *Krishna Kishore*, 63 I. A. 155 : (A. I. R. (28) 1941 P. C. 120). It is obvious that a Chela in relation to his Mahant cannot make out his right to maintenance on any of the three bases for maintenance which arise under the general law. It cannot possibly be said that the Mahant is under a personal obligation to maintain his disciples and no such claim has even been suggested. The only claim in the present case is that it arises out of the property of the Muth. The right to maintenance cannot be based on any kind of present inchoate right of the Chela in the Muth property. This would be inconsistent with the view of the Mahant's position as laid down in the cases above noticed. Neither is there any scope in this case for any moral obligation of one Mahant ripening into legal obligation of another and succeeding Mahant. Considered therefore from any point of view, it appears to be difficult in view of the general principles governing this class of institutions to derive an enforceable right to maintenance as vesting in the Chela as against his Guru on any mere general theories, apart from proof of usage of the institution of which, as has already been pointed out, there is no evidence in this case.

[22] The view, therefore, that I have come to is that while the head of a Muth is bound to maintain his disciples, and the proper maintenance of disciples is a legitimate expenditure of the Muth property and its income, no specific right in favour of individual disciples or Chelas can be recognised apart from usage. The head of the Muth may be answerable for not maintaining any disciple or disciples in the same way as he would be if he violates the observance of any of his other duties relating to the management of the properties in his charge. But the only remedy of a discarded Chela during the life time of a Mahant may be nothing more than the enforcement of the constructive trust, if any, on which the Mahant may be said to hold the property and not the enforcement of an individual right. It must be recognised that this view may involve some hardship to individual discarded Chelas, who give up all connections with their natural families in expectation of being maintained from the Muth. This might appear to be anomalous in the present state of administration of Muths where the old Shastraic idealism appears to be fast disappearing. These considerations, however, can have no bearing upon what we must find to be the law in this behalf to the best of our judgment.

[23] The defendant has also contended that the plaintiff forfeited his rights, if any, on account of his misconduct and that his affiliation as a Chela has been validly terminated by him by the execution of the deed, Ex. 3 in May 1939, and the case in *Ram Prasad Giri* v. *Krishna Nand Giri*, A. I. R. (25) 1938 Bom. 23 : (173 I. C. 113), has been cited. In the view I have taken above, regarding the plaintiff's right to maintenance, it is unnecessary to consider this aspect.

[24] It therefore follows that the appeal must be allowed and the suit dismissed. The plaintiff must pay to the Government the court-fee payable by him on the plaint since he has been permitted to sue in forma pauperis. As regards the other costs each party will bear their own costs throughout in view of the fact that on the issue of fact the plaintiff has succeeded.

[25] **Narasimham J.** — I agree. No written text recognising the right of a Chela to claim maintenance from his Guru has been cited before us. In the absence of any such text such right will be governed by the usage of each institution. In the present case, however, no such usage appears to have developed chiefly because the institution is hardly 100 years old and there was no previous instance in which such right was recognised. The respondent has relied mainly on the conduct of the Mahant in agreeing to pay maintenance to another Chela, namely, Narayan Das in 1933. But as pointed out by my learned brother that instance cannot be any evidence of usage because it was in the nature of a compromise.

[26] The authorities in support of the Chela's right of maintenance relied on by the learned advocate for the respondent are *Gnana Sambanda Pandara Sannadhi* v. *Kandasami*, 10 Mad. 375 at p. 388 and *Kailasam Pillai* v. *Nataraja*, 33 Mad. 265 at p. 286: (5 I. C 4 (F. B.)). I entirely agree with my learned brother's interpretation of those decisions.

V.B.B. *Appeal allowed.*

A. I. R. (37) 1950 Orissa 36 *[C. N. 5.]*

RAY C. J. AND PANIGRAHI J.

Udayanarayan Pati and others — Defendants — Appellants v. *Radhashyam Mangaraj Mahapatra, Plaintiff and others, Defendants — Respondents*

A. F. A. D. No. 198 of 1945, Decided on 3rd March 1949, from decision of Sub-Judge, Cuttack, D/-12th May 1945.

(a) Tenancy Law—Orissa Tenancy Act (II [2] of 1913), S. 212 (2) — Object of — Provisions must be

strictly followed—Rent decree under S. 199—Execution — One co-sharer not served — Right, title and interest of judgment-debtor and not holding passes to landlord by auction sale.

The holder of a rent decree has two remedies, namely, either to proceed against the holding or tenure in respect of the arrears of which the decree has been obtained, or to proceed against other properties. In this respect, a special protection is given to the co-sharer landlord in the provisions of S. 212 so as how to obtain a rent decree and how to execute it, as such, so that the auction purchaser may acquire the holding or tenure as the case may be. Therefore, even though a co-sharer landlord might have had obtained a rent decree he might lose the benefit if he does not follow the procedure for its execution so as to make the holding pass at the auction sale. [Para 5]

Section 212 (2) requires that in order to sell a tenure (or holding) by one or more co-sharer landlords, all the remaining co-sharers should be made parties to the suit and also that when one or more co-sharer landlords having obtained a decree in a suit properly filed applies for execution of the decree by the sale of the tenure notice of the application for execution should be given to all the co-sharers and it is necessary that the provision must be strictly followed in order to give complete title to the auction purchaser. It will not be sufficient to omit one of the co-sharers from the proceeding even though he might be a party in a different capacity. Where, therefore, in execution of a rent decree obtained under S. 199 the landlord fails to serve the notice of execution under S. 212 (2) on one of the co-sharer landlords, what passes to the decree-holder landlord by purchase in the auction sale is only the right, title and interest of the judgment-debtor and not the holding : A. I. R. (19) 1932 Pat. 304 and A. I. R. (13) 1926 Cal. 351, *Rel. on*; A. I. R. (34) 1947 Pat. 33; A. I. R. (35) 1948 Pat. 143; A. I. R. (7) 1920 Cal. 555 and A. I. R. (6) 1919 Cal. 402, *Ref.*; A. I. R. (19) (1932) Pat. 284, *Not foll* ; A. I .R. (11) 1924 Cal. 408, *Disting.* [Paras 8 and 9]

(b) Transfer of Property Act (1882), S. 52 — Doctrine of *lis pendens* applies also to involuntary transfers—Rent decree under S. 199, Orissa Tenancy Act — Mortgage suit on holding pending — Execution sale under rent decree before passing of final decree in mortgage suit—Decree-holder-purchaser gets only right of redemption till confirmation of sale under final decree.

In applying the doctrine of lis pendens, law does not make any difference between a transfer *inter vivos* or an involuntary transfer.

While a suit on a mortgage on a holding was pending, a landlord obtained a rent decree under S. 199, Orissa Tenancy Act, 1913, and put it in execution after a preliminary decree in mortgage suit was passed but before the passing of final decree. The decree-holder landlord purchased the holding in execution but owing to his failure to serve a notice under S. 212 (2) on one of the co-sharers, what passed to him was only the right, title and interest of the judgment-debtor. Landlord obtained possession on 18th August 1928. The mortgage decree was made absolute on 17th November 1928 and in execution thereof, the landlord was dispossessed on 17th November 1942. In his suit for possession of the holding :

Held, that the landlord's purchase was subject to the mortgage decree which was passed subsequently and as such he could avail himself of the right of redemption only till the sale in execution of the mortgage decree was confirmed. He stood in the same position as the mortgagor judgment-debtor in the mortgage suit and was bound by whatever fortunes or misfortunes befell him in the mortgage suit and in the execution proceedings in it. Under the circumstances he had no remedy by way of redeeming the mortgage : 26 Cal. 996, *Rel. on.* [Para 10]

Annotation : ('45 Com.) T. P. Act, S. 52, N. 18, Pts. 3 to 7.

(c) Tenancy Law — Orissa Tenancy Act, (II of 1913), Ss. 74, 212 — First charge — S. 74 must be read subject to S. 212. [2]

Section 74 of the Act must be read with S. 212. The purchaser may have the benefit of the first charge if, and only if, it is enforced in the manner provided in the statute that creates it. Any other view would make S. 212, wholly nugatory. [Para 11]

(d) Evidence Act (1872), S. 114 — Presumption as to official acts being done in accordance with law — Presumption not conclusive—It cannot be raised in face of clear evidence to contrary.

The presumption that the official acts must be presumed to have been done in accordance with rules and laws is not a conclusive one and is not available where there is a clear evidence to the contrary. [Para 5]

Annotation: ('46-Man.) Evidence Act, S. 114, N. 29.

H. Sen — for Appellants.

B. N. Das and G. B. Mohanty — for Respondents.

Ray C. J.—Defendants 1 to 5 are the appellants of whom defendant 3 is dead and the other defendants on record are his legal representatives. The plaintiff brought a suit for declaration of title and recovery of possession under the following circumstances. The plaintiff is a cosharer landlord of the estate within the ambits of which the disputed holding lies. He instituted rent Suit No. 5633 of 1927-28 for recovery of his share of rent but impleaded 12 other cosharer landlords as pro forma defendants in order to constitute the suit in the form conformable to the provisions of S. 199 of the Orissa Tenancy Act. He obtained a decree and there is no dispute that the said decree was a rent decree and would carry the same effect as that obtained either by a sole landlord or the entire body of landlords for the total arrears of rent due in respect of the holding. As the holding, however, had been mortgaged to the appellants in the year 1914 and a suit for enforcement of the mortgage was instituted on 28th May 1927 being Original Suit (Mortgage) No. 232 of 1927, the mortgagee obtained a preliminary decree on 5th November 1927 and the same was made absolute on 17th November 1928. After the preliminary decree in the mortgage suit and before the same was made final, the plaintiff, as a cosharer landlord put the aforesaid rent decree into execution and himself became a purchaser at the execution sale, on 15th May 1928. The plaintiff took delivery of possession through Court, on 18th August 1928, and continued in possession till he was dispossessed by the appellants on 20th August 1941, while the defendants mortgagees took possession of the disputed property as auction purchasers in execution of the final mortgage decree—the auction sale having taken place on 15th March 1940. The plaintiff wanted restoration of possession by an application to the executing Court before whom the mortgage-decree-execution was pending under O. 21, R. 100, Civil P. C. He lost the proceeding, by an order of the executing Court, dated 17th January 1942. He instituted the present suit, on 13th January 1943.

[2] Both the Courts below have decreed the plaintiff's suit finding that as an auction purchaser, in execution of a rent decree, he acquired the holding under S. 212, Orissa Tenancy Act, and, as such, he purchased it free from all encumbrances, the disputed mortgage being one such encumbrance. The defendants have come up in second appeal.

[3] The crucial point for consideration is whether the Courts below are right in coming to the conclusion that the rent decree already referred to was executed, in compliance with the provisions of S. 212, Orissa Tenancy Act. There can be no manner of doubt that the provisions of the section are mandatory, and it must have to be examined in the present case whether the procedure adopted for the execution was or was not in contravention of the said provisions. The relevant portion of the section, that is, sub-s. (2), of the section, reads:

> "When one or more cosharer landlords, having obtained a decree referred to in sub-s. (1) or a decree in a suit framed under S. 199, applies, or apply for the execution of the decree by the sale of the tenure or holding, give notice of the application for execution to the other cosharers."

[4] Unfortunately, there seems to be some apparent conflict of views, here and there, in the reported decisions with regard to whether compliance with the provisions in all its material details is necessary or a substantial compliance will do. Both the Courts below have been very greatly influenced, rather, have considered themselves bound, by a decision of the Patna High Court which is no doubt, in point, to wit, *Bacha Singh* v. *Daro Singh*, A. I. R. (19) 1932 Pat. 284 : (11 Pat. 498).

[5] Before discussing the decisions on the point, I shall address myself to how in the present case the provisions of the sub-section, already quoted are said to have been violated. It is not controverted nor can it be that otherwise good and valid rent decree can lose its force and effect as such, if it is not executed as a rent decree. The holder of a rent decree has two remedies, namely, either to proceed against the holding or tenure in respect of the arrears of which the decree has been obtained, or to proceed against other properties. In this respect, a special protection is given to the cosharer landlord in the provisions of S. 212 so as how to obtain a rent decree and how to execute it, as such, so that the auction purchaser may acquire the holding or tenure as the case may be. Therefore, even though a cosharer landlord might have had obtained a rent decree he might lose the benefit if he does not follow the procedure for its execution so as to make the holding pass at the auction sale. As I have already said, there were 12 cosharer landlords. The plaintiff in the plaint except saying that he obtained a rent decree in a suit framed under S. 199, Orissa Tenancy Act and that he executed the decree by service of processes of attachment and other processes lawfully on the locality, did not aver that he had served the notice of execution against the holding on all the cosharer landlords without exception. The defendant in his statement in a general way attacked the plaintiff's averment that the decree obtained by him was a rent decree or that it was executed as such. In this state of pleading an explicit issue was cast between the parties and they went into evidence on this point. None of them can therefore complain that he was taken by surprise though Mr. B. N. Das, the learned counsel for the respondent suggested that it was so and wanted to gag Mr. Sen by urging that he had not taken up this point, which involves a question of fact, in the Courts below. This objection is not justified. The plaintiff himself, instead of resting content with the pleadings, went on filing certified copies of the order sheet of the rent execution case to show that there was a direction by Court to issue notice to the cosharer landlords under S. 212; he also brought into record the actual notices that had been sent out, and the service reports showing the manner in which they had been served on the cosharer landlords. These documents are Exs. 6 and 6 (a). On reading them, it is found that there is no mention of one of the 12 cosharer landlords. His name is Radhanath Das, as it appears from the khewat filed in the Court below and Radhanath's son has been examined by the defendant who says that his father had and he still has 3 pies and odd share in the estate. Obviously enough Ex. 6 shows that the cosharer landlords 2 to 6 belonging to village Pakhar were served and Ex. 6 (a) shows that the cosharer landlords 8 to 12 belonging to village Anantapur were also served with notice of the execution. From the khewat as well as from the evidence of the son of Radhanath Das, it appears that he too belonged to Anantapur. If he was intended to be served with notice, we would find his name mentioned in Ex. 6 (a). Mr. Das wants to stand upon the presumption that an official act must be presumed to have been done in accordance with rules and laws. This argument should have carried very great force, had he, as I have said, stopped short on filing the order sheets only. The presumption pleaded is not a conclusive one. The evidence makes it clear that one of the cosharer landlords

was not given notice within the meaning of sub-s. (2) of S. 212. Thus it is clear enough that the sub-section was not fully complied with though there was an attempt to do so.

[6] The question that then arises is what is the consequence. In the Patna case relied upon, the facts were almost similar as in the present case. One of the defendants in the mortgage suit pleaded that he had purchased the mortgaged property in execution of a rent decree as such and that his purchase was free from the mortgage. On this the plaintiff mortgagee raised the issue that the imperative provisions of S. 158B (2), Bengal Tenancy Act, had not been strictly complied with, and that the defendant concerned was not entitled to the benefit of an auction purchase in execution of a rent decree. Section 158B (2) is identically in the same terms as S. 212 (2). In fact, the latter section has been borrowed without any modification from the Bengal Tenancy Act and has not since undergone any change. The relevant words in the sub-section are:

> "The Court shall before proceeding to sell the tenure or holding, give notice of the application for execution to the other cosharers."

His Lordship, the learned Chief Justice of the Patna High Court who decided the case relying upon a decision of the Calcutta High Court, *Rajani Kanta* v. *Rahaman Gazi*, 27 C. W. N. 765:(A. I. R. (11) 1924 Cal. 408), observed that the object of the sub-section (S. 158B (2)), Bengal Tenancy Act, was to protect the cosharers and if it is not complied with, they and they alone have a grievance and it is not open to a third party to take advantage of that, and allege that the sale is wholly invalid. The failure to effect notice is a mere irregularity and the only person entitled to complain of it is the cosharer affected by it. It is open to a cosharer to waive the benefit of the section.

[7] This pronouncement necessitates an examination of the case relied upon by His Lordship (viz. *Rajani Kanta* v. *Rahaman Gazi*, 27 C. W. N. 765 : (A. I. R. (11) 1924 Cal. 408). The facts of that case were quite different and I have no doubt that the decision arrived at was fully justified. There certain occupancy holding had been purchased by two gentlemen, Asutosh Ghose and Arunodoy Ghose who did register their purchase (private) with the landlords. One of the landlords as a cosharer brought a suit for recovery of his share of arrears of rent and constituted his suit, for the purpose, in the matter prescribed in S. 148A, Bengal Tenancy Act equivalent to S. 199, Orissa Tenancy Act. He obtained a decree in the presence of his cosharer landlord but in course of execution he did not serve the said cosharer, by name, Tagore with notice under S. 158B. The conflict of title that was agitated in that case was between the previous unauthorised purchasers and the purchaser at the execution sale in execution of the decree obtained by a cosharer landlord. The other cosharer landlord to whom notice of execution being taken against the holding, was not given, did himself appear in the execution proceedings and applied to withdraw, towards the satisfaction of his share of rent in arrear, out of the sale proceeds of the execution sale. He was allowed to do so. It may be noted here that the protection that is sought to be given to the cosharer landlords in the words of Sir Courtney Terrell, the Chief Justice of the Patna High Court was in the case availed of by the cosharer. He was a party to the decree which was undoubtedly a rent decree and he, without a notice specifically addressed to him for the purpose, interested himself in the proceedings of the sale which was a purported sale of the holding and appropriated the sale proceeds towards the arrears then outstanding in his favour. By this act he recognised the auction purchase and the purchaser as such and was by his own conduct bound thenceforward to regard him as the occupancy rayat of the holding. Therefore, the auction purchaser was one who was accepted by all the landlords as the purchaser of the occupancy right in the holding. In this view, his right was certainly superior to that of the private purchaser or was the only recognisable right as against the landlords. The unauthorised transferees therefore who had never cared to get themselves recorded in the landlord's papers, been obviously ignored the rent decree having been obtained against the recorded tenant the transferor in the presence of the entire body of landlords. His Lordship Mukherji J. who delivered the leading judgment in the aforesaid Calcutta decision observes while differing from two decisions of that Court on the point, namely, *Sarip Hochan* v. *Tilattama Debi*, 43 I. C. 3 : (A. I. R. (7) 1920 Cal. 555) and *Ahamad Biswas* v. *Binoy Bhusan*, 23 C. W. N. 931 : (A. I. R. (6) 1919 Cal. 402) pointed out that in the two last quoted cases the cosharers concerned had challenged the validity of the sale in execution whereas in the case before him the legality of the sale was not only not questioned but to use the words of His Lordship

> "The cosharer has adopted the sale, withdrawn his share of the purchase money and granted mutation of name to the purchaser."

On these observations His Lordship drew the conclusion in the following words :

> "It may consequently be inferred that he (the cosharer landlord) knew of the sale and *acquiesced* therein. Can it be maintained, then, in such circumstances, that the sale was either a nullity or a sale inoperative as a sale under the Bengal Tenancy Act."

Thereafter His Lordship while examining the scope and object of S. 158B, defines the line of distinction between cases in which non-observance of certain rule of procedure howsoever imperatively expressed does not go to the root of the Court's jurisdiction and those in which it does. He makes out the well-known distinction whether any imperative provision is inserted in a statute on grounds of public policy or for the benefit of particular individuals. In the former case violation of the rule of procedure affects the Court's jurisdiction and invalidates the proceeding, be it a sale or a decree or an order. Whether the object of S. 158B and for the matter of that of S. 212 is or is not one of public policy is left at large though left to myself, I take a different view with great respect and so does my learned brother as it appeared to me in course of the hearing; but however as the question does not strictly arise in this case, I leave it open. The fact, however, remains that in the case decided by His Lordship Mukherji J. the cosharer had, for all the purposes for which it was necessary to give him notice under S. 158B (2), been a party to the execution proceedings. The position here too could have been different if it could have been shown that the cosharer landlord Radhanath Das who was omitted from the notice of execution had either in the course of the execution proceedings or later acquiesced in the sale and accepted the auction purchaser as the tenant. No such case has been made out.

[8] Under the circumstances, we are constrained to observe that the decision of the Patna High Court already referred to should not have been accepted by the Courts below as the last word on the subject. In that very Court the point has been differently decided in two later decisions: *Kameshwar Singh* v. *Bishwanath Jha*, A. I. R. (34) 1947 Pat. 33: (25 Pat. 267); *Lakshmi Narayan* v *Bhupendra Prasad*, A. I. R. (35) 1948 Pat. 143: (1947 P. W. N. 133). I was myself a party to the earlier decision which has been followed in the later. There it has been stated, in unmistakable term, that the provisions of S. 158B (2) are mandatory, and sale in contravention thereof as a sale of the holding is without jurisdiction. By this I do not mean to say that there is no sale but that the sale in such cases is of the right, title and interest of the judgment-debtor. It is worth mentioning that his Lordship, Sir Courtney-Terrell, the Chief Justice of the Patna high Court in the case of *Rambeas* v. *Akhauri Raj Mohan*, A. I. R. (19) 1932 Pat. 304: (139 I. C. 535) was being asked to hold that the sale was void and he declined to accept the contention. The result, therefore, is that there was a sale of the right, title and interest of the judgment-debtor but not of the holding. One later case of the Calcutta High Court is of the same view. It is the case of *Jabed Ali* v. *Surendra Nath*, 42 C. L. J. 477: (A. I. R. (13) 1926 Cal. 351). It is a judgment in appeal from the judgment of B. B. Ghose J. Ghose J. has elaborately discussed the point and I am in entire agreement with his reasonings which were upheld by the Court of appeal under the Letters Patent. His Lordship Ghose J. says, S. 158B requires that in order to sell a tenure (or holding) by one or more cosharer landlords, all the remaining cosharers should be made parties to the suit and also that when one or more cosharer landlords having obtained a decree in a suit properly filed applies for execution of a decree by the sale of the tenure notice of the application for execution should be given to all the cosharers and it was necessary that the provisions must be strictly followed in order to give complete title to the auction purchaser and it will not be sufficient to omit one of the cosharers from the proceeding even though he might be a party in a different capacity. In the appellate judgment the case reported in *Rajani Kanta* v. *Rahman Gazi*, 27 C. W. N. 765: (A. I. R. (11) 1924 Cal. 408) has been referred to and his Lordship Greaves J. observes:

> "Reliance was placed on the decision in the case of *Rajni Kanta* v. *Sheikh Rahman*, 27 C. W. N. 765: (A. I. R. (11) 1924 Cal. 408). This seems to us to be a decision which depends upon the facts of the case and cannot be taken as having laid down any principle of law. We do not think that the obligation of surviving cosharers is sufficiently carried out by serving notices on some of them."

[9] In the result, it follows that the holding did not pass to the plaintiff at the auction sale at which he purchased. He has purchased the equity of redemption.

[10] The next point is how to adjust the rights between the appellants as mortgagee decree-holders auction purchasers and the plaintiff auction purchaser of the equity of redemption. Ordinarily the latter shall be entitled to redeem the former provided he has been given an opportunity to redeem. Mr Das, the learned counsel for the respondent contends that he should be given a further opportunity to redeem, but unfortunately the plaintiff's purchase is hit by the doctrine of lis pendens. His purchase, as I have shown, had taken place during the pendency of the mortgage suit, which is one of the suits contemplated in S. 52, T. P. Act. I shall quote a passage, in this connection (based upon a decision of the Calcutta High Court, *Har Sankar* v. *Shew Gobind*, 26 Cal. 996: 4 C. W. N. 317), from Sir H. S. Gour's Law of Transfer, 7th Edn., Vol. I, p. 599:

> "Thus where a person purchased at an auction held under Ss. 13 and 54 of the Revenue Sale Law, the share of an estate sold for non-payment of the arrears

of assessment, and at the time of such purchase a suit to enforce an existing mortgage on the property was pending it was held that the auction purchaser took the property subject to the decree subsequently passed, and in execution of which the mortgagee was competent to bring the property to sale, but that the sale made to the auction purchaser was so far valid as it was not inconsistent with the rights of the mortgagee in that suit, and that, therefore, he was competent to redeem the mortgagee, but only, of course, before the confirmation of the sale held in execution of the mortgage-decree. In other words, in such a case the purchaser acquires no more than the equity of redemption of the mortgagor and no right inconsistent with those of the litigating parties during the pendency of whose suit the transfer was effected."

In applying the doctrine of lis pendens law does not make any difference between a transfer inter vivos or an involutionary transfer. As such the plaintiff could only avail himself of the right of redemption till the sale in execution of the mortgage decree was confirmed. He stands in the same position as the mortgagor judgment-debtor in the mortgage suit and is bound by whatever fortunes or misfortunes befell him in the mortgage suit and in the execution proceedings in it. Under the circumstances he has no remedy by way of redeeming the mortgage.

[11] Next it is contended that even though plaintiff's auction purchase was not in execution of a rent decree, as such, yet the debt which was satisfied by the proceeds of the auction sale being rent due in respect of a holding was, according to the provisions of S. 74, Orissa Tenancy Act, a first charge on the holding. Section 74 of the Act must be read with S. 212. The purchaser may have the benefit of the first charge, if and only if, it is enforced in the manner provided in the statute that creates it, any other view would make S. 212 wholly nugatory. There is no substance, therefore, in this submission of Mr. Das.

[12] The result is that the plaintiff's suit must be dismissed, the judgments and decrees of the Courts below reversed. The appeal succeeds and is allowed with costs of this Court.

[13] **Panigrahi J.**—I agree and would like to add a few observations. The procedure in a suit by a cosharer landlord for arrears of rent is laid down in S. 199, Orissa Tenancy Act, and it provides how a cosharer landlord can obtain a rent decree. Section 212 lays down the procedure for executing such a decree. When one or more cosharer landlords having obtained a decree in a suit framed under S. 199 applies or apply for the execution of the decree by the sale of the tenure or holding, the Court *shall*, before proceeding to sell the tenure or holding, give notice of the application for execution to the other cosharers. It is no longer in dispute in this case that one of the cosharer landlords has not been served with notice of the execution although Exs. 6 and 6 (a) clearly show that all the other cosharer landlords had been served with the notices contemplated under S. 212. The question is as to whether the result of the sale that is held by the rent Court without notice to all the cosharer landlords would be to pass the holding or merely the right, title and interest of the judgment-debtor as if it was a money decree. That would depend upon whether we hold S. 212, sub-s. (2) to be imperative, or merely a directory rule, non-compliance with which need not necessarily vitiate the sale. The question as to whether a rule or law is mandatory or directory has often been discussed but one rule is well-established and that is that all rules of procedure are to be regarded as mandatory. Whether non-compliance of the rule is by the party or by the Court, the result is the same, namely, that it would result in rendering the result of the proceeding a nullity. Another rule that is equally well-established is that where a provision of law is enacted for the benefit of a person, non-compliance with it is merely an irregularity. But where the prohibition is intended for the benefit of a class of persons or is based upon public policy the enactment is always to be regarded as mandatory. In the case reported in *Bacha Singh* v. *Daso Singh*, A. I. R. (19) 1932 Pat. 284 : (11 Pat. 498) the learned Courtney-Terrell C. J., says that the object of sub-s. (2) of S. 158B, B. T. Act corresponding to S. 212 (2), Orissa Tenancy Act, is the protection of the cosharers. That may be and is perhaps one of the objects of the enactments, but, in my opinion, the rule is enacted as much to protect the interest of the cosharer landlords as, on the object of the Legislature, to protect intending auction purchasers at a sale held by the rent Court. The object seems to be that an auction purchaser should know whether he has purchased the holding of the judgment-debtor or merely his right, title and interest. As to whether the result is the one or the other would depend upon whether the sale is on behalf of or for the benefit of the entire body of the cosharer landlords or is merely at the instance of one. I am, therefore, not inclined to restrict the language of S. 212 (2) as having been intended for the protection of the cosharers only. Accordingly I agree with the view of His Lordship Ghose J. in *Jahed Ali* v. *Surendra Nath*, 42 C. L. J. 477 : (A.I.R. (13) 1926 Cal. 351) which is also the view held down by my Lord in *Kameshwar Singh* v. *Bishwanath Jha*, A. I. R. (34) 1947 Pat. 33 : (25 Pat. 267) and the later Patna case *Lakshmi Narayan* v. *Bhupendra Prasad*, A. I. R. (35) 1948 Pat. 143 : (1947 P. W. N. 33). The result of the sale held at the instance of the plaintiff, without notice to one of the cosharers landlords, must, therefore, be

regarded as having passed merely the right, title and interest of the judgment-debtors as if it was a money decree.

[14] On the second point raised by the respondent, I am in entire agreement with the reasoning and the conclusion of my Lord. The point is too obvious to need discussion. The plaintiff purchased at the rent sale on 15th May 1928 and the preliminary decree in the mortgage suit was passed on 5th November 1927. It is, therefore, clear that the purchase in the rent court sale was subsequent to the mortgage decree and the mortgagee was under no obligation to implead the plaintiff as a defendant in his suit. By the sale he steps into the shoes of the mortgagors who had been given the option to redeem and therefore, the right to redeem came to an end with the court sale in execution of the mortgage decree. The plaintiff consequently has lost his right to redeem the mortgage. The result is that the plaintiff is entitled to no relief.

D.R.R. *Appeal allowed.*

A. I. R. (37) 1950 Orissa 42 *[C. N. 6.]*

RAY C. J. AND PANIGRAHI J.

Messrs. Mahadev Ganga Prasad — Defendant No. 1 — Appellant v. *Gouri Shankar Sanganaria — Plaintiff — Respondent.*

A. F. A. D. No. 151 of 1946, Decided on 11th March 1949, from decision of Dist. Judge, Cuttack, D/- 12th February 1946.

(a) Evidence Act (1872), S. 92—Contract of sale reduced to writing—No mention of sample—No evidence can be given to show that it was contract of sale by sample—Sale of Goods Act (1930), S. 17.

Where a contract of sale is alleged to be by sample and the express contract reduced to writing between the parties is silent about a sample being exhibited or about the quality conforming to a sample shown at the time of the contract, no evidence can be given to determine whether the contract was by sample. [Para 7]

Annotation; ('46-Man.) Evidence Act, S. 92, N. 13.

(b) Sale of Goods Act (1930), S. 17—Contract of sale in writing — No express or implied term that sale was by sample—Contract is not by sample.

Where the only warranty provided for in the written contract was that the goods contracted for would be of the standard quality manufactured by the seller and that a slight difference or variation in the quality will not entitle the purchaser to put an end to the contract and none of the clauses in the agreement gave a right to the purchaser to cancel the contract on the ground that the contents of the bales, when opened, would not tally with the quality of the sample shown and no sample was retained by the purchaser, it was held that the contract was by description and not by sample, as there was no express provision in the contract that the sale was by sample nor any implied condition to that effect could be inferred. (1814) 4 Camp 22, *Ref.* [Para 7]

Annotation: ('46-Man.) Sale of Goods Act, S. 17 N. 1.

(c) Sale of Goods Act (1930), S. 41—Delivery of goods to purchaser and his acceptance — Distinction.

Section 41 makes a distinction between the delivery of the goods to the buyer and his acceptance of the same after examination. There is, however, no provision for the buyer to refuse to receive the goods. He may receive the articles and yet not accept them. [Para 10]

Annotation : ('46-Man.) Sale of Goods Act, S. 41.

(d) Contract Act (1872), Ss. 37, 39—Contract of sale not by sample—Refusal of buyer to accept goods unless they accorded with sample—Performance held dispensed with by buyer—Seller treating contract cancelled—Buyer held responsible for breach and not entitled to compensation—Sale of Goods Act (1930), S. 41.

A, through his agent *B*, contracted by a written agreement with *C* to sell cotton saries of certain denomination. The contract was not by sample and the denomination had no significance other than that the goods should be of merchantable quality. The goods were delivered to *C* but even before it, *C* sent a notice to B demanding a guarantee from him that the goods contained in the parcel were according to the sample shown and intimating his refusal to receive the goods unless such guarantee was forthcoming. The question was whether *A* was guilty of non-performance or whether the contract was rescinded by *C* earlier by notice;

Held (i) that there was delivery of the goods to the purchaser under the terms of the contract and the only right of the purchaser thereafter was the right to examine the goods as provided for under S. 41. of the Sale of Goods Act. His case that he was justified in not receiving the goods at all did not find support either from the express terms of the contract, as stipulated between the parties, or from any of the provisions of the Sale of Goods Act ;

(ii) that under S. 229, Contract Act, the notice to *B* amounted to an intimation to *A* that *C* would not receive the goods unless a guarantee was given that the goods supplied would be according to sample. *A* was, therefore, justified in treating the contract as cancelled in view of the unequivocal notice;

(iii) that the threat to refuse acceptance was a notice to the seller that *C* had dispensed with the performance of the promise made to him. In those circumstances *A* could rightly put an end to the contract under S. 39, Contract Act. *C* had failed to prove that the principal did anything subsequent to the sending of his notice to *B*, to warrant the inference that he regarded the contract as continuing and that he acquiesced in such continuance;

(iv) that the argument that the seller did nothing to signify acceptance of the repudiation was not sound, because the dispensation under S. 63, Contract Act, is by itself a complete answer. *C* again and again dispensed with the performance of the seller's promise to deliver the goods contracted for and he could not therefore recover damages for the breach of a promise touching the performance of a thing that he had wholly dispensed with. [Paras 10, 11, 13]

(e) Contract Act (1872), S. 234—Contract of sale through agent—Notice by buyer to agent alleging representation beyond authority and holding agent responsible for loss—Principal cannot be made liable subsequently.

Where in a contract of sale of goods by *A* to *C* through *A*'s agent *B*, *C* sends a notice to *B* alleging that *B* had represented to him that the contract would be by sample and that *B* would be held responsible for any loss if the goods were not according to sample, without making *A* liable, *C* cannot subsequently make *A* liable for any loss caused to him as by his notice to *B*, *C* has induced *A* to act upon the belief that *B* alone would be held liable. *C* cannot afterwards hold *A* responsible under S. 234, Contract Act. [Para 12]

L. K. Das Gupta—for Appellant.
P. C. Chatterjee—for Respondent.

Panigrahi J. — The suit out of which this appeal arises was instituted by the respondent-plaintiff for recovery of damages for an alleged breach of contract to sell 5 bales of KKK sarees by the appellant.

[2] The plaintiff's case is that defendant No. 1, the appellant, is the proprietor of Jagjiv Rao Mills, Gwalior, and that he entered into a contract for the sale of five bales of cotton sarees on 4th June 1941 through their local Agents, Messrs. Beharilal Madanlal, who were impleaded as defendants 2 and 3. It is alleged that the contract was entered into on the representation of defendants 2 and 3 who showed a sample of the sarees contracted for. This contract was formally confirmed by the appellant, defendant 1, on 12th June 1941 and the terms of the contract are embodied in a printed agreement which is Ex. A in the case. The plaintiff's case is that he made several demands on defendants 2 and 3 to supply the contracted articles but that they failed to fulfil the terms of the contract and that ultimately he sent a registered notice (Ex. 1) to defendant 1 on 18th March 1942 demanding performance of the contract. The defendant-appellant, in his reply dated 3rd April 1942 (Ex. 1-a) informed the plaintiff that the bales contracted for had been despatched to their agents, defendants 2 and 3, in October 1941, but that on the plaintiff's refusal to take delivery of the articles he treated the contract as cancelled and that he was not guilty of the alleged breach of contract. The plaintiff claimed Rs. 1195-15-9 as damages.

[3] The main contest on behalf of the defendants was that the contract was not for sale of goods by sample and that the only warranty of the contract was that the goods to be supplied should be of the standard marketable quality manufactured by the Gwalior Mills, and that the description KKK did not import any particular quality of the cloth contracted for. Defendant 1 also pleaded that he actually despatched the goods to his local agents and that the R. R. for the consignments were offered to the plaintiffs by the said agents, defendants 2 and 3, personally and also through the Comilla Banking Corporation Ltd., but that the plaintiff refused to accept delivery as the market was then dull, and repudiated the contract. The appellant was, therefore, justified in treating the contract as cancelled. Defendants 2 and 3 were given up by the plaintiff in the trial Court, and the trial proceeded as against defendant 1 alone.

[4] Both the Courts below held that the contract was a contract by sample and that the defendants having failed to deliver the goods according to sample, as demanded by the plaintiff, were guilty of a breach of the contract and accordingly awarded damages to the plaintiff.

[5] In second appeal, the main contention urged on behalf of the appellant is that the Courts below misconceived the scope of the contract; and that the contract was not a contract for sale of goods by sample, and that the Courts erred in admitting evidence which had the effect of varying the terms of the written contract (Ex. A). The contract is in a printed form in Hindi and a translation of it has been placed before us. Exhibit A merely indicates that the purchase was to be made of five bales sarees No. KKKKK (admitted to be a mistake for KKK), 12 × 42, @ Rs. 2-10-6 per pair, mill delivery, June-July shipment, Agents Beharilal Madanlal. On the reverse of this are given the conditions of the agreement of purchase.

[6] The main clauses of the agreement relied upon by the appellant are cls. 2, 4, 8 and 9 which are as follows :

> "*Clause 2.* Details of purchase will be debited to the customer on the day of the booking of the goods in the Railway. The purchaser shall send money direct to the seller as soon as the R. R. will reach him. The seller is at liberty either to send the R. R. through the Bank or to realise money in advance or to proceed as he thinks proper.
>
> *Clause 4.* If the purchaser does not release the R. R. for any reason or fails to take delivery of the goods from the Railway, the seller will be at liberty to release and store the goods in his warehouse at the risk of the purchaser . . . the seller is further empowerd to sell or auction the goods after 7 days notice to the purchaser.
>
> *Clause 8.* The seller will supply goods to the purchaser of the same number, size and quality as indented by the latter. If there be a slight difference in measurement and quality the purchaser will not be entitled to prefer any claims, nor will he cancel the Souda. But if there will be any material variations, the purchaser will intimate to the seller in writing within a week from the date of each arrival of the goods.
>
> *Clause 9.* This clause is to the effect that the seller would manufacture goods of standard quality and would deliver the same to the purchaser. If the purchaser entertains any doubts as to the quality of the goods, he shall, with the consent of the seller, make a survey of the goods through an expert, with the knowledge of the purchaser. If the verdict of the surveyor be that the cloth of the goods is inferior, then the purchaser has the right to take some other goods according to the convenience of the seller."

[7] I have set out these main clauses of the contract of sale and it will be noticed that no mention of any sample is made in the contract. The express contract being silent about a sample being exhibited or about the quality conforming to a sample shown at the time of the contract, no evidence can be looked into to determine whether the contract was by sample. The trial

Court erred in allowing evidence to be given that the contract was one really by sample though the written agreement says nothing about such a sample. The only warranty provided for in the written contract is that the goods contracted for would be of the standard quality manufactured by the seller and that a slight difference or variation in the quality will not entitle the purchaser to put an end to the contract. None of the above clauses in the agreement gives a right to the purchaser to cancel the contract on the ground that the contents of the bales, when opened, would not tally with the quality of the sample shown. It is also admitted that no sample was retained by the plaintiff, nor is it possible to know the quality of the cloths in the bales which were refused. The plaintiff admitted in his deposition that no quality of cloth can be inferred merely by saying that it is KKK 12 yards Gwalior Mills. This clearly indicates that the contract was by description and not by sample. Sale by sample is defined in S. 17, Sale of Goods Act which reads as follows :

> "A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect."

I have said already that there is no express provision in the contract that the sale is by sample, nor can I infer any implied condition to that effect. In *Meyer* v. *Everth*, (1814) 4 Camp. p. 22 : (171 E. R. 8), the seller produced a sample and represented that the bulk would be of equal quality. There was a sale notice which did not refer to the sample, and it was held to be not a sale by sample. Lord Ellenborough observed :

> "When the sale notice is silent as to the sample, I cannot permit it to be incorporated into the contract as it would amount to the admission of parole evidence to contradict a written document. In truth the present was not a sale by sample and the sample can only be used as evidence of deceitful representation."

In a later case *Gardiner* v. *Gray*, (1815) 4 Camp. 144 : (171 E. R. 46), a specimen of the goods was exhibited to the buyer at the time of the sale. There was a written contract which merely described the goods as of a particular denomination, and it was held that it was not a sale by sample, but there was an implied warranty that they shall be of merchantable quality of the denomination mentioned in the contract.

[8] The plaintiff complains that the seller failed to abide by the terms of the contract and deliver the goods and, is therefore, guilty of a breach of the contract. Exhibits 1 and 2 series have been filed to prove the alleged breach by the defendant. Exhibit 2 is a letter dated 21st August 1941 sent by the plaintiff's pleader to the pleader of Devidutt Mangilal who were the agents of the defendant 1 and were trading as Beharilal Madanlal. This letter shows that the plaintiff had contracted to purchase 10 bales of cotton cloth from Devidutt Mangilal, which included 5 bales of KKKKK sarees of 10 yrds. each. The plaintiff complained that he had taken delivery of one bale of KKKKK sarees and had found the quality to be inferior to the sample shown. The letter then proceeds :

> "My clients are willing to accept the bales at once if your clients guarantee my clients that the goods contained in the parcel, under the bills referred to in your letter, are according to sample shown by your clients."

Referring to the goods, the subject matter of the present suit, the letter says :

> "Further please note that your clients, as agents of Gwalior Mill, have further contracted to supply 5 bales of 5 K sarees at Rs. 2-10-6 per pair according to sample. My clients also request that your clients will *give guarantee* that the supply of the same will be according to sample. If they do not do so, my clients will not receive the goods, and will sue your clients for the loss as well."

Devidutt Mangilal sent their reply on the same day, which is Ex. 2-a, through their lawyer, denying that the contract was by sample and asserting that the contract was made for goods of merchantable quality. The letter further says :

> "My client is now fully justified in treating the contract as cancelled, without any further reference to you."

Referring to the contract entered into by them as agents of the Gwalior Mills, the letter proceeds :

> "As regards the other Souda of five bales your client has entered into a contract with the mills (Mahadev Ganga Prasad of Gwalior) and if your client fails to take it, he will have to suffer dire consequences at the hands of the Mills."

The plaintiff's pleader again sent a letter on 23rd August 1941 (which is Ex. G) in reply to Ex. 2-a, asserting that the contract was by sample. Paragraph 3 of the letter referring to the present contract says :

> "As regards the other souda of five bales with Mahadev Gangaprasad of Gwalior Mills, the souda has been done through your clients as the local agents of Mahadev Gangaprasad, and on your client showing the sample about which he now denies. Unless the goods are not delivered according to sample then your clients, *the said Devidutt Mangilal*, will be held ultimately liable."

After this there was no correspondence by the plaintiffs with either defendant 1, or with defendants 2 and 3. It is significant that the plaintiff intimated that he would hold Devidutt Mangilal and not Beharilal Madanlal, defendants 2 and 3, liable for failure of the contract as they had induced him to enter into a contract by exhibiting a sample. On 15th October 1941, defendants 2 and 3 served a D. P. Bill on the plaintiff through the Comilla Banking Corporation. The letter forwarded by defendants 2 and 3 to the Comilla Banking Corporation and the Sola for Rs. 630-6-0, being the value of the two consignments sent by defendant 1 under R. R. No. 766/67 and 767/57, were sent to the Bank by the defendants and are exhibited as Exs. D and D.1. On the same day the Bank sent an intimation, Ex. C, to the plaintiff to the effect that two R. Rs. of the value of Rs. 630-6-0 were awaiting delivery and that the drawer of the Bill was Devidutt Mangilal. The plaintiff's case is that on receipt of Ex. C, he enquired of Devidutt Mangilal as to what these railway receipts related to but that their reply was that the plaintiff was at liberty to act as he liked. According to the evidence of D. W. 2, who is the gumastha of defendants 2 and 3, he went to the plaintiff and asked him to take delivery of the parcel containing KKK 12 yards sarees. He says that the plaintiff went to defendant 2 and enquired from him as to what article had been consigned, and that defendant 2 told him that they were the contracted articles and asked him to take the same. He says :

> "My first offer to the plaintiff was after 10th or 12th October. The plaintiff told this : 'I won't take'."

The plaintiffs' case now is that he did not take delivery of the bales because the demand draft purported to have been drawn by Devidutt Mangilal and not in their capacity as Beharilal Madanlal, Agents of defendant 1. Until now the plaintiff never made any distinction between Devidutt Mangilal and their dealings as agents of defendant 1. In fact, the plaintiff's notice cancelling the contract was addressed to Devidutt Mangilal. Be that as it may, an enquiry in the Comilla Banking Corporation would have disclosed that this Hundi Ex. C had been drawn by Beharilal Madanlal and that the Sola had been made out by defendants 2 and 3 as the selling agents of Mahadev Gangaprasad. The plaintiff, for some reason or other, did not make any enquiry at the Bank, though the contract expressly stipulated that the R. R. would be delivered through the Bank. On the other hand, he says that he went to Devidutt Mangilal, who are no other than defendants 2 and 3, to enquire about the contents of the consignment. The defendants were justified in telling the plaintiffs to accept the bales or to take the risk of refusal according to their pleasure. It appears from the correspondence, exhibited in the case that long after this the plaintiffs sent a letter dated 18th March 1942 Ex. 1, to defendant 1, demanding performance of the contract. Defendant 1 sent a reply dated 3rd April 1942 (Ex. 1-a) complaining that the plaintiff had refused to take delivery and that the contract had been cancelled.

[9] On these facts, the question arises as to whether defendant 1 is guilty of non-performance, or whether the plaintiff had rescinded the contract earlier. It is clear from the correspondence that defendant 1 sent five bales of cloth between the 4th and 17th of October 1941, and that the plaintiff demanded a guarantee from defendants 2 and 3, and that the latter treated the contract as cancelled in view of the categorical threat of the plaintiff that he would not accept the consignment in the absence of a guarantee. That the contract was not by sample and that the denomination KKK had no significance other than that it should be of merchantable quality is clearly established. Our attention was drawn to the case *Ramjivan* v. *Bhikaji & Co.*, A. I. R. (11) 1924 P. C. 143 : (48 Bom 519) which lays down that numbers put on the cloth were mere reference numbers and did not give any warranty or indication of the quality or description of the contents. The duties of the seller and the buyer are laid down in Chap. IV, Sale of Goods Act. The buyer is bound to accept and pay for the goods in accordance with the terms of the contract for sale.

[10] Section 36, Sale of Good Act lays down the rules as to delivery. One such rule is that if the goods are not in existence at the time of the contract, the delivery shall be made at the place at which they are manufactured or produced. This is also incorporated in paras. 2 and 3 of the printed agreement. Paragraph 2 says that the details of the purchase will be debited to the customers on the day of the booking of the goods in the railway . . . . The seller is at liberty either to send the R. R. through the Bank or to realise money in advance or to proceed as he thinks proper. Paragraph 3 says that as soon as the goods arrive at the station, the risk shifts on to the purchaser. There was, therefore, delivery of the goods to the purchaser under the terms of the contract and the only right of the purchaser thereafter was the right to examine the goods as provided for under S. 41 of the Act. That section makes a distinction between the delivery of the goods to the buyer and his acceptance of the same after examination. There is, however, no provision for the buyer to refuse to receive the goods. He may receive the articles and yet not accept them. The plaintiff's case that he was justified in not receiving the goods at all, does not find support either from the express terms of the contract, as stipulated between the parties, or from any of the provisions of the Sale of Goods Act.

[11] It is next to be considered as to whether the contract stood cancelled even before the delivery was made in October 1941. The plaintiff's notice of 21st August 1941 (Ex. 2), asking for a guarantee and intimating his refusal to receive the goods unless a guarantee was forthcoming was served on the agent of the seller. This notice expressly says : "Your clients, as

agents of Gwalior Mills, have further contracted to supply, etc." Section 229, Contract Act says that,

> "any notice given to, or information obtained by, the agent, provided it be given or obtained in the course of business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequence as if it had been given to or obtained by the principal."

The notice, therefore, amounted to an intimation to defendant 1, that the plaintiff would not receive the goods unless a guarantee was given that the goods supplied would be according to sample. Defendant 1, was justified, as has been contended by him, in treating the contract as cancelled in view of this unequivocal notice.

[12] There is yet another aspect in which this notice may be considered. The plaintiff expressly warned the agents that they would be held responsible for the loss, and did not purport to make the principal liable. It may be that the plaintiff then took the position that in so far as the representation according to sample was made by the Agents, they were acting beyond the scope of their authority and that the principal defendant had no knowledge of the same. It may be that the agents are guilty of a fraudulent misrepresentation in having given the plaintiff an assurance that the sale would be according to sample, but they were clearly acting beyond the scope of their authority in doing so. In such cases, the principal would not be liable for any loss that the plaintiff may have suffered. Section 234, Contract Act provides for a case of this type. When a person, who has made a contract with an agent, induces the principal to act upon the belief that the agent alone will be held liable, he cannot afterwards hold the principal liable. In my judgment, therefore, the contract terminated when Ex. 2 was served on the agents of the seller and the plaintiff disabled himself from pursuing any remedy against the seller.

[13] The matter may also be considered from another angle. Under S. 39, Contract Act, when a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract unless he has signified by words or conduct his acquiescence in its continuance. The plaintiff has failed to prove that the principal did anything subsequent to the sending of Ex. 2, to warrant the inference that he regarded the contract as continuing and that he acquiesced in such continuance. Exhibit 1, the letter of 18th March 1942 affects an attitude of injured innocence regarding the performance of the contract and it is absolutely silent as to what had transpired between the agent and himself in August, and calls upon the seller to despatch the goods. This was only an attempt by the plaintiff to recover lost ground and to revive a contract that had already been dead. The threat to refuse acceptance was a notice to the seller that the plaintiff had dispensed with the performance of the promise made to him. In a similar case reported in *Chunamal Ramnath* v. *Mool Chand Ram Bhagat*, 55 I. A. 154 : (A. I. R. (15) 1928 P. C. 99) the buyer intimated to the seller that he would not accept if the goods were packed in bales instead of in cases and tins. The sellers did nothing thereafter, except to intimate to the buyer that he would be responsible for all consequences. Their Lordships of the Judicial Committee held in the circumstances that if delivery was not in conformity with the terms of the contract, the buyers clearly expressed that they would not accept them, and this had been acquiesced by the seller. Exhibit 2-A, the reply to the plaintiff's letter, was a sufficient notice to the plaintiff that if he failed to take delivery he would suffer consequences at the hands of the Mills, and amounted to an acquiescence in the cancellation of the contract. The plaintiff had not led any evidence to establish that the goods tendered would not be of merchantable quality as stipulated for in the contract. The argument that the seller did nothing to signify acceptance of the repudiation is not sound, because the dispensation under S. 63 is by itself a complete answer. The plaintiff again and again dispensed with the performance of the seller's promise to deliver the goods contracted for and he cannot therefore recover damages for the breach of a promise touching the performance of a thing that he had wholly dispensed with. In *Ishwar Das Dharm Chand* v. *Khanu Mal Ghammandilal* reported in, 8 Lah. 276 : (A. I. R. (14) 1927 Lah. 443), the plaintiffs. refused to accept on various grounds, one of which was that the number on the bale did not correspond to the number given in the invoice. Their Lordships held that this discrepancy would not entitle the buyer to reject the goods. I have, therefore, no difficulty in arriving at the conclusion that the plaintiff had repudiated the contract by his notice (Ex.-2) and that his attempts seven months later to revive a contract that was dead was a *brutum fulmen* and is of no consequence. The plaintiff's refusal to receive the R. R., notice of which was given to him by Ex. C, was a breach of his contract and the reason assigned in justification of his non-performance is a mere pretext. He had treated Devidutt Mangilal throughout the correspondence as the persons responsible for having induced him to enter into the contract and had warned them and had threatened to hold them responsible for any damage that he may incur. It is therefore

surprising that when the notice of the Comilla Banking Corporation mentions the R. R. as having been sent by Devidutt Mangilal the plaintiff should suddenly turn round and complain that he did not have proper notice that the goods contracted for had arrived. The plaintiffs was himself responsible for raising the dust and cannot therefore now complain that he could not see.

[14] The Courts below have entirely misconceived the nature and purport of the contract and the judgments under appeal cannot therefore be upheld. We accept the appeal and set aside the judgments and decrees of the Courts below and direct that the plaintiff's suit should be dismissed with costs throughout.

Ray C. J.— I agree.

D.R.R. *Appeal allowed.*

A. I. R (37) 1950 Orissa 47 *[C. N. 7.]*

DAS AND NARASIMHAM JJ.

Sri Gadadhar Ramanuj Das and others — Appellants v. *The Province of Orissa and another — Respondents.*

First Appeal No. 39 of 1945, Decided on 13th September 1949, from decision of Dist. Judge, Cuttack D/-11th September 1945.

(a) Government of India Act (1935), Sch. VII, List II, Item 34 — "Charities" — Word is used in most comprehensive sense — Includes institutions of purely religious character — Provincial Legislature can legislate in respect of such institutions. A. I. R. (34) 1947 F. C. 1, *Foll.* [Para 3]

(b) Interpretation of Statutes — Ultra vires — Federal and Provincial lists — Overlapping — Rule of pith and substance — Govt. of India Act (1935), S. 100.

The principle to be followed in interpreting the Constitution Act, especially when there is some kind of overlapping between the powers of the Dominion Legislature and the powers of the Provincial Legislature, is that the 'pith and substance' of an impugned statute should be considered with a view to determine whether it is within the legislative competence of a Legislature. For the purpose of determining whether the impugned statute is legislation with respect to matters in List I or List II of Sch. VII, its pith and substance or true nature and character should be ascertained. *Case law relied on.* [Para 11]

Annotation: ('46-Man.) Govt. of India Act, S. 100, N. 1.

(c) Orissa Hindu Religious Endowments Act (IV [4] of 1939), S. 49 — Pith and substance is raising money for sole purpose of meeting expenses of Commissioner and those working under him—Provision is ancillary to main provisions of Act — Effect of encroachment on field of income-tax only incidental — Provision is within competence of Provincial Legislature and is not ultra vires—Contribution levied under S. 49 is not tax but fee and falls in Item 54 read with Item 34 of List II and not under Item. 54 of List I—Government of India Act (1935), S. 100, Sch. VII, List I, Item 54, List II Items 54 and 34.

The pith and substance of S. 49 (1) is the raising of money for the sole purpose of meeting the expenses of the Commissioner, and officers and servants working under him. It is true that in assessing the contribution on every institution the method of assessment followed by the Income-tax authorities has been adopted. But the method of assessment or the machinery for collection does not determine the nature of the levy. Similarly, the fact that a graduated form of levy is exacted does not necessarily make it income-tax: A. I. R. (27) 1940 Bom. 65, *Rel. on.* [Para 12]

A levy imposed on a limited class of persons for the sole purpose of meeting the expenditure incurred in administering a special Act applicable to them, is not a 'tax' but a 'fee'. [Para 20]

The purpose for which the contribution can be levied is strictly circumscribed by the Act itself to meet the expenses of the Commissioner and his staff whose sole duty is to administer the Act and make it effective. The mere fact that the Act does not provide for the collection of fees by the issue of licences (as is usually provided in statutes dealing with fees) and provides for the imposition of the levy in accordance with the method adopted in collecting income-tax cannot alter the true nature of the levy.

Consequently, the provisions of S. 49 (1) would undoubtedly be relatable to Items 54 and 34 of List II: *Case law relied on.* [Para 21]

Per *Das J.*—Section 49 being a provision merely ancillary to the main provisions of the Act which admittedly are *intra vires*, and its effect by way of encroachment, if any, on the field of income-tax being incidental, the provision is fully within the competence of the Provincial Legislature and this applies also to the provisions connected with S. 49 and to the analogous provision in S. 24. [Para 48]

Annotation: ('46-Man.) Govt. of India Act, S. 100 N 1.

(d) Words and Phrases—Tax and fees—Distinction pointed out—Interpretation of Statutes — Government of India Act (1935), Sch. VII, List II, Item 54; List I, Item 54.

Though in a broad sense a fee may also be an impost when it is in the nature of a compulsory levy on certain classes of people, the Parliament has maintained a sharp distinction between 'fees' and 'taxes' in its legislative procedure. Where the imposition is in respect of the benefit taken by the person who is required to make the contribution or else where the imposition is for the service rendered by the authorities under an Act and for the purpose of execution of that Act and such contributions are not credited into the general revenues, they are not classified as taxes. The actual name given to the levy in a statute is immaterial. The purpose for which the levy is collected, the amount so collected (whether unduly high or otherwise) and the fund to which the levy is credited (whether to the general revenue or in a separate fund) — these are material factors in determining whether the levy is a 'tax' or a 'fee'. Compulsion is not the distinguishing factor. [Paras 20 & 22]

Per *Das J.*—The true distinction between a tax and a fee is not "compulsion" but the presence or absence of a "quid pro quo". [Para 37]

(e) Orissa Hindu Religious Endowments Act (IV [4] of 1939), S. 6 (12) — Act is not extra territorial in operation—Once any income (moveable) of muth or temple is brought within province from whatever source, it is property within province and comes within scope of Act. [Para 26]

P. C. Basu, P. C. Chatterji and S. Mohanty — for Appellants.

Advocate-General, B. Mahapatra and G. B. Mohanty — for Respondents.

Narasimham J.—This is an appeal by the plaintiffs from the judgment of the District Judge of Cuttack dismissing their suit for a declaration that the Orissa Hindu Religious Endowments Act, 1939 (Orissa Act, IV of 1939) was *ultra vires* of the Orissa Legislature and for other consequential reliefs. The appellant plaintiffs are all Mahants of various Maths situated in the Province of Orissa and the suit was brought by them in a representative capacity under O. 1, R. 8, Civil P. C. No evidence was led by either side and the sole question in dispute is a question of law regarding the competence of the Orissa Legislature to enact the Orissa Hindu Religious Endowments Act, 1939, hereinafter referred to as the impugned Act.

[2] The impugned Act was passed by the Orissa Legislative Assembly and recevied the assent of the Governor-General on 31st August 1939. The Assembly passed the said Act in exercise of the legislative powers conferred on them by Ss. 99 (1) and 100 (3), Government of India Act, 1935, read with items 34 and 54 of List II of Sch. VII to that Act. The assent of the Governor General was obtained under S. 107 (2) of that Act with a view to cure any repugnancy that may exist between any of its provisions and any of the provisions of an existing Indian law relating to matters in the Concurrent List.

[3] One of the main grounds taken in the lower Court was that the whole of the impugned Act was *ultra vires* inasmuch as it applied to purely religious institutions whereas under item 34 of List II the legislative competence of the Provincial Legislature was limited to "charities and charitable institutions, charitable and religious endowments." An elaborate argument was advanced to the effect that though the Provincial Legislature may have the power to legislate in respect of institutions which were *charitable and religious*, it had no jurisdiction to legislate in respect of purely religous institutions. The learned lower Court rejected this argument by interpreting the word 'and' occurring in the said item as equivalent to 'or'. This argument was however rightly given up in this appeal. Item 34 of List II came up for interpretation before the Federal Court in *Manikkasundara Bhattar* v. *R. S. Nayudu*, A. I. R. (34) 1947 F. C. 1: (I. L. R. (1946) Kar. F. C. 27) where it was held that the expression 'charities' was used in its most comprehensive sense and that it would include institutions which were of a purely religious character also. This point is thus concluded by the decision of the Federal Court.

[4] Before discussing the legal questions involved in this appeal I may briefly describe the salient features of the impugned Act. The preamble says that the objection of the Act is "to provide for the better administration and governance of certain Hindu religious endowments." Public temples and Maths were brought within the scope of the Act and all the properties, belonging to or given or endowed for the support of Maths or temples were defined as 'religious endowment' or 'endowment'. The extent clause (S. 2 (a)) made it however clear that the Act extended to the whole of what was then known as the Province of Orissa and that it applied only to Hindu public religious endowments. A statutory authority designated as 'Commissioner of Hindu Religious Endowments' (hereinafter referred to as the Commissioner) was constituted for the purpose of exercising general superintendence over all religious endowments and to secure the proper working of the Act. But his actions were subject to the general control of the Provincial Government and he himself was required to be a member of either the Judicial or the Executive Service of the Province. There are several provisions dealing with the nature of the control to be exercised by the Commissioner over Maths and temples and it is unnecessary to refer to them in detail. In Ch. VIII of the Act, the finacial provisions (Ss. 49, 50 and 51) were inserted and these provisions have been the main target of attack. I may quote sub-s. (1) of S. 49 which is the main charging provision in the whole Act.

> "49 (1). Every math or temple and every specific endowment attached to a math or temple the annual income whereof exceeds Rs. 250 shall, for meeting the expenses of the Commissioner and the officers and servants working under him, pay annually a contribution at the following rates:
>
> (a) at $1\frac{1}{2}$ per cent of the annual income when it exceeds Rs. 250 but not Rs. 2,000;
>
> (b) at 2 per cent of the annual income when it exceeds Rs. 2,000 but not Rs. 5,000; and
>
> (c) at 3 per cent of the annual income when it exceeds Rs. 5,000.
>
> *Explanation*:—A math or temple or a specific endowment attached to a math or temple, the annual income whereof does not exceed Rs. 250 shall not be liable to pay any contribution for meeting the expenses of the Commissioner:
>
> Provided that the Provincial Government may, for special reasons, increase or decrease the rates of contribution payable under this sub-section as they deem fit."

[5] Section 50 says that a fund shall be constituted by the contributions received under S. 49 and the grants or loans that may be made by the Government to that fund.

[6] Section 51 describes in detail the procedure for the realisation of such contributions under the certificate procedure as if they were arrears of land revenue.

[7] It will thus be seen that the entire scheme of the Act was to vest the general control and superintendence over the religious endowments of Maths and temples in the Commissioner and to confer on him certain powers with a view to

enable him to exercise effective control over the trustees of the Maths and temples. Though the Act requires that the Commissioner should be a member of the Provincial Judicial or Executive Service and though his actions are subject to the general control of the Provincial Government S. 8 (1), the Legislature did not intend that he should act as a mere agent of the Government. On the contrary, the Legislature scrupulously refrained from conferring on the Government direct control over the maths and temples and vested the same in a separate statutory authority with well defined statutory powers For the purpose of meeting the expenses of the Commissioner and his staff, every math and temple was required to pay an annual contribution at a rate which was fixed at some percentage of its annual income. The method of fixing the contribution was undoubtedly very similar to that followed in assessing income-tax. There is a minimum of Rs 250 and as regards income above that limit a graduated scale has been followed and the percentage of the income required as contribution varies with the amount of the income. It is an unchallenged fact that the income of several maths and temples in the Province is derived not only from the landed properties but also from other sources such as receipts from investments, donations given by disciples and worshippers, income from urban properties, etc. The Rules framed under the Act (see R. 160 of the O. H. R. E. Rules) recognise income from such sources.

[8] Mr Basu on behalf of the appellant challenged the validity of the Act on the following grounds: (1) The charging section is *ultra vires* because it is, in essence, a tax on income and as such is relatable to item 54 of List I of Sch VII (except of course in respect of agricultural income) which is exclusively within the legislative competence of the Dominion Legislature (S. 100 (1), Constitution Act). (2) If the charging section is severed from the other provisions of the Act, it cannot be reasonably held that the Legislature would have enacted the impugned Act in its truncated form. (3) The impugned Act has no force outside the Province and consequently it cannot be operative in respect of the endowments situated outside the territorial of the Province of Orissa.

[9] The Advocate-General's main contention is that the charging provision (S. 49 (1)) is relatable to item 54 read with item 34 of List II being in the nature of fees for the purpose of administering the said Act and as such within the legislative competence of the Orissa Legislature.

[10] Therefore the main point of controversy is narrowed down to one question, namely, whether S. 49 (1) of the impugned Act is relatable to item 54 read with item 34 of List II or to item 54 of List I.

[11] The principles to be followed in interpreting the Constitution Act, especially when there is some kind of overlapping between the powers of the Dominion Legislature and the powers of the Provincial Legislature, have been laid down in *Subrahmanyam Chettiar* v *Muttuswami Goundan*, A. I. R. (28) 1941 F. C. 47 : (I. L. R. (1941) Kar. F. C. 25) and reiterated in *Ralla Ram* v. *The Province of East Punjab*, A. I. R. (36) 1949 F. C. 81 : (1948 F. C. R. 207), following several decisions of the Privy Council the latest of which is *Prafulla Kumar Mukherjee* v. *Bank of Commerce Ltd, Khulna*, A. I. R. (34) 1947 P. C. 60 : (74 I. A. 23 P. C.). Since the decision of Lord Watson in *Union Colliery* v. *Bryden*, 1899 A. C. 580 : (68 L. J. P. C. 118), it has been repeatedly laid down by the Privy Council that the 'pith and substance' of an impugned Statute should be considered with a view to determine whether it is within the legislative competence of a Legislature Gwyer C. J. in *Subrahmanyam Chettiar* v. *Muttuswami*, A. I. R. (28) 1941 F. C. 47 at p. 51, has referred to these decisions and pointed out that for the purpose of determining whether the impugned Statute is legislation with respect to matters in List I or List II of Sch VII. its pith and substance or true nature and character should be ascertained. To a similar effect is the following observations of the Privy Council in *Governor-General in Council* v. *Province of Madras*, A. I. R. (32) 1945 P. C. 98 : (I. L. R. (1945) Kar. P. C. 153)

> "For in a Federal constitution, in which there is a division of legislative powers between Central and Provincial Legislatures, it appears to be inevitable that controversy should arise whether one or other Legislature is not exceeding its own, and encroaching on the other's constitutional legislative power, and in such a controversy apply in the present case, that it is not the name of the tax but its real nature its 'pith and substance' as it has sometimes been said, which must determine into what category it falls.'

The same principle was reiterated in *Prafulla Kumar* v. *Bank of Commerce Ltd, Khulna*, A. I. R. (34) 1947 P. C. 60 : (74 I. A. 23), in the well-known case dealing with the Money-lenders Acts of the various Provinces.

[12] Judged by this principle, it appears that the pith and substance of the impugned provision (S. 49 (1)) is the raising of money for the sole purpose of 'meeting the expenses of the Commissioner, and officers and servants working under him'. It is true that in assessing the contribution on every institution the method of assessment followed by the Income-tax authorities has been adopted. But as has been pointed out in *Byramjee Jeejeebhoy* v. *Province of Bombay*, A. I. R. (27) 1940 Bom. 65 at p. 70:

(I. L. R. (1940) Bom. 58 F. B.), the method of assessment or the machinery for collection do not determine the nature of the levy. Similarly, the fact that a graduated form of levy is exacted does not necessarily make it income-tax (page 73 ibid). The impugned provision undoubtedly provides that a certain percentage of the income should be the basis of assessing the contribution and authorises the Provincial Government to increase or decrease the rate of contribution. But the Provincial Government's discretion is not entirely unfettered; because the words 'for meeting the expenses of the Commissioner and officers and servants working under him' occurring in that section completely fetter the power of the Government. That is to say, the Government cannot enhance the rate so as to collect by way of contribution, a sum in excess of the expenses of the Commissioner and his staff. There is no provision in the Act from which it can be reasonably inferred that the Legislature contemplated that there would be any sum in excess of the expenses of the commissioner and his staff, or else that the excess should be diverted to the general revenues On the other hand, the Legislature seems to have thought that the total sum realised from such contributions may not suffice to meet the expenses of the commissioner and hence in S. 50 authorised the Government to give grants or loans and even fixed a statutory minimum for such grants and loans. A fair reading of S. 50 of that Act would indicate that the Legislature intended that there should be a separate fund distinct from the general revenues of the Province. The conclusion seems irresistible that though the Provincial Government may make grants to the fund they have no authority to utilise any sum out of the fund for any purpose other than that of meeting the expenses of the Commissioner and his staff.

[13] This leads to the next question as to whether a levy imposed on a limited class of persons for the sole purpose of meeting the expenditure incurred in administering a special Act applicable to them, is a 'tax' or a 'fee'. If it be held to be a fee then the impugned provision would undoubtedly be relatable to items 54 and 34 of List II. The answer to this question depends on ascertaining what Parliament meant by the expression 'fee' occurring in item 54 of List II. The same expression occurs in item 59 of List I and item 36 of List III. The expressions 'taxes', 'duties' and 'cesses' also occur in several items and the question arises as to whether the Parliament intended that each of these expressions should have a different meaning. Section 311 (2) says that 'taxation' includes the imposition of any tax or impost whether general, local or special and 'tax' shall be construed accordingly. In view of this wide definition, 'duties' and 'cess' would undoubtedly be 'taxes' but 'fees' seem to stand on a different footing. Though 'fees' have nowhere been defined in the Government of India Act, in sub-s. (2) of S. 37 and sub s. (2) of S. 82 it is clearly indicated that fees for license or fees for services rendered should not be deemed to be taxes and any Bill containing provision for the payment of such fees would not be a taxing Bill for the purpose of following the special procedure prescribed in sub-s. (1) of both those sections.

[14] For the purpose of ascertaining the essential distinction between 'fees' and 'taxes' it is useful to examine the views put forward by eminent writers on Public Finance. As pointed out by the Earl of Selborne in *Attorney-General for Quebec* v. *Reed*, (1885) 10 A. C. 141 : (54 L. J. P. C. 12)

> "those words must be understood with some reference to the common understanding of them which prevailed among those who had treated more or less scientifically such subjects before the Act was passed."

(See *In re C. P. & Berar Sales of Motor Spirit and Lubricants Taxation Act*, A. I. R. (26) 1939 F. C. 1 at p. 35 : (I. L. R. (1939) Kar. 6), for the value to be attached to the definitions given by eminent text book writers). In Findley Shirras 'Science of Public Finance' occurs the following significant passage:

> "Taxes are compulsory contributions to public authorities to meet the general expenses of Government which have been incurred for the public good and without reference to special benefits. Fees are payments primarily in the public interest for special services which people must accept whether willingly or not; . . . . Fees are for governmental services, while prices are for services of a business character. They differ also from taxes in that they are payments for special benefits enjoyed by the payer, while taxes are for general benefits, expenses which are laid, as Adam Smith say, 'for the benefit of the whole society'. The essence of a tax is the absence of *quid pro quo* between the tax prayer and the public authority. Fees in Adam Smith's words are 'particular contributions (as opposed to general contributions) by persons who give occasion to this expense'. Fees are undoubtedly co-ordinate with taxes, and are sometimes grouped under the main head tax revenue, just as fees are grouped under non-tax revenue. It is indeed sometimes difficult to draw a clear line of distinction between taxes and fees."

[15] In Chapter XI of the Report of the Indian Taxation Enquiry Committee 1924-25, Vol. I, there is an interesting discussion regarding this subject. Though fees may in some instances, tend to become taxes, and though both of them may have two essential characteristics of being compulsory contributions levied from a section of the people for public purposes, yet there is a well-recognised distinction between the two. Taxes are primarily imposed for revenue purposes, whereas fees are levied either for administrative

purposes such as meeting the expenditure incurred in carrying into effect any statute, or for benefits conferred on the persons from whom the money is realised. If the amount of fee levied is disproportionate to the cost of administering a statute, the taxing element predominates and such fee may become tax. Such fee may be realised either in the form of a specified amount for the grant of a license (if the statute authorises the issue of licenses for administering the same) or else it may be in the form of a certain percentage of the income of those persons whom the statute purports to control. But so long as the object is not to raise money for revenue purposes, a 'fee' cannot become an 'income-tax' merely because it is assessed at a certain percentage of the income. Formerly a 'fee' was limited to a payment made in return for a specific benefit received, but in modern times that expression has been given a wider connotation so as to include payments made for meeting the expenses of the officers and staff engaged in administering a statute or in controlling any trade or occupation even though there may not be any direct benefit to the payer. Indeed, in many instances such administrative control may be extremely irksome to the person who is compelled to pay the fee; and it cannot be said that the public servants engaged in such administrative control are rendering any specific service to anyone. It was argued that the Commissioner and his staff were not rendering any service to the Mahants and trustees of the maths and temples. This may be so, but as the object of the impugned Act is to provide for the better administration and governance or the maths and temples, the service of the Commissioner and his staff must be deemed to be for the benefit of the religious endowments and it is not open to a law Court to enter into an investigation as to whether the Commissioner is, in fact, rendering any such service.

[16] The legislative practice of the Parliament also throws light on the point at issue. As pointed out by Lord Macmillan in *Croft* v. *Dunphy*, 1933 A. C. 156 at p. 165: (A. I. R. (20) 1933 P. C. 16):

> "When a power is conferred to legislate on a particular topic it is important, in determining the scope of the power, to have regard to what is ordinarily treated as embraced within that topic in legislative practice and particularly in the legislative practice of the State which has conferred the power."

[17] This was reiterated by Lord Uthwatt in *Wallace Brothers & Co., Ltd.* v. *Commissioner of Income tax, Bombay*, 1948 F. C. R. 1 at p. 16: (A. I. R. (35) 1948 P. C. 118), where after quoting the said observation of Lord Macmillan he observed:

> "The point of the reference is emphatically not to seek a pattern to which a due exercise of the power must conform. The object is to ascertain the general conception involved in the words used in the enabling Act."

[18] An idea as to what the Parliament considered to be 'fee' as distinct from 'tax' will be found from a study of the Parliamentary Legislative Procedure described at pp. 744, 745, 749 and 767 of May's Parliamentary Practice, Edn. 14. There, it has been pointed out that Bills dealing with taxation matters have a special procedure of their own; they have to be initiated in the form of a resolution moved in the Committee of Ways and Means by a Minister of the Crown. But Bills dealing with payments for services rendered by departments of State imposed in the form of licences are not regarded as taxing Bills unless the proceeds are payable into the Exchequer. Thus the *Dyestuffs (Impost Regulation) Act, 1920 (10 and 11 Geo. V, Chap. 77)* did not pass through the Parliament as a taxing Bill because the fee permitted to be levied under that Act was limited to "the purpose of providing for the expenses of the Board" in carrying that Act into execution. On the contrary the *Whaling Industry (Regulation) Act, 1934 (24 and 25 Geo. V, Chap. 49) was passed* by the Parliament as a taxing Bill, because, though it provided for the issue of licenses on payment of fees (S. 5 (2)) the charges for the fees were very high and moreover the fees levied under that Act were payable into the Exchequer (S. 16) (see p. 749 of May's Parliamentary Practice, 14th Edition.) The House of Commons carried the distinction between two expressions so far as to permit the House of Lords to initiate legislation or to amend Bills dealing with imposition of fees and penalties only, whereas the Commons have always zealously claimed the exclusive right of legislation over charges imposed on the people (*Standing Order No. 44 of the House of Commons (Public Business) 1936*). What the Commons meant by the expression 'fees' will be clear from the following passage taken from *Halsbury's Laws of England*, 2nd Edn., Vol. 24 at p. 366:

> "Such fees are imposed in respect of benefit taken or service rendered under the Act and in order to the execution of the Act, and are not made payable into the Treasury or Exchequer or in aid of the public revenue and do not form the ground of public accounting."

In this passage a clear distinction is made between 'benefits taken' by the payer of the fees and 'service rendered' by the person who collects the fees and the definition of the expression is made applicable to both. That is to say there may be instances of services rendered by public officers without there being a corresponding benefit to the payer of the fees. The word 'service' is obviously used in this passage in its broad sense as including the official duties performed by an officer engaged in administering a statute.

[19] An examination of the provision of the Government of India Act of 1919 or the Rules framed thereunder does not indicate any contrary view. On the contrary, in Sch. II, of the Schedules Taxes Rules framed under that Act the expression 'tax' was given a wide definition so as to include a fee' also thereby indicating that but for this inclusive definition the two expressions would have had different meanings.

[20] From the foregoing discussion the following conclusion emerges. Though in a broad sense a fee may also be an impost when it is in the nature of a compulsory levy on certain classes of people, the Parliament has maintained a sharp distinction between 'fees' and 'taxes' in its legislative procedure. Where the imposition is in respect of the benefit taken by the person who is required to make the contribution or else where the imposition is for the service rendered by the authorities under an Act and for the purpose of execution of that Act and such contributions are not credited into the general revenues, they are not classified as taxes. The actual name given to the levy in a statute is immaterial. The purpose for which the levy is collected, the amount so collected (whether unduly high or otherwise) and the fund to which the levy is credited (whether to the general revenues or in a separate fund) these are material factors in determining whether the levy is a 'tax' or a 'fee . Apparently it was this distinction which the Parliament imported into the Government of India Act also and the provisions of sub s. (2) of S. 82 and sub-s. (2) of S. 34 bring out the distinction though they do not seem to be exhaustive of what was meant by the expression 'fees'.

[21] If S. 47 of the impugned Act is carefully scrutinised in the light of the Parliamentary legislative practice, there seems to be no doubt that the contribution referred to in that section is a fee and not a tax As already pointed out nothing out of the contribution can go to the general revenues of the Province. The purpose for which the contribution can be levied is strictly circumscribed by the Act itself to meet the expenses of the Commissioner and his staff whose sole duty is to administer the Act and make it effective. The mere fact that the Act does not provide for the collection of fees by the issue of licenses (as is usually provided in statutes dealing with fees) and provides for the imposition of the levy in accordance with the method adopted in collecting income tax, cannot alter the true nature of the levy if the tests laid down in the preceding paragraph are applied. I would therefore hold that it is not a tax at all and consequently it cannot be relatable to Item 54 of List I.

[22] Mr. Basu's main contention on this point was that the contribution was in the nature of a compulsory levy and as such was a tax. In support of his argument he relied on *City of Halifax* v. *Nova Scotia Car Works Ltd.*, 1914 A. C. 992 : (A.I.R. (1) 1914 P. C. 227 (2)). Though there is no doubt that compulsion is the essence of a tax, it cannot be said that it distinguishes a tax from a fee. Even in a fee there may be compulsion especially against those classes of persons over whom the Act sanctioning the levy of fees imposes control. In *Attorney General for Canada* v. *Attorney General for Ontario*, 1937 A. C. 355 at p. 366 (A. I. R. (24) 1937 P C. 89), Lord Atkin left open the question as to whether a levy was a tax merely because of the compulsion applied in realising the same. To quote his words :

> "Whether in such an Act as the present compulsion applied to an employed person to make a contribution to an insurance fund out of which he will receive benefit for a period proportionate to the number of his contributions is in fact taxation it is not necessary finally to decide."

[23] Mr. Basu then relied on *In re A reference under the Government of Ireland Act, 1920 and S. 3, Finance Act (Northern Ireland) 1934*, (1936) A. C. 352 But that decision is of no help in deciding the main question in the present case. There the sole question was whether a contrubution levied in Northern Ireland by the Council of every County and County Borough to meet the cost of educational services was income tax or not. That contribution was payable into the Exchequer as public revenue and this made it clear that it was a tax and not a fee. Lastly I may refer to *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ltd.*, 1933 A. C. 168 : (102 L. J P. C. 17) on which also Mr. Basu has placed much reliance. The facts of that case are as follows : In British Columbia, the Provincial Legislature passed an Act known as the Dairy Products Sales Adjustments Act, 1920 authorising the appointment of an Adjustment Committee in a district of dairy farmers. The farmers were required to pay to the Committee a levy assessed according to the quantity of fluid milk sold. This levy was known as 'adjustment levy' and it was apportioned by the Committee amongst those farmers who had sold only milk products. The expenses of the Committee were met by a compulsory levy from the farmers known as 'expenses levy'. It was held that the adjustment levy was clearly a tax because it was compulsorily imposed by a statutory committee for a public purpose. It was also held that the 'expenses levy' was also a tax being ancillary to

the adjustment levy. It is difficult to say if their Lordships would have held 'expenses levy' alone to be a tax if that Act had not authorised the imposition of any other levy. In such a case it might have been contended with some force that the expenses levy being solely intended to cover the expenses of the Committee which was constituted for administering the Act was not 'a tax' as ordinarily understood. But in that particular case, the main levy was the adjustment levy which undoubtedly cannot be regarded as 'fee' by any stretch of imagination. As expenses levy was held to be ancillary to the adjustment levy, it was not dealt with separately. Apart from this distinguishing feature, decisions based on the construction of the British North America Act, 1867, cannot be applied without some qualification, in interpreting the Government of India Act, 1935. In the former Act Ss. 91 and 92 contain a full list of the subjects over which the Dominion Parliament and the Provincial Legislature have respective powers of legislation. Significantly, there is no item relating to 'fees' in the list, whereas in the Government of India Act, in every list a separate item was expressly inserted dealing with fees. Item 9 in S. 92, B. N. A. Act, 1867 says :

> "Shops, Saloon, Tavern, Auctioneer and other licences *in order to the raising of a revenue* for Provincial, Local or Municipal purposes."

The words italicised show that the framers of that Act intended that any fee that may be imposed by issuing licenses may be for revenue purposes, thereby expressly removing by the statute itself the essential distinction between a fee and a tax. This was perhaps the main reason for Lord Atkin's observations in *George Walkem v. L. M. D. P. Board*, A. I. R. (26) 1939 P. C. 36 at p. 38 : (180 I. C. 538) to the following effect :

> "If licenses are granted it appears to be no objection that fees should be charged in order either to defray the costs of administering the local regulation or to increase the general funds of the province or for both purposes. The object would appear to be in such a case to raise a revenue for either local or provincial purposes."

[24] This decision is therefore based on the express provisions found in item 9 of S. 92 B. N. A. Act and cannot be an authority for the view that in the Government of India Act, 1935 also (where there are express provisions indicating a contrary view) a 'fee' may be raised for revenue purposes or else that it is not distinguishable from a 'tax.'

[25] The second point of Mr. Basu must fail in view of my decision that S. 49 (1) of the impugned Act is not *ultra vires* but is relatable exclusively to items in the Provincial Legislative List. The question about the applicability of the doctrine of severability need not be discussed here.

[26] The third point of Mr. Basu also appears to be without any substance. The impugned Act says clearly that it extends only to the whole of the Province of Orissa. Mr. Basu urged that the definition of the expression 'religious endowments' in cl. (12) of S. 6 is wide enough to cover all properties of the maths and temples even though some of the properties may be located outside the Province. It appears that in the lower Court it was conceded by the Government of Orissa that maths and temples have properties outside the Province. Mr. Basu's main argument is that in view of the wide connotation given to the expression 'religious endowments' the Act purports to control the properties of the maths situate outside the Province also and that to the extent of its extra-territorial application, it is invalid. In particular he referred to S. 12 which requires every math and temple to maintain a register showing particulars of all properties of the temple. He also referred to S. 58 which requires the sanction of the Commissioner for any kind of transfer of the property of the math or temple. In my view, the question of extra-territorial application of the Act does not arise at all. The Provincial Legislature has obviously no jurisdiction to legislate in respect of properties outside its territorial limits (see S. 99 (1), Government of India Act) and the impugned Act does not purport to do so. The extent-clause of the Act says clearly that the Act extends to the whole of the Province of Orissa. This clause would obviously control S. 58 and the Commissioner's sanction may not be required in respect of transfers of property located outside the Province. But this does not mean that the income derived by the math or temple from properties situated outside the Province should not be taken into consideration for the purpose of levying contribution under S. 49 or else for the purpose of specification of the particulars under cl. (c) of sub-s. (1) of S. 12. Once any income (which is movable property) of a math or temple is brought inside the Province from whatever source, it becomes property within the Province and as such within the scope of the impugned Act. Moreover, S. 12 of the impugned Act is a provision which applies to the trustees of the maths and temples and requires them to enter some particulars in a prescribed register. It is, therefore, an enactment applicable to a person residing within the Province and the competence of the Provincial Legislature to legislate in respect of a person found with the Province admits of no doubt whatsoever.

[27] I would therefore affirm the judgment of the lower Court and dismiss the appeal with costs.

[28] **Das J.**— I agree with my learned brother and should have been content with merely ex-

pressing my concurrence with his lucid judgment. Having regard, however, to the importance of the case and the points raised, it is right that I should give my reasons also for agreeing with his view.

[29] The suit has been brought for declaring that the Orissa Hindu Religious Endowments Act (Orissa Act, IV [4] of 1939) is ultra vires the Orissa Legislature. The plaint travels over a wide range of grounds for saying that the Act is ultra vires and refers to various sections of the Act for the purpose. In the issues, however, the question that was raised was not merely whether the Act as a whole is ultra vires, but also that particular sections thereof are in any case ultra vires (see Issue No. 7). Before us the argument is confined to Ss. 49, 50, 51 and 24. In view of the recent Federal Court decision in *Manikkasundara Bhattar* v. *R. S. Nayudu*, A. I R. (34) 1947 F. C. 1 : (I. L. R. (1949) Kar. F. C. 27), the point that the subject-matter of the Act is not covered by item 34, List II of Sch. VII, Constitution Act is no longer urged. The argument pressed before us is that Ss. 49, 50, 51 and 24 are ultra vires and if that is held to be so, the entire Act must be pronounced to be ultra vires. The argument is put ingeniously as follows :

[30] The Act is, as the preamble states, to provide for the better administration and governance of certain Hindu Religious Endowments. The means by which that purpose is secured is by appointing a statutory authority in the person of a Commissioner under S. 7 of the Act and by vesting in him various large supervisory and administrative powers over the endowments and by providing the funds for his functioning by means of S. 49 of the Act, and by providing compulsory audit under S. 21 and also providing for the payment of the auditor under S. 24. It is, therefore, argued that if the charging sections, i. e., Ss. 49 and 24 are found to be ultra vires, the whole structure of the scheme of the Act which depends on finance for its functioning falls to the ground. It is admitted that this argument would depend upon whether or not the impugned sections are severable from the rest of the Act and whether the Act can be given effect to even if the impugned sections are found to be ultra vires. It was further argued that in case it is found that the impugned sections are severable from the rest of the Act, the appellants would be entitled at least to a declaration that the charging sections, namely, Ss. 49, 50, 51 and 24 are ultra vires.

[31] The main attack is against S. 49 of the Act which enjoins on Maths and temples payment of a contribution for meeting the expenses of the Commissioner and his staff. The contribution is on a basis of percentage of the annual income of the institution. Under S. 24, the audit fees are also payable on a basis not exceeding a certain percentage of income of the institution. These payments which are compulsory in nature and are calculated with reference to income, it is urged, amount to income-tax, falling under item 54, List II of Sch. VII of the Constitution Act and accordingly the sections imposing them are said to be ultra vires the provincial legislature. The argument and the discussion has been mostly confined to S. 49, since the same considerations apply to S. 24 and Ss. 50 and 51 are merely consequential.

[32] There can be no doubt that the levy, under S. 49, in accordance with the statutory rules framed for the purpose, is based on income and to a substantial extent is analogous to income-tax. But is it a tax on income as contemplated by item 54 of List II.

[33] We have not been shown any definite or clear authority which indicates the distinction between a tax and a fee. It has been urged that compulsion is the essence of a tax while an element of option is inherent in a fee. The fees, levied under various Acts such as Births and Deaths Registration Act, Electricity Act, Forest Act, Companies Act and under the licensing provisions of various Acts, have been instanced as also the fees referred to in the English Fees Increase Act (13 George V, Chaper IV) to show that such fees are payable only if the individual takes the benefit or obtains the service. In support of the view that compulsion is the essence of taxation, learned counsel for the appellants cites the cases in *City of Halifax* v. *Nova Scotia Car Works Ltd*, 1914 A. C. 992 : (A.I.R. (1) 1914 P. C. 227 (2)); *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ltd.*, 1933 A. C. 168: (102 L. J. P. C. 17) and *Reference under the Government of Ireland Act, 1920 and S. 3, Finance Act, (Northern Ireland, 1934)*, 1936 A. C. 352. These cases while no doubt showing that compulsion is an essential feature of taxation, do not show that it is its distinguishing feature. In one sense in all levies under legislative or State authority there is an element of compulsion at one stage or other. We have therefore to look elsewhere for the distinguishing feature. My learned brother has pointed out how the word "fee" is understood in parliamentary practice as appears from Order No. 44 of the House of Commons, Standing Orders relating to Public Business. (See May on Parliamentary Practice, Appendix, p. 1007). This standing order refers to

> "Fees imposed in respect of benefit taken or service rendered under the Act, and in order to the execution of the Act, and not made payable into the Treasury or Exchequer, or in aid of the public revenue".

While this statement may or may not be complete or exhaustive as a definition of "fee" it appears clearly to show that where a levy is: (1) for benefit taken or service rendered under an Act; (2) in order to the execution of the Act; (3) and not in aid of the public revenue, it is certainly not a tax and can be designated as a fee.

[34] That a similar distinction has been maintained in the Constitution Act between a tax and a fee is indicated by the provisions of the analogous S. 82 thereof. The Constitution Act maintains distinction between the powers of Legislative Councils and Legislative Assemblies in regard to financial measures analogous to what exists between the House of Lords and the House of Commons. It is provided that certain specified financial measures cannot be introduced in the Legislative Council, but that a bill or amendment which provides for "payment of fees for services rendered" is not to fall within the prohibition. There can be no doubt that the word "fees" as used in this S. 82 can be legitimately understood in the sense in which it has been used in Order No. 44 of the Standing Orders of the House of Commons. In this connection, the antithesis between the phrases "benefits taken" and "services rendered" in Order No. 44 may be noticed. The former refers to something which depends on the option of the person charged while the latter is wide enough to include a service imposed irrespective of the wishes of the person charged. There is no reason why the word "fees" when used in item 64 of List II of Sch. VII should not be understood in the same sense as in S. 82.

[35] That a levy to raise a special fund for a special purpose need not be a tax is indicated in *Attorney General for Quebec* v. *Walter Reed*, (1885) 10 A. C. 141 at pp. 144, 145: (54 L. J. P. C. 12) wherein their Lordships of the Judicial Committee say:

> "It is not necessary for their Lordships to determine whether, if a special fund had been created by a provincial Act for the maintenance of the administration of justice in the provincial Courts, raised for that purpose, appropriated to that purpose, and not available as general revenue for general provincial purposes, in that case the limitation to direct taxation would still have been applicable."

[36] The question in the case was whether certain stamp duties collected in connection with administration of justice were direct or indirect taxation. Their Lordships came to the conclusion that it was an *indirect* levy and felt no doubt that it was an indirect *tax* owing to the absence of the above features. This is no doubt not a direct decision that such a levy is a fee, but is an indication in support of the above view.

[37] Learned counsel for appellants, however, urges that even so the word "fee" is related to the rendering of services, and that under the impugned Act, there are no services rendered to the various persons from whom the levies are made. This argument has however no force. As pointed out by my learned brother the concept of services by Government has undergone vast changes in modern times. The function of the State has ceased to be that of merely maintaining law and order and providing optional services. The care of the well-being of the public has become a normal function of the State. All administrative control undertaken and exercised for the benefit of the public or of sections thereof is "service rendered" by the State. It is the *sine qua non* of such services undertaken in public interests that, where necessary, it is independent of the option of the individual concerned. It thus appears to me that the true distinction between a tax and a fee is not "compulsion" as the learned advocate for the appellant contends, but the presence or absence of a "*quid pro quo*" as pointed out by reputed economists like Adam Smith. In modern times the '*quid pro quo*" has ceased to depend on the option of the individual. The basic idea that it is a *quid pro quo* is maintained in that a fee is not to be raised for general revenue purposes but only for a specified purpose, such as the administration of a particular Act enacted for public benefit and is to be limited to the finance required for the purpose. That fees are sometimes raised as part of general revenues such as "court-fees or that taxation as defined in S. 311 (2) inclusive of special imposts, does not affect the question how the word "fee" is to be normally understood.

[38] In the present instance, S. 49 of the impugned Act does not use the word "fee", but it clearly specifies the levy as an annual contribution for meeting the expenses of the Commissioner and the officers and servants working under him. It is of course required for the special purpose of administering the Act. It is not made part of the general provincial revenues as appears from S. 50. Under that section, the Government not only makes grants, but also grants loans. If the endowment funds were a part of the general exchequer, there could be no question of a loan by the Government to it. The section clearly says that the contributions received constitute a separate fund and it is not suggested that it is in excess of the requirements. Indeed as pointed out by the learned District Judge towards the closing portion of his judgment (P. 42 of the printed paper book) the appellants themselves appear to have suggested that the Endowments Office had been working at a substantial deficit met by loans from the Government for the time being. The levy is

clearly therefore not a tax. I have also no difficulty in thinking that the contribution is for services rendered. The legislature has the right to think that the endowments which are within the scope of the Act require to be kept under effective administrative supervision to provide against mismanagement. Such administration to provide against mismanagement would undoubtedly constitute a service to the institutions irrespective of the opposition of any or all of the present incumbents thereof. Indeed, even in the case of fees, which more clearly appear to be for the benefit of the individuals it will be found that the administrative control undertaken and the services rendered are as much in the larger public interests as in the interests of the individual. Even if therefore service and "*quid pro quo*" are essential characteristics of a fee, the levy under S. 49 is a fee. It, therefore, appears to me to be clear that the levy contemplated by S. 49 is not a tax but a fee coming within item 54 of List II.

[39] It is, however, urged that even though the contribution levied under S. 49 may be only a fee, under item 54, still it is a levy on income and encroaches on the field which has been specifically preserved to the centre as its close preserve and is hence invalid. Sections 138, 141 and 142-A, Constitution Act are also pointed out in this connection and it is said that to allow the Provinces to tap "income" as the source for levies of this kind would upset the basis for the statutory financial arrangements. It is further said that this is not a case of a levy on something else affecting income only in an indirect way or incidentally, but is a levy on income itself and on nothing else, though the field of its operation and the quantum imposed may be very limited. It is suggested that for the levies both under the Central Income-tax Act as also under S. 49 of the impugned Act, the centre is the same and only the circumferences different and that to allow the provinces to impose a levy under the name of a fee even for the limited purposes of raising an ear-marked fund for a provincial subject would in effect, result in imposing double income-tax on the individual affected. It is also said that to allow the provinces to impose a levy on income under the name of a "fee" is to permit by an indirect method, what is prohibited directly.

[40] While the argument is plausible, there are other considerations which must determine the question. In cases, where undoubtedly there is over-lapping, the validity or otherwise of an impugned provision is to be determined by determining the true nature thereof, by its "pith and substance." The "pith and substance" of a particular impugned provision in an Act is not to be determined by merely detaching it from the rest of the Act. The Act, in the present case, **in its main content is admittedly within the competence of the provincial legislature as relating to item 34 of List II. Section 49 of the Act is not directly a measure of taxation, but is a levy for the specified purpose of the Act. It is, therefore, a mere ancillary provision for carrying out the Act. Its validity must stand or fall with that of the main provisions of the Act itself.**

[41] It has been repeatedly held that where over-lapping is incidental, validity is not affected. The question has been fully considered by their Lordships of the Judicial Committee in ***Prafulla Kumar Mukherjee* v. *Bank of Commerce Ltd., Khulna*, A. I. R. (34) 1947 P. C. 60 at p. 65: (74 I.A. 23 P.C.).** Their Lordships say as follows:

> "The extent of the invasion by the provinces into subjects enumerated in the Federal List has to be considered. No doubt it is an important matter, not, as their Lordships think, because the validity of an Act can be determined by discriminating between degrees of invasion, but for purposes of determining what is the pith and substance of the impugned Act. Its provisions may advance so far into Federal territory as to show that its true nature is not concerned with provincial matters, but the question is not has it trespassed more or less, but is the trespass whatever it be such as to show that the pith and substance of the impugned Act is not money-lending but promissory notes or banking? Once that question is determined, the Act falls on one or other side of the line and can be seen as valid or invalid according to its true content."

[42] There can be no reasonable doubt that whether the levy under the impugned S. 49, is called a fee or a tax, its encroachment into the field of income-tax, if any, is only incidental and not direct. It does not cease to be incidental for the reason that the entire field of its operation is "income" unlike as in the case cited above, ***Prafulla Kumar* v. *Bank of Commerce, Ltd., Khulna*, A. I. R. (34) 1947 P. C. 60: (74 I. A. 23 P. C.),** where the encroachment is only partial and from a side. As pointed out by their Lordships in the above case the question is not "has it trespassed more or less." The principle of "incidental" encroachment applies also where the encroachment is "ancillary". This is clearly elucidated by their Lordships in the above case in the passage following the one above extracted, where they say:

> "This view places the precedence accorded to the three lists in its proper perspective. No doubt, where they come in conflict, List I has priority over Lists III and II and List III has priority over List II but, the question still remains, priority in what respect? Does the priority of the Federal Legislature prevent the Provincial Legislature from dealing with any matter which may incidentally affect any item in its list or in each case has one to consider what the substance of an Act is and, whatever its ancillary effect, attribute it to the appropriate list according to its true character? In their Lordships' opinion the latter is the true view."

[43] This is a clear enunciation of the principle that what is to be determined is whether

the purpose and effect of the impugned provision of the Act is direct or ancillary once the main content of the Act is within the competence of the Legislature. The above Privy Council decision has been noticed and expounded in a recent case in the Bombay High Court reported in *Mulchand Khundanmal Jagtiani* v. *Raman Hiralal Shah*, A. I R. (36) 1949 Bom. 197 at p. 200 (2): (51 Bom. L. R. 86), where it is pointed out:

> "The main principle laid down in this case of the Privy Council is that the Provincial Legislature may deal with a federal subject if it is only an ancillary or incidental effect of the legislation provided that in substance it is dealing with a provincial subject."

[44] That the validity or otherwise of an ancillary provision must depend upon the true character of the main provision has been held in various cases. In *Croft* v. *Dunphy*, 1933 A. C. 156 at p 168: (A. I. R. (20) 1933 P. C. 16), the expenses levies (which probably were not open to objection otherwise) were pronounced invalid on the ground that it was ancillary to the main levy viz., adjustment levy which was held to be invalid.

[45] In *George Walkem Shannon* v. *L. M. D. P. Board* A. I. R. (26) 1939 P. C. 36: (180 I. C 538) the validity of the levy of a particular license-fee appears to have been upheld, *inter alia*, on the ground that it was ancillary to the main provisions of the Act. At page 38, their Lordships say:

> "If regulation of trade within the province has to be held valid the ordinary method of regulating trade, i. e., by a system of licenses, must also be admissible . . . . if licenses are granted it appears to be no objection that fees should be charged in order to defray the costs of administering the local regulation."

[46] In *Lawson* v. *Interior Tree Fruit and Vegetable Committee*, 1931-2 (Canada) D. L. R. 193, the main provisions of the Produce Marketing Act of British Columbia were held to be invalid on the ground that in their operation they affect inter-provincial trade. The provisions in the Act relating to levies on marketed products were also accordingly held to be invalid on the ground that they were ancillary provisions though the view is indicated that they might by themselves have been valid (*see* p. 198 of the report).

[47] It is a significant feature of the three lists of Sch. 7, Constitution Act, that the last item of each list provides for the imposition of fees in respect of the subjects in that list. If it was meant to refer only to sources of taxation referred to in that very list, it is purposeless. It seems to me that it is meant to provide the power for an ancillary levy irrespective of the fact that the source may fall outside the particular list and may touch the sources in the other lists. It could not have been contemplated that entirely new sources would be discovered.

[48] I am therefore satisfied that S. 49 of the impugned Act being a provision merely ancillary to the main provisions of the Act which admittedly are *intra vires*, and its effect by way of encroachment, if any, on the field of income tax being incidental, the provision is fully within the competence of the Provincial Legislature and this applies also to the provisions connected with S. 49 and to the analogous provision in S. 24. In this context, it is not without some significance that the actual operation of the impugned levy is on a field which is wholly outside the actual operation of the Income-tax Act as at present. See S. 4 (3), Income-tax Act (which?) exempts income from religious endowments from taxation. It is also to be noted that the Central Legislature cannot touch a substantial portion of the field of the operation of S. 49 which relates to income from agricultural lands.

[49] The next contention of the learned counsel for the appellants that because the definition of the word "religious endowment, or endowment" in S 6, sub-s. (12) comprises "all" property and the Act contains various provisions relating to such property and because at least some of the institutions within the scope of the Act have admittedly properties outside the province and outside the dominion, the Act has a necessary extra-territorial operation and is hence invalid, may be briefly dealt with.

[50] As pointed out by my learned brother the Act has to be construed with reference to the competence of the Legislature and the extent clause in the Act, viz. S. 2. In *Macleod* v. *Attorney General for New South Wales*, 1891 A. C. 455: (60 L. J. P. C. 55), the words "whosoever and wheresoever" in a Provincial Act, were in spite of their generality, construed to refer only to those actually within the jurisdiction of the province and within its limits.

[51] *In the matter of Hindu Women's Rights to Property Act, 1937*, A. I. R. (28) 1941 F. C. 72 at p. 75 (2): (I. L. R. (1941) Kar. F C. 149), their Lordships lay down that the Court is bound to construe the word 'property" in the Hindu Women's Rights to Property Act as referring only to those forms of property with respect to which the Legislature which enacted the Act was competent to legislate. It makes no difference on principle that in this case the word used in the definition of endowment is "all" property and the question arises with reference to the extra-territorial situation of the property and not to the "form" of property.

[52] Further, in *British Columbia Electric Ry. Co., Ltd.* v. *The King*, A. I. R. (33) 1946

P. C. 180 at p. 185, their Lordships of the Judicial Committee point out that:

> "A Legislature which passes a law having extra-territorial operation may find that what it has enacted cannot be directly enforced, but the Act is not invalid on that account and the Courts of its country must enforce the law with the machinery available to them."

[53] In the present case, the question whether specific provisions of the Act which may have an extra-territorial operation in respect of property outside the province are effective in respect of such property, does not arise. That will have to be determined on the facts, when such arises. It is enough to say that this is not a ground for pronouncing the Act itself to be invalid. I think it desirable also to say that even the question whether the levy under S. 49 can be made in respect of income of extra-provincial properties whether income has been received in the province is one that does not call for a decision at present. When the question arises, it is a matter for consideration whether "territorial connexion", of the person levied against, is not enough *vide* in *Wallace Bros. & Co., Ltd* v. *Commissioner of Income-tax, Bombay City and Bombay Suburban District*, A. I. R. (35) 1948 P. C. 118 at p. 120 : (75 I. A. 86 P. C.).

[54] The only other question that remains which has been raised at the bar is that the impugned provisions of the Act are inseparable from the rest and if they are found to be invalid, the whole Act is *ultra vires*. As pointed out by my learned brother in the view that we have taken this question does not call for decision. Since, however, the question has been raised the point may be briefly dealt with.

[55] The argument is that the whole Act is *ultra vires* if the charging sections are *ultra vires* in as much as the charging sections are the foundation for the working of the Act. While no doubt it is necessary that for the working of an Act of this nature through the machinery of a Commissioner and his staff vested with large supervisory and administrative powers there should be finance it is not the essence of the scheme that the finance should be raised in the particular way. Section 8, sub-s. (2) of the Act provides that the Commissioner shall receive out of the funds of the endowments such salary as the Provincial Government may fix. From this general declaration it would follow, apart from anything else, that all the endowments which come within the purview of the Act are under a legal obligation jointly to contribute to the salary of the Commissioner. If there was no specific provision defining how the contribution was to be fixed and realised, the Courts, in a case of dispute, might have to determine it in some reasonable way and might well fix it on the basis of income. But it cannot be said that the working of the Act will be rendered impossible though it may become cumbersome. Section 8 provides no doubt, only for salary But it is a matter for consideration whether it should not be construed, if necessary, as wide enough to include his expenses inclusive of his establishment. But even if a limited interpretation of "salary" is adopted, it does not follow that the working of the staff is necessarily hampered. Section 50 in providing for grants and loans by the Government compulsorily by the use of the word "shall" indicates that the ultimate responsibility for the finance is with the Government. Though no doubt S. 50 presupposes the existence of the endowments fund, the power to make the grants is not dependent on it and in any case the contributions to the salary under S. 8, would in themselves constitute the nucleus of an "Endowment Fund."

[56] It cannot therefore be said that in the absence of the particular provision as to the quantum of levy of contributions under S. 49, the working of the entire Act is rendered impossible. It is no doubt true as found in the various cases to which our attention has been drawn that if some essential portions of an Act are found to be *ultra vires*, it cannot be said that the legislature would have maintained the Act in its truncated form and that therefore the entire Act must be held to be *ultra vires*. The following cases are cited in support of the argument *Attorney-General for Manitoba* v. *Attorney-General for Canada*, 1925 A. C. 561: (94 L. J. P. C. 146) and *Attorney-General for Canada* v. *Attorney General for Ontario*, 1937 A. C. 355 : (A. I. R. (24) 1937 P. C. 89). But this does not apply to a case where as in this, the substantive provisions of the Act and the machinery set up therefor are entirely within the competence of the legislature and what is attacked is merely the means of finding the expenses for its working. When it is found as in this case that independent of such provision, the intention of the Act is clear, that the endowments should contribute to the expenses in some measure and the Government are also bound to make grants for the same, it must be held that the charging sections are severable. It is sufficient to refer in this connection to the following cases. *Toronto City Corporation* v. *York Corporation*, 1938 A. C. 415 : (107 L. J. P. C. 43) and *Attorney General of Alberta* v. *Attorney-General of Canada*, A. I. R. (35) 1948 P. C. 194 at p 199 : (52 C. W. N. 236 P. C.). All the contentions raised on behalf of the appellants therefore fail and the appeal must be dismissed with costs.

[57] **By the Court** — Since the question raised in this appeal is one of importance under the Government of India Act, a certificate will

issue under S. 205 of the said Act that the case involves a substantial question of law as to the interpretation of the Government of India Act, 1935.

R.G.D. *Appeal dismissed.*

A. I. R. (37) 1950 Orissa 59 *[C.N. 8.]*

RAY C. J.

Indramoni Devi — Petitioner v. *Raghunath Bhanja Birabar Jagdeb and others — Opposite Party.*

Criminal Revn. No. 127 of 1949, Decided on 1st September 1949, from order of Magistrate, First Class, Khurda, D/- 23rd February 1949.

(a) Criminal P. C. (1898), S. 145 — Possession means actual possession — Mere attornment does not give possession.

Possession within the meaning of S. 145 is actual physical possession and not notional possession. Mere attornment to person by tenant does not give the former possession, and does not dispossess another party, unless there has been delivery of crops by the tenant as a result of the attornment: 15 Cal. 527, *Rel. on.* [Para 4]

Annotation: ('46-Com.) Criminal P. C., S. 145, N. 25.

(b) Criminal P. C. (1898), S. 145 — "Continuous possession" eaning — Mexplained.

Continuity of possession should be understood with reference to the object over which it is exercised. By continuous possession is meant such possession which a party in possession may have occasion to exercise and has exercised and exercises whenever and wherever he or she likes. [Para 4]

Annotation: ('46-Com.) Criminal P. C, S. 145, N. 41.

(c) Hindu law — Maintenance — Charge — Person inheriting estate cannot alienate the same, except for pressing necessity to the estate, to the prejudice of right of maintenance of the widow and daughters of deceased last holder. [Para 3]

G. C. Das and P. C. Chatterji — for Petitioner.

B. N. Das and G. B. Mohanty—for Opposite Party.

Order.—The petition arises out of a proceeding under S. 145, Criminal P. C. The dispute relates to 32 acres and odd of lands being admittedly maintenance lands of one Rama Chandra Bidhar Samant. Rama Chandra Bidhar Samant was the son of Krishna Chandra Bhanja, proprietor of killa Haldia within which the disputed lands are situate. Krishna Chandra had another son (Pitabas Bhanja) who being the elder succeeded, by the rule of primogeniture prevalent in the family in matters of succession and inheritance, to the killa. According to the family custom, Rama Chandra Bidhar Samant got the disputed lands in lieu of the maintenance. The terms and conditions to which the maintenance grants are subject, as it appears from para 5 of the provincial settlement report (an Exhibit), were that they would revert to the proprietor of the killa if the *Bhaya* (Rama Chandra, in this particular case) became Nisantan (without issue). Rama Chandra died leaving behind Brajasunder Bidhar Samant his son and a widow (Indramoni Devi, the petitioner before us). This widow was Ramchandra's second wife. Through her, Ramchandra had three daughters who are alive. Brajasunder too died prematurely leaving behind a widow (Arnapurna). The parties have fought an issue in the Court below as to whether Arnapurna is civily dead on account of her immoral character and a *Tyagasudhi* having been performed by Indramoni and other agnates in relation to her. I consider that to be wholly immaterial for the purpose of this case. Brajasundar died sometime in June 1946. In January 1947, the proprietor of Haladia, the principal member of the first party, got a deed of surrender executed by her in respect of these lands in lieu of securing her own maintenance and the maintenance for Indramoni by a separate deed. It should be borne in mind that Indramoni Devi is not a consenting party either to the deed of surrender or to the deed of maintenance. Her attitude is that she does not like to lose hold of the lands, her maintenance being a charge over it though it has not been so declared in the civil Court. Raghunath Bhanja, the principal member of the first party, took advantage of the position that the previous tenants through whom Ramachandra, after him, his son Brajasunder and then Indramoni as well as Brajasunder's widow possessed the disputed lands were also tenants of killa Haladia and got certain pattas and muchalikas exchanged as between himself and the said tenants. Knowing that the tenants had gone over to the side of Raghunath, there arose naturally a tense feeling between the parties. As it usually happens, several people of the village Haladia were attracted sympathetically towards the widow. This gave rise to an apprehension of breach of the peace and was followed by the police report recommending the proceeding under S. 145, Criminal P. C.

[2] Both parties filed their respective written statements. On the last day of hearing, the second party could not be present and the matter was heard and decided *ex parte* in favour of the first party. The first party had adduced evidence in support of their story of possession both documentary and oral. Their witnesses had been cross examined by the second party, but the latter had not adduced any evidence before the Magistrate. In this state of things, the order having been passed in favour of the first party, the second party has come up in revision. The learned Magistrate, in his brief judgment, works out the problem with regard to the question of title in favour of Raghunath and then by an automatic process declares possession in his favour presumably relying solely upon the fact that the tenants had attorned, by execution of

kabuliyat or muchalika, to Raghunath Bhanja, the proprietor of killa Haladia.

[3] I have no hesitation in my mind that the ultimate right of reversion that reserved in case of this maintenance grant has not yet accrued. Mr. B. N. Das, appearing for the first party, wants to work out the possession in lieu of maintenance grant started from Brajasunder and argues that as Brajasunder has died *Nisantan*, the maintenance grant must exhaust itself and in the right of ultimate reversion the proprietor should succeed to the lands When confronted, he cannot escape from the conclusion that the widow Indramoni Devi and Ramchandra Bidhar Samant's daughters have their right of maintenance and right of residence in the family lands and in the family house; but he says that after Arnapurna (Brajasunder's widow) surrenders the property, thereby accelerating the reversion, that right must be deemed to have been lost. This I decline to pronounce as an admissible proposition. The position is crystal clear that Indramoni could sue Brajasunder or Brajasunder's widow for maintenance and could have got declaration of a charge in her favour as against these very properties, and this by the simple rule that these properties once belonged to her husband and in the hands of anybody who has come into possession thereof in virtue of a right derived from her husband or at any rate through him. It is also clear that under Hindu Law neither Brajasunder nor his widow could alienate these properties to the prejudice to the maintenance and residence rights of Indramoni and her daughters except if such alienation was for pressing necessity to the estate. The position of deed of surrender is much worse than that of transfer for consideration. The deed of surrender cannot, therefore, clothe Raghunath Bhanja, the proprietor of Haladia, with any right free from right inherent in Indramoni and her daughters by virtue of their right to be maintained out of these lands. In short, notwithstanding the deed of surrender, the position is the same as it should be if Brajasunder and his widow died leaving no issue behind. As I have said, so long as Ramachandra Bidhar Samant is not *Nisantan* the property cannot revert back to the stock from which it came. The question of title, in the sense of right to possession, should, therefore, be decided in favour of Indramoni and her daughters. The daughters, I am told are not parties. So they should not be bound by this decision

[4] Next is the question of possession. I have read the evidence adduced by the first party with the help of the learned counsel for both parties. The faithful summary of that evidence is that Raghunath Bhanja has not inducted any new tenants into the lands for the purpose of cultivation and growth of crops after the deed of surrender. The tenants who had been holding since the time of Ramchandra Bidhar Samant have been holding upto the initiation of the proceeding. Question arises whose possession it is. Before the deed of surrender it cannot be gainsaid that the possession of those tenants were possession of Brajasunder's widow as also of Indramoni. If Brajasunder's widow gives up her possession or even right to possess, the whole of it goes to Indramoni. Mr Das says that this possession of Indramoni does not continue on account of the intervention of the deed of surrender and the deeds of Muchalika or attornment by the tenants to his client (Raghunath Bhanja). It is pertinent to observe that Indramoni stands completely out of the transactions between Brajasunder's widow and Raghunath and between Raghunath and the tenants who are the members of the first party. Under the circumstances, whether the continuity of Indramoni's possession has either been broken or otherwise intercepted is the crucial point for consideration. Continuity of possession should be understood with reference to the object over which it is exercised. By continuous possession is meant such possession which a party in possession may have occasion to exercise and has exercised and exercises whenever and wherever he or she likes. In this case, the lands are tenanted. The act of possession to be exercised by Indramoni is by receiving her share of the produce. Admittedly, according to all the witnesses for the first party, she received them in the year 1946. The next crop that she was to receive was not grown in 1947 and should have been received by or due to her in about November or December of that year. In the meantime, the produce has been seized by the Police. In these circumstances except for the tenants' attorning to Raghunath, the continuity of possession of Indramoni should be maintained. The question, therefore, is whether the tenants by attorning to Raghunath, the possession has gone over to him. Here, it has to be remembered that possession within the meaning of S 145, Criminal P. C., is actual physical possession and not notional possession. In that sense, Raghunath has not acquired possession. Suppose, the proceeding was initiated after the crop of 1947 had been delivered to Raghunath as a result of the attornment, it could be well said that he thereby acquires possession and that of Indramoni is disturbed. By mere attorning, these tenants cannot be held to have dispossessed their own landlord, namely, Indramoni. In the case of *Sarbananda Basu* v. *Pransankar Roy* 15 Cal. 527, a dispute arose as to the right to collect the

rents of certain land the ownership of which was claimed by both A and B, and the tenants who had been paying rent to A refused to pay rent to A and attorned to B. It was held that the conduct of the tenants in attorning to B was not an assertion of possession adverse to A such as to put an end to the relation of landlord and tenant between them and A and to A's right to collect rents. Such attornment therefore did not deprive A of his right to have recourse to S. 145 in case of a likelihood of a breach of the peace, so as to have his possession of the right to collect the rents maintained, pending proceedings in a civil suit. This case is not only on all fours with the present case but also the present case is rather stronger than the case reported, inasmuch as, the tenants in the present case have not refused to pay rent to Indramoni Dei though they might have been parties to some paper transactions by way of attorning to Raghunath. In this view of the matter, the learned Magistrate's order declaring possession to be with the first party is erroneous and must be set aside.

[5] Mr. B. N. Das, appearing for the first party, has pressed for remand. If there is the order of remand, it will be to enable the second party to adduce evidence but not to enable the first party to improve upon his case and adduce further evidence, he having closed it already. If the witnesses for the first party support possession of the second party, I do not find any utility in an order of remand which will amount to unnecessary protraction of the case. In the result, I declare possession with Indramoni Devi through the tenant-members of the first party. The said tenant-members must pay the produce of the lands due to Indramoni in her landlord's interest to her. In case they do default in paying, their conduct will amount to disobeying the order. Raghunath Bhanja, the principal member of the first party is hereby prohibited from interfering with the possession of Indramoni through the tenant members of the first party until he evicts her in due course of law. The crops that were seized must now be made over to Indramoni Devi. With regard to the case of other members of the second party who are impleaded along with Indramoni, I have nothing to say as they do not claim possession of the lands nor have they been represented before me.

[6] In the result, the petition is allowed and the rule is made absolute.

R.G.D. *Revision allowed.*

A. I. R. (37) 1950 Orissa 61 [C. N. 9.]

NARASIMHAM J.

Hari Behera v. Harikrishna Kantha.

Second Appeal No 288 of 1947, Decided on 4th August 1949, from decision of Dist. Judge of Ganjam-Puri, D/- 20th May 1947.

Tenancy laws — Orissa Tenancy Act (II [2] of 1913), S. 236 (as amended by Orissa Tenancy (Amendment) Act, X [10] of 1946) — "Homestead" — Meaning explained Ejectment suit under S 57 (b) — Defence under S. 236, as amended — Proof required of defendant, stated — Tenancy laws — Orissa Tenancy Act (II [2] of 1913), S 57 (b).

If a tenant claims the benefit of S. 236, as amended in 1946, he must first establish that the plot is his homestead and secondly that he ordinarily resides therein. The expression 'homestead' has not been defined either in the Amending Act X [10] of 1946 or in the parent Act and the ordinary dictionary meaning of that expression would prevail. The word 'homestead' means the place where the raiyat actually resides The expression 'homestead' would include not only the site on which the dwelling house stands but also that portion of the land which is ordinarily and reasonably necessary for the enjoyment of the house. It is not easy to lay down any rule about the extent of land that may be reasonably and ordinarily necessary for the enjoyment of a house. It will depend on various factors such as the size of the house, the status and means of its occupant and the place where it is situated [Para 3]

In a suit for ejectment, under S 57 (b), of an under-raiyat, a Sikmidar, from his alleged homestead, when a defence is taken under S. 236 as amended by Act X [10] of 1946, the under-raiyat should lead clear evidence to show that the whole or a specified portion of the plot was reasonably and ordinarily necessary for the enjoyment of the house which according to him is standing on the plot. He must further show that he ordinarily resides in that house. If the Court holds that a portion of the plot is used as homestead the Court should come to a finding about the actual extent so used and demarcate the same. [Paras 4 & 5]

S. N. Dasgupta for P. C. Chatterji — for Appellant.

G. Dhal for S. Misra — for Respondent.

Judgment.—The defendant is the appellant in this appeal. The plaintiff purchased occupancy holding No. 83 in which is included sikmi plot No. 868 measuring 39 decimals in extent, from the recorded raiyat by a sale-deed dated 9th April 1945. The defendant was recorded as a Sikimidar of the plot and the plaintiff's suit was for ejectment of the Sikimidar under S. 57 (b), Orissa Tenancy Act, after service of the usual notice to quit.

[2] The main defence taken by the defendant was that he was not liable to eviction because the disputed plot (868) was his homestead and that under the provisions of S. 236, Orissa Tenancy Act as recently amended by Orissa Act, X [10] of 1946 occupancy right had accrued to him in his homestead. The trial Court accepted this plea but the lower appellate Court held that the homestead of the appellant was limited to that portion of the disputed plot in which his dwelling house stood and that as regards the re-

maining portion of the plot the appellant had acquired no immunity from eviction by virtue of the amendment made to S. 236, Orissa Tenancy Act.

[3] It appears to me that neither the Courts nor the parties fully understood the implications of the amendment made to S. 236 by Orissa Act X [10] of 1946. That section (as amended) says that in respect of the homestead in which a tenant ordinarily reside his incidents of tenancy shall be the same as those of an occupancy raiyat. Therefore if a tenant claims the benefit of this section he must first establish that the plot is his homestead and secondly that he ordinarily resides therein. The expression 'homestead' has not been defined either in the amending Act or in the parent Act and the ordinary dictionary meaning of that expression would prevail. There are also some judicial decisions interpreting the same expression occurring in S. 182, Bengal Tenancy Act, and they afford a useful guide. I may refer to *Ramnath Banerjee* v. *Girish Chandra*, I. L. R. (1941) 1 Cal. 278 : (A. I. R (28) 1941 Cal. 515) where Mitter J. observed : "The word 'homestead' occurring in S. 182 means the place where the raiyat actually resides." To a similar effect are the observations in *Dina Nath* v. *Sashi Mohan*, 20 C. W. N. 550 : (A. I. R. (3) 1916 Cal. 730) :

> "We are further not prepared to accede to the contention of the appellants that the expression 'homestead' is used in S. 182 as a generic term descriptive of a particular kind of land; on the other hand, we think, it denotes land on which a raiyat has his homestead, that is, land used by him for residential purposes."

The primary meaning of the expression as given in the Oxford Dictionary is also the same. On behalf of the appellant, Mr. Dasgupta urged that homestead should include not only the site over which the residential house stands but also that portion of the land and appurtenances which are ordinarily and reasonably necessary for its enjoyment. He relied on *Babulal Tiwari* v. *Mulla Mallah*, A. I. R. (25) 1938 Pat. 13 : (172 I. C. 835) and some Calcutta decisions cited in that ruling. I do not think there can be any doubt about the proposition that a dwelling house would include not only the house but also the land and its appurtenances which are ordinarily and reasonably necessary for its enjoyment. The expression 'homestead' would, therefore, include not only the site on which the dwelling house stands but also that portion of the land which is ordinarily and reasonably necessary for the enjoyment of the house. It is not easy to lay down any rule about the extent of land that may be reasonably and ordinarily necessary for the enjoyment of a house. It will depend on various factors such as the size of the house, the status and means of its occupant and the place where it is situated. No decision can obviously be given in the absence of any evidence throwing light on these facts.

[4] In this case therefore the appellant should have led clear evidence to show that the whole or a specified portion of the plot was reasonably and ordinarily necessary for the enjoyment of the house which according to him is standing on the plot. He must further show that he ordinarily resides in that house. The necessity for this arises chiefly because there is some evidence on record to show that on the adjacent plot No. 869 which is 10 decimals in extent the appellant has a residential house which has been recorded in the settlement as his occupancy holding. It was argued on behalf of the respondent that the house in which the appellant ordinarily resides is in plot No. 869 and in support of this argument the learned advocate has relied on the admission of the appellant himself (D. W. 1) both in his examination-in-chief and in his cross-examination to the effect that his homestead lies contiguous to the land in dispute. Apparently both the Courts have overlooked this answer given by the appellant and have not given due weight to the same.

[5] In this case there is no finding by either Court nor is there any clear evidence to indicate the extent of the land that is homestead or else that the appellant was ordinarily residing in the house situate on the plot in dispute (868). It is therefore necessary that the appeal should be remanded for rehearing on the following two points:

> "(i) Whether the whole or portion of plot No. 869 would constitute 'homestead' within the meaning of S. 236, Orissa Tenancy Act. If the Court holds that only a portion of the plot is used as homestead the Court should come to a finding about the actual extent so used and demarcate the same.
>
> (ii) Whether the appellant ordinarily resides in that homestead."

[6] The order of the lower appellate Court is therefore set aside and he is directed to rehear the appeal himself after giving reasonable opportunity to both the parties to adduce further evidence on the aforesaid two points and then dispose of this appeal according to law. Costs would abide the result.

R.G.D. *Case remanded.*

A. I. R. (37) 1950 Orissa 62 *[C. N. 10.]*

RAY C. J. AND JAGANNADHA DAS J.

King-Emperor v. *Lachhu Kamara—Respondent.*

Government Appeal No. 2 of 1945, Decided on 13th September 1949, against order of Sub-divisional Magistrate, Koraput, D/-11th September 1945.

(a) Penal Code (1860), S. 224 — Apprehension must be lawful — Case under S. 447 — In first in-

stance summons should issue — Issue of warrant is not lawful apprehension —Resistance is not offence —Criminal P. C. (1898), S. 204.

Where a person was put on trial for having committed an offence under S. 224, Penal Code, on the allegations that he offered resistance to his lawful apprehension, in order to bring the charge home to the accused, it has to be established that the accused intentionally offered resistance to his lawful apprehension for the offence with which he was charged or he escaped from the custody in which he was lawfully detained. [Para 2]

The case under S. 447, Penal Code is one in which, according to S. 204, Criminal P. C., summons has to be issued for the accused's attendance. The Court shall be entitled to issue a warrant not in the first instance but only later, after the summonses are not complied with. [Paras 2 & 3]

Where the Magistrate issues warrant of arrest at the first instance for an offence under S. 447 after taking cognizance of the offence, instead of summons, apprehension of accused under such circumstances cannot be said to be lawful one within S. 224, Penal Code, and resistance to it will not be an offence. [Para 3]

Annotation : ('46-Man.) Penal Code, S. 224, N. 1; ('46-Com.) Cr. P. C., S. 204, N. 7.

(b) Penal Code (1860), S. 224 —Lawfully detained —Warrant of arrest returned unexecuted —No issue of fresh warrant— Second attempt to arrest — Accused taken into custody — Arrest is without any order of arrest—It is not custody in which accused could be held to be lawfully detained — To escape or attempt to escape from such custody is no offence. [Para 7]

Annotation : ('46-Man.) Penal Code, S. 224, N. 2.

(c) Penal Code (1860), S. 224 — "Intentionally"— Accused forcibly taken away from custody by others — Accused cannot be said to have "intentionally" escaped from custody. [Para 8]

Annotation : ('46-Man.) Penal Code, S. 224, N. 2.

Advocate-General—for Appellant.
J. Brahma—for Respondent.

Ray C. J.—The respondent (Lachhu Kamara) was put on trial for having committed an offence under S. 224, Penal Code, on the allegations that he offered resistance to his lawful apprehension for an offence under S. 447, Penal Code, with which he was then charged and that he escaped from the custody of Sri K. M. Chakrabarty, Officer-in-charge of Lamptaput Out Post, by whom he was lawfully detained for the said offence.

[2] He was acquitted of this charge by Sri K. K Samal, Sub-divisional Magistrate, Koraput. This appeal by the Government is directed against that order of acquittal. In order to bring the charge home to the accused, it has to be established that the accused intentionally offered resistance to his lawful apprehension for any offence with which he was charged or he escaped from the custody in which he was lawfully detained. It was to be examined whether these elements of the offence have been established in this case. To start with, there are no materials on record to guarantee a finding that his apprehension that was resisted was a lawful one. The case under S. 447 is one in which, according to S. 204, Criminal P. C., summons has to be issued for the accused's attendance. The material portion of the section reads:

> "*Section 204* (1). If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be one in which, according to Col. 4 of Sch. II, a summons should issue in the first instance, he shall issue his summons for the attendance of the accused . . . ."

[3] As I have said, according to Col. 4 of Sch. II, summons as distinguished from warrant of arrest has to be issued at the first instance. Assuming it was the first process issued after the Magistrate took cognizance of the offence, it would be beyond his competence. He shall be entitled to issue a warrant not in the first instance but only later after the summonses are not complied with. There is no material before us to say that this warrant was issued not at the first instance but later. We can say that the prosecution has failed to establish that his apprehension was lawful one within the meaning of S. 224.

[4] Next, we have to see whether he had escaped or attempted to escape from any custody in which he was lawfully detained for any such offence. The warrant, in execution whereof he was detained, has been printed in the Paper Book at pp. 8 and 9. It appears that the Sub-divisional Magistrate, Koraput, issued the warrant under his signature dated 30th March 1945, addressed to the Sub-Inspector of Police, Padwa, to effect arrest of Lachhu Kamara (the respondent) at Nandapur. According to the evidence before us, the Sub-Inspector of Police, Padwa, endorsed it to A. S I. (P. W. 1) within whose Out Post Nandapur is situate. He could not execute the warrant and returned it with the following report:

> "Sir, The warrantee concealed his presence somewhere, in order to avoid his arrest. Thus the warantee could not be arrested. I pray that warrant of arrest may kindly be issued to arrest the warrantee at where he will be found out. Sd. K. M. Chakrabarty, A. S. I., 17th April 1945."

[5] This report to the Sub Inspector was disposed of by the latter in the manner indicated from the following quotation:

> "Report submitted to the S. D. M., Koraput, on 20th April 1945 and 3rd May 1945. M. O. S. Sd Illegible."

[6] It follows that the first warrant issued by the Sub-divisional Magistrate was returned unexecuted and a more comprehensively worded order of arrest was solicited. The matter was placed before the Sub-divisional Magistrate by the Sub-Inspector of Police in pursuance of the report of the A. S I. After this, we should expect a fresh warrant of arrest to be issued by

the Sub-divisional Magistrate, but we find none. We, however, find the report of P. W. 1 (K. M. Chkrabarty) dated 22nd May 1945 in which he says:

> "Sir, I beg to report that to-day I arrested warrantee but the relatives of the warrantee took away the warrantee from police custody by assaulting the escort party. The S. Police will be requested to supply with Reserve party to arrest him"

[7] The second attempt to arrest, therefore, in course of which he was taken into custody, was without any order issued by the Sub-divisional Magistrate, and, therefore, it was not a custody in which he could be said to have been lawfully detained. To escape or to attempt to escape from such custody would not amount to an offence under S. 224.

[8] Besides, we have gone through the entire evidence on record and we do not find any material to hold that Lachhu Kamara had offered or had attempted to offer any resistance or illegal obstruction to the apprehension by the police. According to the evidence, he submitted to the police arrest and to their custody until he was forcibly snatched away in his handcuffed condition near to his house by the members of his family where the hand-cuffs were broken by smithy weapons. Thereafter, all the members of the family excepting himself, as the evidence stands, armed themselves with bows, arrows, tangias and ropes, threatened the police party away from the repetition of their effort to make an arrest. Lachhu Kamara did not join in this. If he was forcibly snatched away from the custody, it cannot be said he intentionally escaped from the custody. The key word, in S. 224 is 'intentionally.' We are satisfied both in the fact and law, that no case has been made out against the respondent. In the result, the appeal is dismissed.

Das J.—I agree.

R.G.D. *Appeal dismissed.*

A. I. R. (37) 1950 Orissa 64 *[C. N. 11.]*

JAGANNADHA DAS AND PANIGRAHI JJ.

Ranga Bewa—Plaintiff—Appellant v. *Raju Lenka and others—Defendants—Respondents.*

A. F. A. D No. 7 of 1946, Decided on 19th August 1949 from decision of Addl. Sub-Judge, Cuttack, D/- 11th September 1945.

(a) Limitation Act (1908), Art. 47—Applicability—Suit by co-sharer for possession of share in respect of which order under S. 145, Criminal P. C., was passed in his favour— Art. 47 does not apply — Where possession of both parties is confirmed, Art. 47 does not apply — It is only when party is held to be out of possession that Art. 47 applies.

A suit for possession by a successful party in a proceeding under S. 145, Criminal P. C., is not governed by Art 47. The article does not apply to a suit by a co-sharer for possession of his separate share or for partition of joint properties in respect of portion of which an order under S. 145, Criminal P. C., was passed in his favour. Where in a proceeding under S. 145, Criminal P. C., possession of both co-sharers is confirmed, Art. 47 has no application. Its applicability is restricted to cases where a party is held to be out of possession: 7 I. A. 73 (P. C.); 26 Bom. 146 and A.I.R. (14) 1927 Mad. 50, *Rel. on*; A. I. R. (17) 1930 Cal. 612; A. I. R. (24) 1937 All. 300 and 39 C. W. N. 853, *Considered.* [Para 7]

Annotation: ('42-Com.) Limitation Act, Art. 47, N. 5.

(b) Civil P. C. (1908), S. 100 — Case not set up in pleadings and not borne out by evidence or by written statement cannot be raised for first time in second appeal. [Para 8]

Annotation: ('44-Com.) Civil P. C., Ss. 100 and 101, N. 55

H. Mohapatra—for Appellant.
K. N. Das, H. Sen and S. P. Mohapatra — for Respondents.

Panigrahi J.—The facts giving rise to this appeal are rather complicated, but the question of law arising is extremely simple.

[2] The plaintiff's deceased husband, Danei, was the adopted son of Kelu. Kelu and Pira were uterine brothers. Subsequent to the adoption of plaintiff's husband a son, Kalindi, was born to Kelu, and as Kalindi died issueless when he was joint with Danei, Kelu's 8 annas share in the joint family properties devolved on him. Pira brother of Kelu, died leaving him surviving his widow, Sadhabani. The admitted case of the parties is that by a registered deed of partition, dated 15th June 1913, the plots in disputes were divided between Kelu and Pira. The present dispute relates to possession of the properties allotted at the partition. During his lifetime Kalindi (the natural born son of Kelu) executed a deed of gift dated 30th January 1917 in favour of Banambar son of Pira, conveying the 8 annas share of Kelu in the suit properties ignoring the interests of Danei. Banambar, however, predeceased his mother, Sadhabani. Thus, Sadhabani on the death of her son, Banambar, became entitled to the entire interest in the property, 8 annas interest having been inherited by her through Pira and the rest by the deed of gift from Kalindi to her deceased son. Sadhabani herself gifted away her entire interest in the property to her son-in-law, one Arta, by a registered deed of gift dated 21st November 1919. Arta, in his turn, executed a sale of the entire property in favour of defts. 1 to 2 by a registered sale deed dated 11th July 1923. Danei's son, Hazuri, asserted his title to 8 annas interest in the property and executed a sale deed, dated 26th June 1923, in favour of one Padan Panda.

[3] After a few preliminary skirmishes in the criminal Court, proceedings under S. 145, Criminal P. C., were started in the year 1923 to which the plaintiff, Ranga and the alienee, Padan, and plaintiff's tenant, one Domai were arrayed on

one side as the first party and the present defendants (viz., the vendees from Arta) and Sadhabani, the widow of Pira, were arrayed as the second party. The Magistrate found that the plaintiff was in possession of four rooms standing on plot No. 126. He also found that Sadhabani, the widow of Pira, was in possession of the rest of the disputed lands together with five rooms thereon. He further found that neither Arta nor the present defendants to this suit had had any possession over any portion of the lands or houses comprised in those proceedings. He accordingly ordered that

> "the persons as aforesaid shall so continue in their possession unless and until they are evicted therefrom in due course of law."

[4] The plots in dispute are: R. S. plot No. 122 measuring .08 of an acre; R. S. plot 124 measuring .05 of an acre with two shop rooms thereon; R.S. plot No. 125 measuring .01 of an acre with two rooms; and R. S. plot No. 126, measuring .04 of an acre with six rooms thereon. A slight increase in the area of most of these plots is noticed in the subsequent survey and the Current Settlement entries show that the R. S. plot numbers have also been altered. Thus R S. 122 corresponds to C.S. 212 and measures .09 of an acre; R.S. 124 corresponds to C. S. 211 and measures .08; and R. S. 126 corresponds to C. S 203 though its area has remained unchanged. According to the deed of partition plot No. 122 was divided equally between Kelu and Pira, each getting a half share; out of plot No. 124 Kelu got .02 and Pira got .03 with the two shop rooms thereon; plot No. 125 measuring .01 of an acre with two rooms thereon was allotted to Kelu alone. Thus plots Nos. 124 and 125 measuring together .06 of an acre and containing four rooms were equally divined so that each cosharer got .03 of an acre of land and two shop rooms. Plot No. 126 was evenly divided so that each party got 02 and three rooms. It appears that at the time of the proceedings under S. 145, Criminal P. C., the plaintiff was found in possession of all the four shop rooms, standing on plots 124 and 125 and of one room on plot No. 126. The plaintiff was thus in possession of five rooms though the possession was not in accordance with the allotment made at the partition. Sadhabani, the widow of Pira, was similarly in possession of five rooms on plot No. 126. The purchasers from Arta had no possession of any of these rooms or lands at the time.

[5] The Magistrate having declared the possession of the present plaintiff in respect of five rooms, the purchasers from Arta were obliged to file a civil suit for declaration of their title to and recovery of possession of the lands together with the rooms thereon, in O. S. No. 439 of 1924. In this suit the findings were that: (1) Danei Lenka had been adopted by Kelu; (2) he formed a joint undivided family with Kalindi and Hazuri; and (3) Pira and his son Banambar constituted a different joint family. The trial Court also held that Kalindi's alienation by way of gift was invalid and inoperative and that the gift by Sadhabani was not valid beyond her 8 annas interest in the property. He further held that the plaintiffs the purchasers from Arta never had possession of the suit properties and that their sale was valid to the extent of 8 annas share of Pira's and no more. Referring to the sale deed executed by Hazuri (plaintiff's predeceased son) the trial Court held that the sale in respect of the two rooms on plot No. 124 was invalid but that the sale could take effect in respect of 2 decimals of land on R. S. plot No. 124 and the entire R. S. plot No. 125 together with the shop rooms thereon. The title of the purchasers, viz., the plaintiffs in that suit, was accordingly declared to be valid in respect of Pira's share only, while their claim with regard to the remaining 8 annas share of the disputed property, namely the share allotted to Kelu was disallowed. In execution of this decree of the trial Court, the plaintiffs took possession of the rooms on plot No. 124 on 8-9-1931.

[6] The present suit was raised by Ranga Bewa, widow of Kelu, on 20-5 1939. She prayed for separate possession of the properties allotted to her husband under the deed of partition of 1913 or, in the alternative for division of the properties in equal moieties. The suit had a rather chequered career and had come up once before the High Court in S. A. 59 of 1941. Manohar Lall J. who heard the appeal, remanded the appeal for a fresh disposal in the light of certain observations made in his judgment with regard to the scope of the order under S. 145, Criminal P. C. I very much regret to note that those observations have not been properly appreciated by the learned Additional Subordinate Judge who heard the appeal after remand, and the very same mistake which necessitated the remand has been responsible for the judgment under appeal before us.

[7] The learned Additional Subordinate Judge directed the dismissal of the plaintiff's suit on the ground that the plaintiff having failed to file a suit within a period of three years from the date of the order under S. 145, Criminal P. C., as prescribed under Art. 47, Limitation Act, had lost her right to the property. In arriving at this conclusion the learned Additional Subordinate Judge committed errors of record, the most notable of which is that, according to him,

> ". . . the four rooms claimed and dealt in the S. 145 proceedings are the three rooms standing on old plots

124 and 125 and the one room standing on R. S. plot No. 126."

This is an entirely erroneous impression of what was in dispute in the S. 145 proceedings. The learned Subordinate Judge winds up his conclusion thus:

> "Even conceding that the entire land of Kelu Lenka's half share appertaining to the first group was found in possession of the plaintiffs at the time, S. 145 proceedings were started, the decision for the most part being adverse to the plaintiff, she was to establish her title within the period of three years prescribed therefor under Art. 47, Limitation Act."

As pointed out by me eariler the plaintiff's possession of five rooms viz., two standing on the plot No. 124, two on plot No. 125 and one on plot No. 126, was upheld. The effect of that order was that plaintiff was declared to be in possession of an excessive share to which she was not entitled. I therefore fail to see how the order could be construed to be against the plaintiff and why she should have filed a suit "to recover possession of property" as contemplated under Art. 47. Article 47, Limitation Act, in terms prescribes that

> "a suit to recover the property comprised in such order should be brought by a person bound by an order respecting the possession of immovable property made under the Code of Criminal Procedure."

The plaintiff was under no obligation and did not need to recover any property as she was already in possession of more than her legitimate share. The defendants were therefore rightly driven to file a suit for recovery of possession and Art. 47 has no bearing on this matter, the plaintiff's suit being one for an equal division by metes and bounds between herself and Sadhabani's representatives-in-interest. See *Bhimappa v. Irappa*, 26 Bom. 146 : (3 Bom. L. R. 594). Article 47 is restricted to those cases where the party is held to be out of possession in a proceeding under S. 145, Criminal P. C., and cannot apply to a case like the present where the possession of two co-sharers is confirmed by the Magistrate. There is no necessity, arising out of the order under S. 145, Criminal P. C., either for the plaintiff or for Sadhabani to bring a suit for a declaration as to which of the two was entitled to a separate right of possession. For a similar case see *Pratapa Simha v. Simji Raja Saheb*, 51 M. L. J. 652 : (A. I. R. (14) 1927 Mad. 50), where it was held that Art. 47, Limitation Act, is inapplicable to such a suit by either of the two. The Bombay High Court has also consistently held that a suit for partition is not a suit for recovery of possession within the meaning of Art. 47 and that an order under S. 145, Criminal P. C., against one of the co-sharers does not necessitate the filing of a suit within three years. A different note has been struck in *Afale Sunnari v. Talib Husain*, A. I. R. (17) 1930 Cal. 612 : (128 I. C. 106) and *Jai Devi v. Dakshini Din*, A. I. R. (24) 1937 ALL. 300 : (169 I. C. 125). A later Calcutta case reported in *Jogesh Chandra v. Suresh Chandra*, 39 C.W.N. 853, lays down that Art. 47 does not contemplate that the title of a co-sharer should be deemed to be extinguished by reason of his failure to bring a suit within three years, for what that article bars is a claim to exclusive possession. But these cases are clearly distinguishable as the plaintiff before us was found to have been in possession of a larger share of properties than what had been allotted to Pira's share. A suit by the successful party to recover possession is not governed by this Article. See *Wise v. Amir un-nissa*, 7 I. A. 73 : (6 C. L. R. 249 P. C.). There is also evidence to show that the allotments made in the partition deed were not strictly adhered to. But whatever that be the plaintiff was admittedly in possession of the shop rooms on R. S. plot No. 124 although they had been allotted to Pira and Sadhabani was in possession of two out of the three rooms allotted to Kelu on R. S. plot No. 126 at the time of the S. 145 proceedings. The learned Munsif who tried the title suit filed by the defendants was unable to decide whether the tenants of the present plaintiff were in possession of any of the properties purchased by the defendants in the present suit. We are, therefore, satisfied that the plaintiff's possession was upheld by the Magistrate and she was not under any necessity to file a suit to recover possession.

[8] Another contention that was raised is that the defendants have acquired title by adverse possession and that the plaintiff should, therefore, be non-suited. It is difficult to appreciate this contention in view of the categorical finding of the learned Munsif who tried the title suit filed by the present defendants, that they had no possession at any time prior to the suit. It is also evident that the present defendants took delivery of possession of Pira's share only, in execution of the decree in that suit viz. in 1931. So far as the defendants are concerned they have never asserted any hostile title nor have they been at any time in possession prior to 1931. They do not claim to have got into possession prior to that date through Sadhabani. In fact such a case was never set up in the pleadings. Sadhabani is not a party to the suit and we are unable to hold what her defence would have been. She could, if at all, claim possession of two rooms on R. S. plot No. 126 on the strength of the order under S. 145, Criminal P. C. It would have been open to the plaintiff as well to plead and prove that subsequent to the order, and within three years, she got possession of her share in R. S. plot No. 126. In the absence of Sadhabani it is

not open to the defendants to raise any such plea, nor shall we be justified in entertaining the plea which is not borne out either by the evidence or by the written statement of the defendants.

[9] The judgments of the lower Courts should accordingly be set aside and this appeal allowed with costs throughout. The plaintiff shall be entitled to an equal share of the excess land discovered at the Current Settlement in R. S. plots 124 and 122. She will also recover possession of the entire plot No. 125 with the two rooms standing thereon, .03 1/5 of bari in plot No. 124 corresponding to C. S. plot No. 211 and .04½ of an acre from the east in R. S. plot No. 122 corresponding to C. S. plot No. 212, .02 of an acre in R. S. plot No. 126 corresponding to C. S. plot No. 203 with the three rooms thereon, and an equal moiety in C. S. plots 574 and 207 from the east. The plaintiff shall give up in favour of the defendants the rest of the properties in the partition deed which may be in her possession, if any.

[10] **Das J.** — I agree with my learned brother that the judgments of the Courts below should be set aside and the appeal allowed with costs throughout.

[11] My learned brother has dealt with the question relating to the bar of the suit by limitation under Art. 47, Limitation Act on the footing that the plaintiff's rights as co-sharers have not been extinguished by virtue of the order under S. 145, Criminal P. C., inasmuch as, her possession was affirmed in respect of items of property which exceeded her half share. There is justification for the view on the facts that the parties are to be dealt with as co-sharers since as my learned brother points the partition and separate allotment between Kelu and Pira were not in fact adheared to in the subsequent enjoyment.

[12] I would, however, rest the decision on the fact that the order under S. 145 is not in favour of the defendants in this case, while no doubt, the said order recognises the possession of Sadhabani in respect of some of the disputed items and to that extent may be against the plaintiff, in any action between plaintiff and Sadhabani, the present defendants can take no advantage of it because they neither derived any possession from her nor validly derived any title through her in respect of Kelu's half share. See *Pakki Adinarayana* v. *N. Suramma*, A.I.R. (12) 1925 Mad. 799 : (86 I. C. 744). On the other hand, the order under S. 145 shows that the present defendants were not in possession of any of the items of property inasmuch as it states as follows:

> "In spite of the deed of gift in favour of Artatran Nayak or any sale deed executed in favour of Raghu Lenka and Biswanath I do not find any evidence in support of the fact that either Arta or any of the vendees from him had had ever any possession over any portion of the lands or house under these proceedings."

[13] In this view I do not consider it necessary to express any opinion on the conflicting views in *Bhimappa* v. *Irappa*, 26 Bom. 146 : (3 Bom. L. R. 594) and *Atale Sunnari* v. *Talib Hussain*, A. I. R. (17) 1930 Cal. 612 : (128 I. C. 106), noticed by my learned brother in his judgment.

R.G.D. *Appeal allowed.*

A. I. R. (37) 1950 Orissa 67 *[C. N. 12.]*

SPECIAL BENCH

RAY C. J., DAS AND NARASIMHAM JJ.

Saradhakar Naik and others — Petitioners
v. *The King*.

Criminal Misc. Case Nos. 2, 3, 4 and 5 of 1948, D/- 9-9-1948.

Public Safety — Orissa Maintenance of Public Order Act (IV [4] of 1948), S. 1 — Act was validly extended to Orissa States which have by agreement of 15th and 30th December 1947 transferred their administrative control to Dominion of India—Delegation of control by Dominion Government to Orissa Government, by virtue of Extra-Provincial Jurisdiction Act (1947) is valid—Act of 1947 is not ultra vires—Extra-Provincial Jurisdiction Act (1947), S. 3 — International law—Extra-territorial legislation.

By Instruments of Accession executed by Orissa States on 16th August 1947, the Orissa States gave the Dominion Legislature power to make laws on defence, external affairs and ancillary matters, regarding the States. By subsequent agreements of 15th and 30th December 1947, the Rulers ceded to the Dominion Government full and exclusive authority and jurisdiction by transferring administration of the States (which included legislative powers) for the governance of the States. [Paras 17, 23, 25 and 26]

[Per *Ray C. J.* — Validity of Instruments of Accession and subsequent agreements, being acts of two Sovereign States cannot be questioned in municipal Courts — Conception of Sovereign State, Government and legislation discussed.] [Paras 17, 19, 20, 21 & 44]

The powers thus transferred to the Dominion Government were validly delegated to the Government of Orissa by virtue of the Extra Provincial Jurisdiction Act, 1947. The Act is not ultra vires. The Executive authority of a Sovereign State can exercise extra-territorial powers over a foreign territory and can promulgate laws in that behalf, subject only to limitations of International law.

Notification of Government of India delegating its authority to Orissa Government and Orissa Government's Administration of Orissa States Order, 1948, are intra vires.

Consequently, extension by the Orissa Government of the Orissa Maintenance of Public Order Act, 1948, which was originally applicable only to Province of Orissa, to all Orissa States, including Bamra and Kalahandi States, is intra vires : *Case law and Texts reviewed.* [Paras 59, 60]

P. R. Das and P. Misra—for Petitioners.

Advocate General, G. C. Das and B. Mahapatra — for Opposite Party.

Ray C. J.—The four cases, mentioned above, arising out of as many petitions, were some of the pending cases in respect of which the jurisdiction of the Patna High Court ceased from the 26th July, under Orissa High Court Constitution Order. They have since been transferred to this Court, and heard analogously, as the points for decision are common to all and will be governed by this order.

[2] Criminal Misc. 2/48 has been filed by one Saradhakar Naik of Bamra State, seeking interference of this Court, in the matter of illegal arrest and detention of one Jaydev Thakur of Bamra State and to order him to be set at liberty.

[3] Similarly, Cr Misc. Nos. 3, 4 and 5 of 1948 arise out of petitions filed, respectively, by Jayadev Naik of Bamra, Rusi Naik and Pravakar Das of Kalahandi, in relation to the arrests and detentions of Ratnakar Patra of Bamra, Nilakanth Patnaik and Lingaraj Das of Kalahandi. In all the petitions, the legality of arrests and detentions of the prisoners has been challenged on identical grounds, viz., that the States concerned were sovereign States under the suzerainty of British Government, as their territories were never ceded to nor included within the dominion of His Majesty, the King of England, that the British suzerainty lapsed on 15th August 1947, that by an Instrument of Accession, dated 16th August 1947, the States acceded to the Dominion of India on terms, *inter alia*, that the Dominion Legislature might make laws, for the acceding States, in respect only of (i) defence, (ii) external affairs, (iii) communication, and (iv) other ancillary matters, as set out in the Schedule of 'the Instrument' executed in that behalf; that except for the accession and subject to the terms thereof, the States retained their (internal) sovereignty and territorial integrity; that the subsequent agreement of 15th December 1947, was not binding being inchoate and incomplete on account of omission of a vital term relating to consideration not having been settled nor incorporated in it (this contention was not pressed at the hearing); that inspite of that agreement, neither the sovereignty, nor the territorial integrity of the States were at all affected; that in any view, the Rulers of the States had no powers to cede (not pressed at hearing) nor in fact did they cede the legislative power to the Indian Dominion, and that, under the circumstances, the notification of the Orissa Government extending the Orissa Maintenance of Public Order Act, 1948, to the said States was ultra vires and, the arrest and detention of the prisoners were illegal, and without jurisdiction.

[4] On notice of the aforesaid petitions being given to the Orissa Government, the latter got an affidavit filed, impugning *inter alia*, the correctness of the allegations that they had been detained under the Orissa Maintenance of Public Order Act, it was, however, disclosed therein that the petitioners were being prosecuted some under S. 6 and some under S. 11 of the Act, for having committed particular offences under the sections, and that the petitions under S. 491, Criminal P. C. did not lie. Thereupon, at the request of the petitioners' counsel, the petitions were allowed to be amended by insertions of prayers for quashing the prosecutions on the self-same grounds.

[5] They have ultimately been heard by this Court, as petitions for quashing the proceedings of pending prosecutions under S. 6 or 11, Orissa Maintenance of Public Order Act. Mr. P. R. Das, the petitioners' counsel, challenges the validity of the prosecution on slightly different grounds that will appear from the following synopsis of his arguments :

[6] I. The States of Bamra and Kalahandi were soverign States and the territories belonged to the respective Rulers. Ref: Aitchinson's Treaties and Engagements, Edn. 5, Vol. I, pp. 368 and 369. Stress is laid upon the words "your territories" in the 'Sanands' referred to.

[7] Reference is also made, in this connection to the Orissa District Gazetteers pp. 120 and 196 relating respectivly, to Bamra and Kalahandi; he also referred to the renewed 'Sanands' of the year 1905, reproduced at pp. 412 and 413 of Aitchinson's Treaties and Engagements, in which the same words "your territories" occur.

[8] In this connection reliance has also been placed on the Instrument of Accession, paras. 1 and 8, and the White Paper, paras. 8, 21, 24, 25, 27 and 54 referring to the said and similar States as sovereign States.

[9] II. As they fell outside the British Dominion, and weilded internal sovereignty neither the British Indian laws nor those enacted by British Parliament, extended to them (territories of Indian States)—References :

(a) Bulter Committee's Report of the year 1927, p. 10, para. 11, stating that one feature, common to all the Indian States, is that they are not governed by the British Indian law p. 14 paras. 19 to 21; and that by virtue of the paramountcy of the British Government, intervention in the Rulers' administration was in the interest of States, and people, ibid, p. 22, para. 37.

(b) Lee-Warner's book on Native States of India, p. 404 passages:

> The Imperial Courts of Appeal give no countenance to the theory that no 'sovereignty' is left to the Native

States. In the case of *Muhammad Yusuf-ud din* v. *Queen-Empress*, 24 I. A. 137 at p. 145 : (25 Cal. 20 P. C), the Lord Chancellor on behalf of the Privy Council pointed out that the sovereignty derived from the Nizam on a particular line of railway did not justify the arrest complained of. 'The authority, therefore, to execute any criminal process must be derived in some way or another from the sovereign of that territory.' He continued, 'as the stream can rise no higher than its source, the Notification of the Government of India can only give authority to the extent to which the sovereign of the territory, the Nizam, has permitted the British Government to make that Notification.' And most significant was the Report of the Privy Council in 1902 in the *Matabeleland case*. 'The situation is one very familiar to Indian lawyers and administrators. For in India Company during its rule, and afterwards the Crown, has acquired large powers of administration...And yet, unless there has been cession of territory, the least independent of such states is for some important purposes a foreign State, its subjects are not British subjects, the laws passed by the Indian Legislature do not affect them, and it is subject to such rules as have been duly made in accordance with the jurisdiction acquired over it.'

(c) Judicial decisions : *Hemchand Devchand* v. *Azam Sakarlal*, (1906) A. C. 212 at pp. 233, 236; *Statham* v. *Statham*, 1912 P. 92 : (81 L. J. P. 33); *Duff Development Co., Ltd.* v. *Govt. of Kelanton*, 1924 A. C. 797 : (93 L. J. Ch. 343); *The Empress* v. *Keshub*, 8 Cal. 987 : (11 C. L. R. 241 F. B.) and *Bichitranund Dass* v. *Bhugbut Perai*, 16 Cal. 667.

[10] III. Modern events have not appreciably affected the internal sovereignty nor the territorial integrity of the Rulers and the States :

(i) According to S. 7, Indian Independence Act 1947, the suzerainty of His Majesty over the States lapsed, but was not acquired by the Indian Dominion, and as a result, the Rulers regained full sovereignty internal and external.

(ii) The next event of accession to the Dominion, by Instrument of Accession dated 16th August 1947, with signification of assent of Governor-General of India, however, gave the Dominion Government jurisdiction of external sovereignty with powers to the Dominion Legislature to make laws on subjects mentioned in the schedule of the Instrument, namely, defence, external affairs, communication and ancillary matters. Whatever may be the legal efficacy of accession, either to limit, or at the most to extinguish their external sovereignty it did not purport to touch even the fringe of their internal sovereignty and territorial intergrity.

(iii) Accession was followed by 'supplementary instrument' dated 14th December 1947. The latter and the former (instruments) are but component parts of one whole and when conjointly read and interpreted, the net result that evolves is by far the less than cession of territory and surrender of legislative powers. In short, the territories and the power to make laws for them remained vested in the Rulers, the aforesaid two instruments notwithstanding

[11] IV. Limitations of the Dominion Legislature: The Indian Independence Act, 1947, ss. 1, 6 and 8, limits the law-making power of the Legislature to territoriality, the submission being that the grant of legislative powers contained in the Act was limited to the territories of the Indian Dominion and not beyond. The words "full powers" in S. 6 will not extend the powers beyond the limits of the grant. It implies full powers within the limit. In support of this contention, reliance is placed upon *Bejoy Singh* v. *Surendra Narayan*, A. I. R. (15) 1928 P. C. 234 : 56 Cal. 1.

[12] Like wise "extra territorial operation" of the laws made by the Dominion Legislature will not extend them to foreign territories, such as those of Indian States, except so far as the personal jurisdiction over the subjects of the Indian Dominion resident in the States may take them. Vide : *Macleod* v. *Attorney-General for New South Wales*, 1891 A. C. 455 at p. 457 : (60 L. J. P. C. 55).

[13] This argument as to extra-territoriality of Dominion legislation is sought to be illustrated by reference to Lee Warner's Book on Native States of India at pp. 354-355.

[14] V. The impugned "Extra-Provincial Jurisdiction Act" like British Foreign Jurisdiction Act in its operation is limited to personal (as distinct from territorial) jurisdiction over those who owe allegiance to the sovereignty of the Indian Dominion and to its Legislature which latter (sovereignty of Legislature) cannot be extended over any foreign territory except so far as they are ceded and subject always to the terms of cession.—Reliance is placed upon Hall X, International Law, Edn. 8, p. 27; Oppenheim Edn. 6, 165 to 168 (foot-note).

[15] VI. This leads to construction of the agreement of 15/30th December 1947 which (according to him) is a supplement to the Instrument of Accession and shall be read and interpreted along with it. Such interpretation neither supports cession of territory nor of legislative power. They only result in cession of certain powers of administration short of above.

[16] VII. In this view of this matter extension of Orissa Maintenance of Public Order Act by the Government of Orissa, deriving its authority from Indian Dominion under the Extra-Provincial Jurisdiction Act, is *ultra vires* and the proceedings set on foot for prosecution of the petitioners are void and hence liable to be quashed and the petitioners are entitled to be set at liberty.

[17] If anything is undisputed, amongst the manifold contentions at the Bar from the side

of the petitioners, it is this, that if on fair construction of the agreements, made on the 15/30th day of December 1947, between the Governor-General of India and the Rulers of the States, in question, it is found that either 'cession of territory' or cession of such rights and attributes of sovereignty as include 'the power of legislation,' has taken place, the petitioners have no case. In my judgment this concession has been very candidly and rightly made. In doing so, the learned counsel has withdrawn all objections directed against the validity of the agreement such as absence of consideration and absence of power of cession of the rulers concerned. In this connection, it has to be noted that it is always open to two sovereign States to enter into any arrangement amounting to either cession or accession of their territories or sovereignties, both external and internal. It is not disputed that the Instrument of Accession executed by the rulers and accepted by the Governor-General of India amounts to surrender of external sovereignty of State by virtue of which certain federal authorities specified in that behalf, in the instrument, have been assigned functional jurisdiction, legislative, executive, administrative and the like whichever is necessary to give effect to the real objective of the accession. The instrument in para. 8 leaves unaffected the continuance of the rulers' sovereignty in and over the States and save as provided by or under the instrument, the exercise of any power, authority and rights enjoyed by the rulers at the time of its execution. It also, according to the text of the same paragraph, retains the validity of any law then in force in the State.

[18] While conceding that his entire case stands or falls on the construction of the agreements of the 15/30th December (hereinafter mentioned in this order as "the agreement"), he urges that it shall be considered as a supplement to the Instrument of Accession (hereinafter referred to as "the instrument") and both the agreement and the instrument shall be read and construed as component parts of one whole. Of course, Mr. Das has not devoted much attention to this part of his argument in order to point out how the advocated method of construction would enure to his benefit. One thing, however, he wanted to impress in this connection, namely, that cession and accession are of widely different import, and one is inconsistent with another. If the agreement is taken as a supplement to the instrument, para. 8 of the latter, already referred to, would be taken as the key to the construction of the agreement and, if so construed, some residue of sovereignty would still continue in the ruler, and such limited and narrow a construction would be put upon the words, such as, 'full and exclusive power in relation to governance of administration,' so as to bring them into conformity with the import of the aforesaid paragraph. This rule of construction, as advocated by Mr. Das may or may not be correct. The terms contained in para. 8 were embodied in the instrument, in consideration of what had been acceded at the time. The consideration laid down there may be completely out of place, if it is agreed between two sovereign States that the continuance of sovereignty in the ruler should henceforth cease. There may be some difficulty in the way of the prosecution, in view of the provision of the Government of India Act, 1935 relating to accession of Indian States. I shall not, however, devote more attention to this aspect as, in my view the agreement is not a supplement to the instrument. On reading S. 6, Government of India Act, 1935 (hereinafter referred to as "the Act") the impression is deep in me that in any arrangement amounting to accession, discontinuance of sovereignty in the ruler of the acceding States and of the institution of the State, as such, under him are out of place. In the case of such arrangement, the ruler undertakes to allow the dominion functionarises to exercise their executive authority in giving effect to the laws issued by the Dominion Government in that behalf. There is no trace of such a conception in 'the agreement.' Mr. Das in his able argument could not point out to us what, if any, executive power is reserved or retained by the ruler in order to carry out his functions, if any, except that he wanted to contend that the power of legislation was still in him. I shall come to this later. Besides, there are other objections, as valid as they could be against treating 'the agreement' as a supplement to the instrument.' The instrument is executed by the ruler on which the Governor-General endorses his acceptance. The instrument, until accepted, amounts to an offer of accession in pursuance of the provisions of the Act. It becomes effective in the Dominion only after it is accepted by the Governor-General. The respective forms of offer and acceptance are:

> (i) I hereby declare that I execute this instrument on behalf of this State and that any reference in this instrument to me or to the ruler of the State is to be construed as including a reference to my heirs and successors. Given in my hand this day
>
> Sd.
>
> (ii) I do hereby accept this instrument of Accession dated of
>
> Sd. Governor-General of India ;

While the agreement, under consideration, is bilateral in the sense that it is executed by or on behalf of both the Governor-General and the ruler, "the agreement" opens with "agreement made this 15/30th December 1947 between the Governor-General of India and so and so, the ruler of . . . ."

It is clear, therefore, that both in form and substance the two are as distinct, form each other, as they can be. Besides, from the form adopted for the agreement, it is clear that the parties did not intend it to be acted upon as a supplementary instrument of association. Had that been the intendment, nothing should have prevented them from adopting the form of and expressing it as an 'instrument,' particularly because, much wider powers in relation to internal territorial sovereignty can as well be acceded to by the rulers to the Dominion Government. *Prima facie*, therefore, the intention of the parties was not to allow the acceding States to continue as such. I shall not be understood, however, to say that the above inference as to the intention of the parties shall outweigh the import of the express terms of the agreement. In construing the agreement in order to ascertain what has been agreed upon, full play shall be allowed to the plain grammatical meaning of the language subject to such technical meaning as have gathered round technical terms used therein.

[19] It is, however, to be remembered in dealing with the matter of construction of documents like the agreement, that it represents a transaction between two sovereign States and they are to be considered on the footing of their being acts of State. Neither the validity nor the legality should be made subject of consideration, by Municipal law, in Municipal Courts. Of course if they create any right or liability they can always be subject of treatment before a Municipal Court.

[20] I shall now address myself to the construction of the agreement, to determine whether it amounts to cession of territory or at any rate, cession of legislative power. As the document contains certain expressions which must be taken to have acquired technical meaning, I shall have to address a few words as to the juristic conception behind a 'State' more particularly 'sovereign State.' In this I have the authority of Salmond on Jurisprudence. Conception of State begins with conception of union of individuals known as society with a special end in view and functioning and implying a permanent and definite organisation—a determinate and systematic form, structure and operation. Union of individuals first begins in its natural state when there is no system, no organisation, no form of fixed and determinate nature, but there is always a conception of common bondage that binds them all in order to achieve the common end of either repelling an external enemy, or achieving domestic good and punishing evil-doers of the society. The next stage is its transition from natural to political society which implies some sort of permanent organisation set up in order to ensure their combined operations in pursuit of their common end, in a systematic and definite manner. Such an organisation of the society may be a creature of agreement or custom or forcible imposition or otherwise. Then it becomes either a State or body politic. The most essential characteristic of this organisation is the coming into existence of an 'organ', fundamentally necessary for the purpose of these functions, which constitute "political Government." This "organ" takes various forms and needs various conditions. Uptill the middle ages, the usual form of such 'an organ' was either a monarch or a sovereign or a ruler' in whom vested the right to exercise the functions which constitute 'political Government-, " Historically the most important operations of Government" have been two, namely, war and the administration of justice, and the end of political society has been defence against external enemies, and the maintenance of peaceable and orderly relations within the community itself. It is easy to show, by a long succession of authorities, that these two have always been recognised as the most important duties of the Government." Thus, we can hardly imagine a State that abandons the administration of justice. The secondary functions of the State may be divided into two classes. The first consists of those which serve to secure the efficient fulfilment of the primary function or functions and the chief of these are two in number, namely, legislation and taxation. Legislation is formulation of the principles in accordance with which the State intends to fulfil its function of administering justice. Taxation is the instrument by which the State obtains that revenue which is the essential condition of all its activities. Thus while still maintaining order and justice between individuals, and while still in most cases organising itself for defensive and, it may be, offensive wars, the State has come to organise constructively for the well-being of its members. We have moved away from the 19th century idea of the police state, negative and repressive, to a new conception of the social-service state. It is the carrying out of these functions of the State by, 'the organ' appointed for the purpose, that is known as 'governance' of a territory as a State. The Government of a territory necessarily implies political or civil power without which no Government can acquire or possess the ability of effectively exercising any functions in any department of governmental action. The civil power, as distinguished from the political power, has three components distinctly known as legislative, judicial and executive. Accordingly, the

Government is divisible into three great departments, namely, legislature, judicature and the executive. The executive is simply a residue of the Government after deducting the legislature and the judicature. It is this residue which, under the constitution of the United Kingdom, is known as a "prepogatice", a part of which still belongs to the King and a part is occupied by sovereignty of Parliament. This civil power is both sovereign and subordinate. Sovereign civil power is that which is absolute and uncontrolled within its own sphere. Subordinate power, on the other hand, is that which, even in its own sphere of operation, is in some degree subject to external control, that is, there exists some other constitutional power which is superior to it and which can prevent, restrict or direct its exercise or annul its operation.

[21] Legislation is used in a wide sense to include all methods of law-making. To legislate is to make new law in any fashion. Any act done with the effect of adding to or altering the law is, in this wider sense, an act of legislative authority. As so used, legislation includes all the sources of law and not merely one of them.

[22] With this background of the fundamental conception of State Government and legislation, let us examine what the agreement purports to convey. The agreement begins with a preamble which must be prayed in aid whenever the text or the operative part of the document presents any difficulty of construction. According to the preamble, the object of cession, as incorporated in the agreement, is to integrate the State administration with that of the Province of Orissa as far as possible, which means that the organ that carries the governmental functions of the Province of Orissa would carry the same or similar functions in the State. Article 1 of the agreement is the vital part. According to this article the Ruler cedes to the Dominion Government full and exclusive authority, jurisdiction and powers for and in relation to the governance of State and agrees to transfer the administration of the State to it on the 1st day of January 1948. The Dominion Government is empowered, in order to exercise the powers, authority and jurisdiction to adopt such measures and employ such agencies as it may think fit. In short, full powers of Government and administration to that end are yielded up by the Ruler to the Dominion Government. Without anything more, it will include the power of legislation which may be by making of laws by a legislative body or by any other means. Coming to the rest of the document, it does not provide for either expressly or impliedly, any reservation of any sort of function or power to the Ruler in relation to the Government of the territory. I have shown how legislative power, like judicial and executive powers, is inseparable from the act of governance the object of which is to maintain peace and orderly relation and effectuate social service within the bounds of a territory. As against the unlimited and unqualified surrender of the governmental powers of the Ruler in favour of the Dominion Government some sort of reservation is necessary in order to hold that the Ruler still retains such of the attributes of sovereignty as can entitle him to exercise either legislative or judicial or executive functions of any character whatsoever. In the field of constitutional law absence of such reservation attracts great significance. Its significance is all the greater in a case, as in the instant case, where reservations of private rights and properties as means of maintenance as well as of personal honours, titles and privileges of the Ruler and his relations, specified in that behalf, have been freely and expressly made. The proposition, as advanced by Mr. Das, that where the words of grant are clear, unequivocal and express nothing beyond the corpus of the grant is inferable from mere absence of any reservation, by way of limitation of the grant, is perfectly sound, but it is equally sound that the corpus of the grant so far as it has been clearly and unequivocally expressed, should not be abridged or curtailed only inferentially without any reservation in that behalf. In the case of *Sammut* v. *Strickland*, 1938 A. C. 678 at p. 704 et. seq: (107 L. J P. C. 105) per Lord Maugham L. C., the following propositions were laid down as well established in constitutional law:

> "The true proposition is that, as a general rule, such a grant (of legislative institution) without the reservation of a power of concurrent legislation precludes the exercise of the prerogative while the legislative institutions continue to exist. Nor is it in doubt that a power of revoking the grant must be reserved or it will not exist."

Applying these principles to the present case it can be safely laid down, in the absence of power of revocation and of reservation of any power of concurrent authority, either to legislate or to exercise any other function appurtenant to the sovereignty of the Ruler, that the latter has completely divested himself of all powers of governing the country which must include his power of legislation that he certainly had on the eve of the agreement. It is further clear from the principle, authoritatively laid down as above that so long as the Dominion Government, to whom the powers necessary to govern, essentially involving the power of administration and legislation are ceded, exists, the Ruler shall have no power of legislation. The above proposition of Lord Maugham L. C. in its application to the grant of His Majesty in that case was subjected to the qualification that in case the institution entrusted with the power of legislation be *lawfully* revoked, the King's prerogative to legislate may revive, but not till then. In the agreement, the right of succession to the Gadi has been expressly reserved. If this reservation has any meaning, it is this, that in case the Dominion Government ceases to exist, for some reason or other, the Ruler may, if not otherwise prevented, regain the powers. This, however, holds good only if the Ruler, as such, can claim any prerogative like that of His Majesty, the King of England.

[23] It has been rightly conceded that the power of legislation must be taken to have been granted within the terms of the agreement, if the agreement effectuates not only cession of powers of Government but also of the territory which will be the subject of my next consideration. But I am quite clear, that independently of grant of territories, grant of legislative, judicial and executive powers, the necessary ingredients of the power to govern a State, has been made by the agreement. It follows, therefore, that the Dominion Government has acquired the power of legislation over the States of Bamra and Kalahandi.

[24] Besides the legal and constitutional standpoint, let us approach the question from a practical standpoint. In course of argument, I asked Mr. P. R. Das to tell me with whom, after the agreement, did the power of legislation lie? His reply was that it lay with the Ruler and he wanted me to accept that the Ruler could be induced to make such laws as the Dominion Government or, the agency employed by it would require for the purpose of governing the country. Bearing in mind that there is no supreme power which can control both the Dominion Government and the Ruler in exercise of their respective functions of administration and legislation, as the case may be, it would be absurd to think that such an arrangement would be thought of as one to carry out the object in view, namely, intergration of the State administration with that of the Province of Orissa. That would amount to placing the Ruler in a position from where he can bring the entire administration to a standstill. It seems very unlikely that it should have been intended, by the parties to the agreement, to institute a complex system of diarchy, by separating the powers of legislation from the administrative machinery, and confiding the two functions to two agencies completely independent of each other and without anything common to bind them together, as to bring about harmony and co-ordination, in their respective activities, from which could evolve a Government ensuring peace, order and good government to the society. It is needless to say that such an administrative agency would be left in enjoyment of but truncated and mutilated powers as the only means to provide for adequacy of administration. In such circumstances, it would be difficult, nay, impossible to hold that there was not parting of the power of legislation in favour of the Dominion Government by "the agreement."

[25] If anything is certain as to the construction of the "agreement," it is this that the administration of the State has been irrevocably transferred. What does "administration" mean and include, is obviously the problem for solution. Holland in his Jurisprudence reproduces the various definitions of "administration" viz., (i) 'exercise of political powers within the limits of the constitution,' (ii) 'the total concrete and manifoldly changing activity of the State in particular cases' and (iii) 'the functions or the activity of the sovereign power.' With regard to the topics which included under the very wide conception of "administration" Holland says:

> "It may fairly be said to include the making and promulgation of laws; the action of the Government in guiding the State in its foreign relations, the administration of justice, the management of the property and business transactions of the State; and the working in detail, by means of subordinates entrusted with a certain amount of discretion, of the complex machinery by which the State provides at once for its own existence and for the general welfare."

[26] In view of this pre-eminently correct and precise import of 'administration' which is transferred to the Dominion Government, there is no room for the assertion that 'power of legislation' has not been transferred.

[27] The next question that has been very much mooted at the Bar is whether the territories of the concerned States have at all been ceded. A little while after, I shall be able to establish conclusively that cession of territory is not essential to complete cession of jurisdiction of that (territory) must be taken to have been ceded. I lay down this simple proposition that if cession of territory be essential for exercise of the power, authority and jurisdiction yielded up by the agreement to hold that territory has not been ceded would be repugnant to the grant. Mr. P. R. Das relied upon *Bejoy Singh* v. *Surendra Narayan*, 56 Cal. 1: (A. I. R. (15) 1928 P. C. 234) and urged that without express grant of territory cession of all powers of governance and administration would not tantamount to cession of territory. But a different rule of construction should apply to treaties or agreements, between two sovereign States, having for their object cession of jurisdiction for the purpose of the governance of territory. The

agreement is an act of State and cannot be scrutinised in the light of the principles of Municipal laws. I would quote a passage from Vaughan William L. J. in the case of *Salaman v. Secretary of State for India*, (1906) 1 K. B. 613 at p. 625 : (75 L. J. K. B. 418):

> "The transactions of independent States between each other are governed by other laws than those which municipal Courts administer."

The agreement was not reached in the exercise of recognition of legal right or under colour of legal title. If I am asked to consider whether 'cession of territory' is intended and has taken place by virtue of the agreement, I shall answer the question in the affirmative. My reasons are as follows and are based upon high **authorities.** L. Oppenheim in his treatise of International Law at p. 492 says :

> "No unanimity exists among writers on the Law of Nations, with regard to the modes of acquiring territory, on the part of the member of the family of Nations. The topic owes its controversial character to the fact that the conception of State territory has undergone a great change since the appearance of the science of the Law of Nations. When Grotius created that science, State territory used to be still, as in the Middle Ages, more or less identified with the private property of the monarch of the State. Grotius and his followers applied, therefore, the rules of Roman Law concerning the acquisition of private property to the acquisition of territory by States. Now-a-days, however, the acquisition of territory by a State can mean nothing else than the acquisition of sovereignty over such territory."

While the learned author at p. 499, Art. 213, says:

> "Cession of State territory is the transfer of sovereignty over the State territory by the owner-State to another State. There is no doubt, whatever, that such cession is possible according to the Law of Nations, and history presents innumerable examples of such transfer of sovereignty. The Constitutional Law of the different States may or may not lay down special rules for the transfer of acquisition of territory. Such rules can have no direct influence upon the rules of Law of Nations concerning cession, since Municipal Law can neither abolish existing nor create new rules of international law."

Article 214 :

> "Since cession is a bilateral transaction, it has two subjects-namely, the ceding and the acquiring State. Both subjects must be States, and only those cessions in which both subjects concern the Law of Nations."

Article 215 :

> "The object of cession is sovereignty over such territory as has hitherto already belonged to another State."

Article 217 :

> "The treaty of cession must be followed by actual tradition of the territory to the new owner-State, unless such territory is already occupied by the new owner, as in the case where the cession is the outcome of war and the ceded territory has been, during such war, in the military occupation of the State to which it is now ceded, but the validity of the cession does not depend upon tradition, the cession being completed by ratification of the treaty of cession.

Article 219 :

> "As the object of cession is sovereignty over the territory, *all such individuals domiciled thereon as are subjects of the ceding State become ipso facto by the cession subjects of the acquiring State.*"

[28] Salmond on Jurisprudence, Edn. 10, p. 131 says :

> "The territory of a State is that region throughout which the State makes its will permanently supreme and from which it permanently excludes all alien interference . . . . . The exclusive possession of a defined territory is a characteristic feature of all civilised and normal States. It is found to be a necessary condition of the efficient exercise of governmental functions. But we cannot say that it is essential to the existence of a State. A State without a fixed territory—a nomadic tribe for example—is perfectly possible. A non-territorial society may be organised for the fulfilment of the essential functions of Government and if so it will be a true State. Such a position of things however is so rare and unimportant that it is permissible to disregard it as abnormal. It is with the territorial State, that we are alone concerned and with reference to it we may accordingly define a State as a *society of men established for the maintenance of order and justice within a determined territory by way of force.*"

[29] On review of the position as a whole, the following principles are deduced :

> "(i) the modern way of ceding a territory is by cession of sovereignty ;
>
> (ii) it is all the more prominent where cession of sovereignty is followed by 'tradition' of the territory ;
>
> (iii) cession of full internal sovereignty without cession of territory is not a normal state of affair, particularly because, possession of territory is a necessary condition of the efficient exercise of government functions ; and
>
> (iv) to hold that the entire internal sovereignty along with the administration was transferred without the territory would be something abnormal and repugnant is not unconceivable."

[30] In this view of the matter, I hold that cession of territory has taken place in this particular case. Suppose, for instance, in order to exercise fully and exclusively the powers, authorities and jurisdiction for and in relation to goverance of the country, the tradition (handing over of the territory) has taken place and occupation thereof has been acquired by the receiving State, the latter, as an act of appropriation, would itself amount to cession. (*See* Art. 220 of Oppenheim International Law, Vol. 1). If, after such occupation, the receiving State acts in a manner, as if the territory has been acquired, the setting aside of such an act or declaration of its illegality or invalidity would be beyond the competence of Municipal Courts.

[31] There is another aspect of the question. It is this. That Indian States owned territories, was, in almost all of the cases, a fiction of law. In this connexion, I will rely upon the historical facts collected in Lee Warner's Book on Native States of India. The author defines a "Native State" as

> "a *political community*, occupying a territory in India of defined boundaries, and subject to a common and

> responsible *ruler who has actually enjoyed and exercised as belonging to him* in his own right duly recognised by the supreme authority of the British Government *any of the functions and attributes of internal sovereignty.*"

I lay stress on the words underlined (here italicised) and invite attention to mention of territory as in occupation of "political community".

[32] He observes at pp. 32-33 :

> "No Native State in the interior of India enjoys the full attributes of complete external and internal sovereignty, since to none is left either the power of declaring war or peace, or the right of negotiating agreements with other States; but the sovereignty of Native States is shared between the British Government and the Chiefs in varying degrees. Some States enjoy a substantial immunity from interference in nearly all functions of internal administration while others are under such control that the Native sovereignty is almost completely destroyed. But communities whose rulers ordinarily exercise any, even the smallest degree of internal sovereign authority, are classified in India as *Native States* and excluded from the territories subject to the King's Law."

Here, too, the reference is to enjoyment of attributes of sovereignty.

[33] At p. 37 :

> "The rest of the once semi-sovereign communities are grouped under one or more political divisions called Thana Circles, over *each* of which a Thanadar with magisterial and judicial powers presides. All of the descendants of the original Chiefs conduct the revenue administration of their patches of territory on their own system, and their holdings are treated as beyond the jurisdiction of British India. But their jurisdictory powers vest for them and by their tacit assent, in the political officers of Government. The Thanadars and the British agent who supervises them are subject to the executive orders of the British Government, but not the jurisdiction of the Courts of law established in British India. The Native State thus subsists and is not converted into a British Province; and the remedy applied avoids the precedent set by Rome of annexation under the plea of misrule. That which happened in Mahi Kanta has . . . . occurred also in Kathiawar and the Rewa Kanta, where many Talukadars who have lost their jurisdiction retain the status of Native Chiefs."

Here too the same conception of "sovereignty" being expressed in terms of "territory" is maintained.

[34] At p. 38 :

> "But the Indian term 'Sananda' requires explanation. It may be translated as a diploma, patent or deed of grant by a sovereign, of an office, privilege or right. In fact, in Lord Canning's Sanandas of adoption the word 'grant' replaces the more usual term 'Sananda' in the proviso attached to the grant of the right of adoption."

[35] This precludes any notion of a Ruler owning a territory as his own except that he is granted the leave of exercising some functions of sovereignty, subject to the control which may extend to complete negation thereof, of the British suzerainty.

[36] This is amply borne out from the following extracts at p. 42:

> "The resignation of Peshwa sovereignty in 1818, the trial of Emperor of Delhi, the transfer of Company's rule to the Crown, and the deposition of late Gwaikar of Baroda, are historical events which affect Indian treaties and modify phrases of equality or reciprocity, just as the 'War of Sucession' adds to the Constitution of the United States the principle that the Union cannot be dissolved."

[37] The aforesaid quotations bring it home to the students of International and Constitutional law that the Native Indian States were holding the territories not because they were owners thereof but because certain attributes of internal sovereignty, in some cases, to the fullest extent and in others to a very slight or nominal extent had either been granted or conceded to them, subject always to their complete extinguishment, at the will of the paramount power. In short, it was sovereignty at will. The conclusion deducible is that they held the territories only in an ideal sense which truly belonged to the social community that occupied it. The Rulers and the British Government shared, as between themselves, the attributes of sovereignty over the territories while the British Government had power to exercise the full internal sovereignty to the exclusion of a Native Chief. They would still call him a ruler of a territory. Judged in this historical retrospect, it leaves no room for doubt that "enjoyment of attributes of sovereignty" and "possession of territory over which sovereignty was being exercised" are convertible. Accordingly, cession of all attributes of internal sovereignty (those of external sovereignty having already been ended) amounts to cession of territory. In this sense, I would hold that the territory has also been ceded, but as this finding is not essential for the decision of the cases before me, I should leave it open. I, however, entertain no doubt, about the conclusion that I have arrived at.

[38] Now, I shall examine the position from the standpoint that there has been irrevocable cession of full and exclusive legislative, judicial and executive powers essential for governing the territory and that no attributes of sovereignty have been reserved for the Rulers.

[39] Mr. B. N. Das, in reply, contends that the Act of Orissa Government, complained of, is an Act of State and is not subject to the jurisdiction of the Municipal Court; secondly, that it is not essential for the exercise of the jurisdiction ceded to the Dominion Government that there will be cession to territory. In this connexion, he relies on *Secy. of State* v. *Rustom Khan*, A. I. R. (28) 1941 P. C. 64: 68 I. A. 109. This case fully bears out the views that I have taken. Mr. P. R. Das argues that it is the King's prerogative that makes all the difference. I shall presently show that the Exe-

cutive of every Sovereign Independent State owns prerogative rights of legislating for and governing territories that do not fall strictly within their dominions, provided the jurisdiction had been acquired by any means including cession (of jurisdiction).

[40] The next question that falls to be considered is whether "the legislative function" has, in this case, been assigned to the Government of Indian Dominion or to the Dominion Legislature. The answer to this is to be found in the Constitution of the Dominion. But a different position may present itself for solution, in a case when it is assumed along with the powers the territory is not transferred. In such a case, legislature apart, the Executive of the Dominion can certainly exercise the power of making and promulgating laws on its own responsibility or may subject itself to be regulated by the Legislature. So long as the Legislature legislates laws with the object of being obeyed by the Executive, in executing its power and function of administration, it does not legislate beyond its competence. Historical retrospect of the dual Government of the Indian States by the Chiefs, and the Governor-General of India, as representative of the King of England, will sufficiently illustrate the position. It may be said that the King of England could make laws for exercise of jurisdiction in foreign territories such as Indian States by virtue of his "prerogative". There is, however, no charm in this word. It consists of the residue of the sovereign powers unappropriated by Parliament together with those powers expressly granted to the Crown by Statute (Osborn Concise Law Dictionary).

> "Prof. Dicey defines prerogative more precisely as the discretionary authority of the Executive, and he explains this to mean everything which the King (in this case the Governor General) and his servant can do without authority of an Act of Parliament": (Anson — Law and Custom of Constitution)..

The Executive head of every independent sovereign State enjoys the omnipotence of prerogative and it is not peculiar to the King of England. With the cession of legislative power, as evidenced by the agreement, the Executive can legislate. If they (the Executive) could not legislate or otherwise govern before the cession, it was because of the Law of Nations by which every member of the State is bound. The agreement removes that barrier.

[41-42] It is here necessary to trace the origin of the activities of the "Province of Orissa" in the concerned States in order to test their legality.

[43] The constitutional documents relevant to the issue are set out herein below in chronological order:

(1) The Indian Independence Act (10 and 11 Geo. VI. Ch. 30).

(2) Standstill Agreement.

(3) Instrument of Accession d/- 16th August 1947.

(4) The Agreements d/- 15th/30th December 1947.

(5) Extra Provincial Jurisdiction Act, 1947 (Act No. XLVII [47] of 1947).

(6) Central Government Ministry of State Notification Nos. 111-1B/-d New Delhi, d/ 23rd December 1947, and 172-1B, dated 23rd March 1948.

(7) The Administration of Orissa States Order, 1948.

[44] Of the above, besides the Indian Independence Act, and the Extra Provincial Jurisdiction Act, all others are either Acts of State or Executive Order in the nature of legislation. Items 2, 3 and 4 are transactions between two Sovereign States and hence Acts of State. The discrimination of their validity or otherwise is beyond the competence of Municipal Courts and they must be assumed as valid and binding upon all the Courts in the State (Indian Dominion) who shall take judicial notice thereof. Item 1 above is not impugned before us. Item 5 (Extra-Provincial Jurisdiction Act) is the much impugned Act being the fountain source of all powers and jurisdiction of the Government of Orissa. Item 4 is not attacked as to its validity or legality but its construction was the subject of much serious controversy at the Bar, about which I have already arrived at my conclusion, though for the purpose of this case, I am assuming that not the territory but full internal sovereignty was ceded to the Dominion Government provided Constitutional law as well as International law assumed existence of any such distinction however thin.

[45] The Extra-Provincial Jurisdiction Act has been impugned on the assumption that it purports to make law for a territory beyond the Dominion of India over which Dominion Legislature has no power to legislate. Reliance is placed upon s. 6, Indian Independence Act. Sub-section (i) of the section enables the Legislature to make laws for the Dominion including laws having extra-territorial operation. It is rightly contended that "*laws with extra territorial operation*" are different from "*laws for extra territories*" that is, territories beyond the Dominion.

[46] In this connexion, it is submitted that the Dominion Legislature is a creature of British Parliament and its legislation must be operative within the limits, specified in that behalf, by the Parliamentary Statute, namely, the Indian Independence Act. This agreement, however, overlooks sub-s. (ii) of the section. According to

sub-s. (ii) and sub-s. (iv), it is only the Dominion Legislature that can put a limit upon its legislative power for the future, but not the Independence Act nor any other Act, Order, Rule or Regulation, passed under such Act of the Parliament, of the United Kingdom. I shall quote sub-s. (ii) so far as is material for this purpose. It reads:

> "No law and no provision of any law made by the Legislature of either of the new Dominions shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provision *of this* or any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the power of the Legislature or each Dominion include the powers to repeal or amend any such Act, Order, Rule or Regulation in so far it is part of the law of the Dominion."

The Dominion Legislature is as good a Sovereign Legislature as the Parliament of the United Kingdom.

[47] It is sought to be urged by the learned Advocate-General that sub-s. (ii) of the section will operate to validate any such law meant for any territory beyond the Dominion. It will amount to an act of State of a sovereign Legislature of an independent State. This contention, however, is not sound. Until any other law having the effect of repealing S. 6, Indian Independence Act is made and promulgated by the Dominion Legislature, it cannot make any law for area beyond territorial limits of the Dominion. It is true that by accession, the concerned States have become part of the Indian Dominion but the legislative power of the Legislature in respect of the acceding State is limited to the subjects relating to external sovereignty of the State as scheduled in detail in the Instrument. Then the question arises whether Extra-Provincial Jurisdiction Act is only an Act with extra-territorial operation or is law for the territory of the concerned State. That the impugned Act is an Act with extra-territorial operation or is law for the territory of the concerned State. That the impugned Act is an Act with extra-territorial operation is clear from its preamble. The preamble reads:

> "Whereas by treaty, agreement, grant, usage, sufferance and other lawful means, the Central Government has, and may hereafter acquire, jurisdiction in and in relation to areas outside the provinces of India: It is hereby enacted as follows."

[48] The Legislature carefully avoids any reference to 'acquisition of territory' but treats of 'acquistition of jurisdiction' in or in relation to areas outside the Provinces of India. Jurisdiction includes rights, powers and authority.

[49] The Central Government of the Indian Dominion, no doubt, owes allegiance to the Constitution of the Dominion and, therefore, to its Legislature. It is competent for the Legislature to confer power or powers upon the Central Government or to prescribe "the limits" within which and "manner in which" and "the agency through which" any such power or jurisdiction should be exercised. It has not been argued by Mr. P. R. Das that the said Act, as an Act with extra-territorial operation, is ultra vires the Indian Dominion Legislature.

[50] Conceding, for the sake of argument, that the Act, according to what is conveyed by its language understood in its plain grammatical meaning, purports to be an Act which applies to foreigners abroad or is otherwise in conflict with any principle of International law, the Courts must obey and administer it as it stands, whatever may be the responsibility incurred by the nation to foreign powers in executing such a law, for the Courts cannot question the authority of Parliament or assign any limit to its powers (Vide Maxwell on Interpretation of Statutes, pp. 157-158. Ref. *Comp. Bonham's Case,* (1609) 8 Rep. 118a, commented on in *Kemp* v. *Nevile,* (1861) 31 L. J. Ch. 158 : (10 C. B. N. S. 523). See also *Day* v. *Savadage,* (1614) Hob. 87; *Lond. (City of)* v. *Wood,* (1701) 12 Mod. 688; 1 Kent, Comm. 447. Besides, by transfer of sovereignty over the one the people residing there become the subjects of the Indian Dominion for all purposes of the Government both externally and internally.

[51] That there can be no serious objection to the Central Government, without the help of a Legislature, exercising powers of legislation by virtue of a jurisdiction acquired in a foreign territory through an agency appointed in that behalf has innumerable parallels. I will invite attention to instances of exercise of such jurisdiction under the Foreign Jurisdiction Acts passed by the Parliament of United Kingdom:

> "Under the Order in Council made in pursuance of the successive Foreign Jurisdiction Acts British Courts have been established and British Jurisdiction is exercised in numerous foreign territories in respect not only of British subjects but of foreigners, that is, in cases to which Parliamentary legislation, though recognised, confirmed, supported, and regulated by Acts of Parliament, derives its authority, ultimately not from Parliament, but from powers inherent in the Crown or conceded to the Crown by a foreign State." (See Ilbert's Government of India, 3rd Edn., p. 383).

[52] The learned author at p. 395 of his book says:

> "But in the third stage the Foreign Jurisdiction Acts have been applied to certain territories in Africa which are under the exclusive protectorate of England in this sense, that their Chiefs are debarred from entering diplomatic relations with any other European Power and that consequently such extra-territorial jurisdiction as is exercised within the territories is monopolised by officers of the British Government instead of being exercised by them concurrently with officers of other European States."

[53] At page 400 Ilbert says:

> "The application to protectorates of the machinery of the Foreign Jurisdisction Acts has brought into grea-

ter prominence the question as to the classes of persons with respect to whom the jurisdiction is exercised. The answer to these questions depends upon the nature and origin of the jurisdiction, and on the terms of the instrument by which the jurisdiction is derived from an arrangement between the British Crown and the territorial sovereign, it clearly can be made exercisable in the case of persons under either of those authorities."

[54] It is clear from the above that extra territorial operation of the Act can extend to persons who are not directly subjects of the legislating State but of the foreign territory but subject always to the extent of the jurisdiction required. In the instant case, the only objection raised as to deficiency of jurisdiction related to absence of power of legislation, such as extending the Acts in force in the Province of Orissa to the States area. This objection, however, disappears as soon as it is proved or established as has been done in the earlier part of the judgment, that the attributes of sovereignty including the power of making and promulgating laws have been ceded. It may be noted that not only a legislature but also an executive head, granting that the latter has power of sovereignty, can exercise extra-territorial powers over a foreign territory and can make and promulgate laws in that behalf. It will be worth-while to quote the following passage from Illbert's Government of India at pp. 417-418 :

"But the Governor-General in Council has in his executive capacity extra territorial powers *far wider than those which may be exercised* by the Indian Legislature. By successive Charters and Acts extensive powers of sovereignty have been delegated by the English Crown, first, to the East India Company, and afterwards to the Governor-General in Council as its successor. The Governor General in Council is representative in India of the British Crown, and as such can exercise under delegated authority the powers incidental to sovereignty with reference both to British India and to neighbouring territories, subject to the restrictions imposed by Parliamentary legislation and to the control exercised by the Crown through the Secretary of State for India. Thus he can make treaties and conventions with the Rulers, not only of Native States within the boundaries of what is usually treated as India but also of adjoining States which are commonly treated as extra Indian, such as, Afganisthan and Nepal, and can acquire and exercise within the territories of such States powers of legislation and jurisdiction similar to those which are exercised by the Crown in foreign countries in accordance with the Foreign Jurisdiction Acts and Orders in Council under them, and extending to persons who are not subjects of the King.

The existence of these powers was until recently declared, and their exercise was to some extent regulated by the Foreign Jurisdiction and Extradition Act, 1879, of the Government of India, which contained recitals corresponding to those in the Foreign Jurisdiction Act, 1890, passed by the Governor-General in Council, as representative of the British Crown, rested on the same principles, and might with advantage be based on the same statutory foundations as the extra territorial powers of the British Crown on other parts of the world. Accordingly, in 1902, an Order in Council under the Act of 1890 made provision for the exercise of foreign jurisdiction by the Governor-General of India in Council, and the Indian Act of 1879, having been superseded as to foreign jurisdiction by this Order and as to other matters by later Indian legislation was formerly repealed by the Indian Act XV of 1903."

[55] With regard to the effect of the Foreign Jurisdiction Order in Council of 1902, the author observes at p. 419 :

"The language of the Order is wide enough to include every possible source of extra territorial authority. The powers delegated are both executive and legislative, and are sufficiently extensive to cover all the extra territorial powers previously exercised in accordance with Indian Acts."

[56] As instance, of exercise of full jurisdiction acquired by cession, the following passage at pp. 423-424 may be noted :

"There are certain areas within which full jurisdiction has been ceded to the Government of India, and within which jurisdiction is accordingly exercised by Courts and Officers of the Government of India over all classes of persons as if the territory were part of British India. The most conspicuous instances of this is the district known as the Berar, or as the Hyderabad Assigned Districts, which, although held under a perpetual lease, and administered as it were part of the Central Provinces, is not technically, with British India. The same appears to be the position of the residences and other stations on the occupation of political officers, and of cantonments in the occupation of British troops."

[57] The learned author draws the following conclusions after a comprehensive review of the subject "British Jurisdiction in Native States" which will prove very instructive and illuminating on the subject, in question. They are :

(i) The extra territorial powers of the Governor-General of India in Council are much wider than the extra territorial powers of the Indian Legislature and are not derived from, though they may be regulated or restricted by, English or Indian Acts.

(ii) The powers are exercisable within the territories of all the Native States of India. Whether they are exercisable within the territories of any State outside India is a question which depends on the arrangements in force with the Government of that State, and on the extent to which the powers of the Crown exercisable in pursuance of such arrangements have been delegated to the Governor-General.

(iii) The jurisdiction exercisable under those powers might be made to extend not only to British subjects and to subjects of the State within which the jurisdiction is exercised, but also to foreigners.

(iv) The classes of persons and cases to which jurisdiction actually applies on the agreement, if any, in force with respect to its exercise, and, in the absence of express agreement, or usage and the circumstances of the case, and may be defined, restricted, or extended accordingly by the instrument regulating the exercise of the jurisdiction.

[58] Besides the above, certain extracts from Lee Warner's Book on Native States in India will illustrate that foreign jurisdiction can be exercised by an Executive Government in a much wider sense than by the Legislature. The latter in making laws with the extra-territorial operation, exercises personal jurisdiction in foreign territories while the former can, by its power of legislation derived from the owner of the territorial sovereignty over an area, exercise jurisdiction over the subjects of the foreign states. At p. 358 he says:

> "The jurisdiction which the Governor-General in Council exercises through his delegates the Political Agents, in the Native States, of foreign jurisdiction; a portion of the full attributes of sovereignty or jurisdiction which, as was shown in the second chapter, are distributed in various degrees. With the Chief's consent, express or implied, the Governor-General in Council shares with him the attribute or sovereignty known as jurisdiction. The subject of the Native State who may contest the authority of the Courts thereupon established by the Governor-General in Council, will get no redress from the sovereign of his State who admits the right of British Interference. If he appeals to British Law, he will be referred to the provisions of British law, which, although they do not confirm, yet support and regulate the exercise of foreign jurisdiction in the case in question. While Act XXI [21] of 1879 was in force, its S. 5 declared that the Notifications of the Governor-General in Council issued under the Act were conclusive; and, since the appeal of that Act, the Foreign Jurisdiction Act, 1890, and the King's Order in Council, of 11th June 1902 together with the Notifications published under it by the Governor-General in Council, warrant the Officers concerned in exercising the powers entrusted to them, and prevent other British subjects and British Courts from raising any objections."

At p. 359, Lee Warner writes:

> "When the subject of Railway Administration is dealt with, it will be found that the Native States usually cede 'full jurisdiction short of sovereign Powers'. The reservation saves the railway lands ceded by them from annexation, whilst the Governor-General is able to provide the necessary Courts for the trial of railway cases and to equip them with the necessary laws and rule of procedure."

At p. 365, he writes:

> "The laws which are introduced are not passed by the Legislative Council of India, but are applied by the Government of India; and the Courts, which administer justice within them are Courts established by the Governor-General in Council, or if for convenience' sake neighbouring British Judge or Magistrate is given authority over these areas, he exercises his functions not as a British Judge or Magistrate, but under special appointment, under the provisions of the Foreign Jurisdiction Act."

[59] In consideration of what I have said above, I may safely conclude that under the Extra Provincial Jurisdiction Act, 1947, of the Indian Dominion Legislature corresponding to Foreign Jurisdiction Act, 1890, of the Parliament of the United Kingdom, Foreign Jurisdiction Act (XXI [21] of 1879) of the British Indian Legislature, later replaced by the Foreign Jurisdiction Order in Council, 1902, by which the Governor-General of India was empowered to exercise jurisdiction over foreign territories outside British India such as those of Native States and the like, the Orissa Government derives its power to exercise authority and jurisdiction in relation to the governance of the territories of the concerned States. In exercise of such power, the Orissa Government has extended to the said territory the application of several Acts (Orissa) including the Orissa Maintenance of Public Order Act.

[60] In my judgment, the passing of the Extra-Provincial Jurisdiction Act, the Notification of the Government of India delegating its authority to the Government of Orissa and Orissa Government's exercise of the powers and extension of Orissa Maintenance of Public Order Act, to the territories concerned are all intra vires, valid and binding upon the subjects of those territories. This would completely dispose of the petitions, but, however, as the learned counsel have cited certain authorities, I consider it my duty to deal with them in as ample a manner as the necessity of the case requires.

[61] Mr. P. R. Das relied upon the following cases for establishing his proposition that the Native States were outside the Dominion of His Majesty the King of England and neither British Indian Laws, nor law passed by British Parliament had any operation in those territories. The cases cited do support that proposition, nevertheless, they support the view taken by me as above that cession of powers and jurisdiction by one State to another can empower the latter to exercise internal territorial sovereignty. Each case must depend on its own facts. The main spring of powers, authority and jurisdiction will be the treaty, engagement or agreement, as the case may be. I shall now proceed to deal with the cases cited one after the other.

[62] *The Empress* v. *Keshub*, 8 Cal. 985: (11 C. L. R. 241 F. B.) decides that the territory of Mayurbhanj was not a part of British India. *Bitchitranund Dass* v. *Bhugbut Perai*, 16 Cal. 667 follows the Full Bench decision of *The Empress* v. *Keshub*, 8 Cal. 985: (11 C.L.R. 241 F.B.), and holds that Keonjhar was not a part of British territory.

[63] *Statham* v. *Statham*, 1912 P. 92: (81 L. J. P. 33)—In this case it was observed,

> "but, though His Highness is thus not independent, he exercises as ruler of his State various attributes of sovereignty, including internal sovereignty, which is not derived from British Law, but is inherent in the ruling chief of Baroda, subject, however, to the suzerainty of His Majesty the King of England and to the exercise by the Government of *India of such of the rights and powers of territorial sovereignty as have by treaty, usage, or otherwise passed to and are exercised by the suzerain, such as, for instance, the*

exercise of jurisdiction over Europeans and Americans in Baroda, of interference to settle disputes as to succession to the State or to put a stop to gross misrule in the State, or to regulate armaments and the strength of the military forces & c."

It should be noted that the powers of interference enumerated in the underlined (*here italicised*) portion of the passage are mentioned as "attributes of territorial sovereignty."

[64] The next case relied upon is that of *Hemchand Devchand* v. *Sakarlal*, 1906 A. C 212. In this, it was held that Kathiwar was not, as a whole, within the King's Dominions. With regard to the legislative dependence, it was observed :

> "No legislative power over it has been claimed. The intervention has never been carried further than was judged necessary, in this emergency, for the maintenance of peace, good order, and security. The position of the chiefs has always been respected; and at least in the case of more important among them, many of the functions commonly regarded as attributes of sovereignty have been preserved to them. The form adopted in establishing and regulating tribunals in the province has been that which was regular and appropriate if it was not British territory, but quite irregular and inapplicable if it was."

From the aforesaid passage, it is clear that under the power ceded, under the treaty arrangements, to the British Indian authorities, some sort of regulations were in operation for establishing and regulating tribunals for administration of justice involving thereby a power of making laws and enforcing their administration.

[65] Next, much reliance is placed upon the case of *Muhammad Yusuf-Ud-Din* v. *Queen Empress*, 24 I. A. 137 : (25 Cal. 20 P. C). In this case by some correspondence between the Nizam and the Governor-General, civil and criminal jurisdiction over the areas of the railway line running through the Nizam's territories had been ceded. A higher jurisdiction having been sought to be exercised by a Notification or Order of the British Indian Government, it was challenged by the Nizam. The question came up before their Lordships of the Privy Council, who held that mere yielding up of civil and criminal jurisdiction did not amount to a grant or cession of territory and the jurisdiction claimed, being an excess of the jurisdiction granted, could not be sustained—this case does not detract from the view taken by me inasmuch as the agreement between the Indian Dominion and the concerned States purports to yield up the entire jurisdiction essential for the governance and administration of the territories, and I have discussed, at length, the real import thereof. In the result, this case does not conflict with the view taken by me, it being an authority on its own facts.

[66] The case of *Macleod* v. *Attorney-General, for New South Wales*, 1891 A. C. 455 : (60 L. J. P. C. 55) is an authority for the proposition that any legislation deriving a jurisdiction from the Imperial Parliament cannot legislate so widely as to govern all persons in the habitable Globe. Certain limitations must be placed on such legislation so as to confine its operations within such limits as are within the territorial as well as personal jurisdiction of the Legislature. "Personal jurisdiction" is defined by Lord Winsleydale as legislative power over persons who are natural born subjects or residents whilst they are within the limits of the Kingdom or persons who owe obedience to the laws of the Legislature and whose interests the Legislature is under a correlative obligation to protect. Applying these principles to the Extra-Provincial Jurisdiction Act (impugned as ultra vires by the petitioners' learned counsel), it can be safely concluded that it does not overstep the limitations, if any, placed upon the legislative power of the Indian Dominion Parliament, inasmuch as, the Act purports to govern Indian Dominion Executive who owe obedience to the laws of the said Parliament, in exercise of such power, authority, and jurisdiction as they acquire by treaty, usage, sufferance or by other lawful means. Besides, as I have already said, the Dominion Government having acquired, by virtue of "the agreement" sovereign powers enabling them to govern and administer the country, the residents have become the subjects of the Indian Dominion and their interest the Legislature is under a correlative obligation to protect. If the impugned Act purports to apply to such subjects, it does not offend against the principle enumerated by the Privy Council in *Macleod's case*: (1891 A.C. 455: 60 L. J. P C. 55).

[67] The next case relied upon is (*Duff Development Co, Ltd.* v. *Government of Kelantan*, 1924 A. C. 797 : (93 L. J. Ch 343). This case was cited to prove that the constitutional position of a sovereign is not annihilated by agreement or treaty with a superior power which limits its powers in the sphere of affairs relating to its internal territorial sovereignty and that when a question arises as to whether a particular State is a sovereign State, it is more for the Government of the country than for the Court to decide. As a proposition of law, it was laid down :

> "That a State may without ceasing to be a sovereign State be bound to another more powerful State by an unequal alliance. No doubt the engagements entered into by a State may be of such a character as to limit and qualify; or even to destroy the attributes of sovereignty and independence : Wheaton, Edn. 5, p. 50; Halleck, Edn. 4, p. 73; and the precise point at which sovereignty disappears and dependence begins may sometimes be difficult to determine. But where such a question arises, it is desirable that it should be determined not by the Courts which must decide on legal principles only, but

> by the Government of the country, which is entitled to have regard to all the circumstances of the case. Indeed, the recognition or the non-recognition by the British Government of a State as a sovereign State has itself a close bearing on the question whether it is to be regarded as sovereign in our Courts".

The sovereignty of the Government of Kelantan was decided on terms of the treaty by which both the States were bound. Apart from the general principles laid down, this case is an authority on its own facts. It is always a matter of construction of the deed embodying cession of powers, authority and jurisdiction or territory, as the case may be.

[68] The case of *Triccam Panachand* v. *B. B. & C. I. Rly. Co.*, 9 Bom. 244, is likewise an authority on its own facts, the decision being based upon construction of an agreement by which the Thakare (the chief) assigned to the Officers of the Government of Bombay, in perpetuity, a spot of land. This case has no application to the facts of the present case.

[69] Lastly, reliance is placed upon a passage occurring in Oppenheim's International Law, 6th Edn. (foot-note) at p. 168, namely :

> "The Courts of the United States of America have always upheld the theory that the Federal Government is sovereign as to all powers of Government actually surrendered, whereas each member-State is sovereign as to all the powers reserved."

There is no dispute about the correctness of the position thus enunciated. If the matter rested with the Instrument of Accession the Dominion Government and the concerned States should have respectively occupied the same status as the Federal Government and the member-States in the United States of America, but the present is a case in which the concerned States did not reserve any power and actually surrendered all powers of Government. After such surrender they can claim no sovereignty as against the Dominion Government.

[70] In the supplementary argument on behalf of the petitioners, it was urged, relying upon S 8, Government of India Act, 1935, as adapted by the India Provincial Constitution Order, 1947, that the Executive Authority of the Dominion is co-extensive with the legislative power of the Dominion Legislature. This argument is untenable in view of the express provision of the section, the relevant portion of which reads :

> "Subject to the provision of this Act, the Executive Authority of the Dominion extends to the matters with respect to which the Dominion Legislature has power to make laws, *including the exercise of rights, authority and jurisdiction in and in relation to areas outside the Dominion.*"

Attention is to be paid to the underlined words (here italicised) above. These words conclusively prove that the authority of the Executive far exceed that of the Legislature. This should be so as the Executive Authority of the Dominion possesses "Prerogative" (rights and powers).

[71] I am clearly of opinion that there is no merit in the petitioners' cases and their petitions are rejected.

[72] **Das J.** — I agree that the applications should be dismissed. The prosecutions which are sought to be quashed are for alleged breach of certain notifications issued under the Orissa Maintenance of Public Order Act. The validity of the said Act as such or of any of the provisions thereof or of any notifications thereunder are not challenged before us and we are not concerned with the same in these applications. What is challenged is the application or the applicability of the said Act to the Orissa States, in particular to Bamra and Kalahandi which are comprised in the Orissa States.

[73] In the context of the attainment of Dominion Status by India on 15th August 1947, the Rulers of the Orissa States executed Instruments of Accession under S. 6 Government of India Act, and Standstill Agreements under S 7, Indian Independence Act. They or most of them including Bamra and Kalahandi executed what may be called for convenience "Integration Agreements" on 14th December 1947, and subsequently, whereby: "Exclusive Authority, Jurisdiction and power for and in relation to the Governance of the State" has been ceded to the Dominion Government. The Central Legislature enacted the Extra-Provincial Jurisdiction Act (Act XLVIII [48] of 1947) whereby the acquisition by the Central Government (which means the Governor-General by the General Clauses Act) of jurisdiction in and in relation to areas outside the provinces of India by various lawful means is recognized and the exercise of it is regulated. This Act is of a general nature and has no specific reference to any particular state or states and by S. 3 (2) thereof the Central Government may delegate any such extra-provincial jurisdiction to any officer or authority in such manner and to such extent as it thinks fit. By S. 4 thereof the Central Government is authorised to make orders for the effective exercise of any such extra-provincial jurisdiction and such order may provide inter alia :

> "For determining the laws and procedure to be observed whether by applying with or without modifications all or any of the provisions of any enactment in force in any province or otherwise."

[74] The Central Government by notification dated 23rd December 1947 (superseded by a subsequent notification dated 23rd March 1948) delegated its extra-provincial jurisdiction in respect of Orissa States to the Provincial Government of Orissa including the power under S. 4. The Orissa Government, acting under the

said delegated authority passed on 1st January 1948 the Administration of the Orissa States Order, 1948, whereby elaborate arrangements are enacted for the Administration of the States. Section 4 of the said order applies certain enactments specified in the schedule thereto to the Orissa States of which the Orissa Maintenance of Public Order Ordinance (later amended as Orissa Maintenance of Public Order Act by notification dated 10th April 1948) is one. This chain of events shows that the Orissa Maintenance of Public Order Act is sought to be made applicable to the States not by its own force but by virtue of adaptation by a Legislative Order enacted by the Provincial Government of Orissa in pursuance of the authority delegated to it by the Central Government under the provisions of the Extra Provincial Jurisdiction Act, and in exercise of the jurisdiction that the Central Government has derived from the states by the Integration Agreement of December 1947.

[75] The substance of the arguments on behalf of the petitioner is :

(1) That the integration agreements do not confer on any Dominion Authority the legislative power over the states ;

(2) That the chain constituted by the following, namely, the Extra Provincial Jurisdiction Act, the delegation thereunder to the Provincial Government and the Legislative Order of the Provincial Government of Orissa extending Orissa laws to the States is in substance an attempt at legislation for an area outside the Dominion of India which is ultra vires.

[76] The arguments on behalf of the Government are in substance to the effect that :

(1) That the fullest jurisdiction has been ceded under the Integration agreements, including the Legislative ;

(2) That the chain of events by which the Orissa laws have been applied to the States does not constitute any direct legislation for the States by any Legislative Authority of the Dominion in exercise of its normal powers but is merely the exercise of the ceded jurisdiction ;

(3) That the various links in this chain of events are acts of States whose validity cannot be questioned in the municipal Courts.

[77] As regards this last point submitted on behalf of the Government, it is unnecessary to express any final opinion, but it appears to me to be plausible to say that, in these petitions, where the right of certain subjects of the Orissa States to challenge the validity of certain steps taken by the Dominion authorities is involved, not only the step constituting the integration agreement but also all the subsequent steps in purported exercise thereof, up to the stage of applying certain laws and making certain administrative arrangements, are all Acts of State which neither the subjects of the States nor the municipal Courts constituted by the Dominion authorities can question. The subjects of the state could not question the laws if they had been purported to be applied by the ruler himself. Much less can they question the same in a municipal Court of the Dominion if the laws are applied to the State by a Dominion Authority in purported exercise of jurisdiction ceded by the ruler, the ruler himself acquiescing in it. The rights of the subjects of a state, in which ceded jurisdiction operates, which are justifiable in the Courts established by the ceded jurisdiction are only those that are granted or recognized by the new authorities and all acts of the new authorities up to the stage of granting or recognition of rights may well be Acts of State. The judgments of the Privy Council in *Secy. of State* v. *Kamachee Boye*, 7 M. I. A. 476: (4 W. R. 42 P. C.), *Secy. of State* v. *Binraj Bai*, 39 Bom. 625 : A. I. R. (2) 1915 P. C. 59 and *Vagesinghji* v. *Secy. of State*, 48 Bom. 613 : (A. I. R. (11) 1924 P. C. 216) may be referred in this connection.

[78] This aspect of the case has, however, not been fully argued before us and I hesitate to express a definite opinion on a matter on which we have not had the advantage of assistance by way of full arguments from the Bar. Further in this case it may be contended that a different principle applies. It may well be, that where the liberty of an individual is being threatened by prosecution before tribunals amenable to correction by this Court, and the prosecution purports to be for voilation of certain laws which the Government purports to have enacted in pursuance of the powers conferred by the Dominion legislature (in this case the extra Provincial Jurisdiction Act), the individual though not a subject of the Dominion (assuming that he continues to be a subject of the State) has the right to approach this Court and ask it to examine the validity and legality of the exercise of authority by the Dominion authorities on some principle analogous to that indicated in *Hemchand Devchand* v. *Azam Sakanlal*, 1906 A. C. 212 at p. 238 para. 1.

[79] As regards the further arguments that have been raised by the learned Advocate-General on behalf of the Government to the effect that apart from any effect of the integration agreements, the states form integral parts of the Dominion of India and that the rulers of the States are not sovereigns in any sense of the term, it is unnecessary to go into these at any great length, because so far as at least as these cases are concerned, we must go by the position assumed in the integration agreements. It is

obvious that the integration agreements proceed on the footing that the states are not part of the Dominion of India and the rulers of the States have got sovereign status, for the purpose of entering into this agreement and ceding jurisdiction over their territory. It is, therefore, unnecessary to decide whether in a larger sense they are sovereigns and whether the states are parts of the dominion territory. It may be also added that S. 6 (1), Extra Provincial Jurisdiction Act has been brought to our notice. It is not contended that it bars our jurisdiction and we have not been asked to make any reference thereunder.

[80] It is now necessary to consider the validity of the petitioner's arguments. The first question that arises for consideration is the construction of the integration agreements dated 14th December 1947. The agreement states that the ruler thereby cedes to the Dominion Government

> "full and exclusive authority, jurisdiction and powers for and in relation to the governance of the states".

The contention of the learned counsel for the petitioner is that this cedes to the Dominion Government only what may be called the executive authority and jurisdiction and not any legislative authority. I agree with my Lord, the Chief Justice for the reasons given by him, in coming to the conclusion that this agreement is effective to transfer complete legislative powers and authority and jurisdiction. The phrase used, namely,

> "full and exclusive authority jurisdiction and powers for and in relation of the governance of the states"

is a phrase of the widest amplitude and there is absolutely no reason to limit it to what may be called mere executive authority. The demarcation between executive, legislative and judicial functions, amongst the functions of the Government, is a modern conception of democratic states and does not appear to have existed in these states themselves. The word ' Governance" comprises all the three functions and no reservation can be implied in favour of the grantor of the jurisdiction who apparently had all the three functions combined in him. The learned counsel for the appellants lays stress upon the use of word "Administration" in the preamble of the agreement as also in the place where the agreement provides as follows:

> "Agrees to transfer the administration of the said States to the Dominion Government from 1st January 1948."

[81] The learned counsel would have it that the word "Administration" is confined to the executive functions. Apart from the fact that the use of the word "Administration" in the preamble cannot limit the scope of the operative words of the agreement which so clearly state that the Governance of the States has been ceded, there is no authority in support of the position that "Administration" means only executive functions. That it is not so has been fully pointed out by my Lord, the Chief Justice and would appear also to follow from what has been assumed by the Privy Council with reference to analogous arrangements noticed in *Secy. of State* v. *Rustam Khan*, 68 I. A. 109 : (A. I. R. (28) 1941 P. C. 64) and *Dattatraya* v. *Secy. of State*, 58 Cal, 570 : (A. I. R. (17) 1930 P. C. 267). The use of the word "Full and Exclusive" in the agreement is very significant and it is obvious that if only executive function was intended to be ceded by the agreement and not the legislative function also, the executive jurisdiction itself could not be full and exclusive inasmuch as the legislative machinery of the state would be competent to limit it and to regulate it or even probably to negative it. The fact that the agreement provides only for payment of only a personal allowance from the revenues of the states is also very significant because if what was intended to be ceded was only executive functions and not either the legislative or the judicial functions it is difficult to see wherefrom the ruler would have found the financial resources for carrying on the judicial and legislative functions. It is therefore absolutely clear to me that what has been ceded is the entire governmental function inclusive of the executive, judicial and legislative function and that there has been no reservation with respect to any portion of the Government functions. In fact, the agreement amounts to a complete transfer of internal sovereignty of the States to the Dominion Government, probably retaining for the ruler a titular sovereignty as might appear from the references to the Gadi of the States in Art. 5 of the agreement. Whether this-titular sovereignty enables him to revoke this agreement is a question on which we are not called upon to express any opinion in this case.

[82] The learned counsel for the appellants has sought to derive support for his argument by submitting that this agreement was only a supplementary instrument of accession, the implication being that if it is treated as a supplementary instrument of accession, he may be able to press in aid S. 8, sub-s. 2, Government of India Act which requires that an instrument of accession shall specify the matters which the ruler accepts as matters with respect to which the Dominion Legislature could make laws for the states and the limit actions to which the powers of the dominion legislature to make

laws for the state are subject. I agree with my Lord, the Chief Justice, for the reasons given by him that this agreement is not a supplementary instrument of accession contemplated by S. 6, Government of India Act. It has not been contended before us that it is not open to the ruler of a State to cede all or any of his functions to the Dominion Government otherwise than by an instrument of accession. Mr. P. R. Das, learned counsel for the appellants, has in answer to a question put to him candidly conceded that he could not take up any such position. There is nothing in the Government of India Act which limits the power of the Dominion Government or of the Rulers of States to enter into agreements between themselves. Section 8, Government of India Act impliedly recognises the contrary. Indeed if the Rulers are sovereigns as the applicants contend, their power to enter into any kind of agreement they choose with any other sovereign state could not be denied or controlled by any express or implied legislation of the Dominion Government.

[83] The next question that has been raised is as to the validity of the arrangements for the extension of the specified Acts that have been made in pursuance of the purported exercise of the jurisdiction ceded under these integration agreements. The argument is that what has been done amounts to direct or indirect legislation for the States by dominion authority and that dominion authorities are not competent to legislate for the states inasmuch as the states are not part of the dominion territory. In support of the position that states are not territorial part of Dominion of India, various cases have been cited and it has been urged that a mere grant of jurisdiction however full and ample and exclusive does not amount to cession of territory. There is undoubtedly considerable authority for the view that states are not part of the Dominion territory and that cession of jurisdiction does not amount to cession of territory (vide *Muhammad Yusuf Uddin* v. *Queen Empress*, 24 I. A. 137 : (25 Cal. 20 P. C); *Hemchand Devchand* v. *Azam Sakarlal*, (1906) A. C. 212; *Secy. of State* v. *Rustam Khan*, 68 I. A. 109 : (A. I. R. (28) 1941 P. C. 64) *Dattatraya* v. *Secy. of State*, 58 Cal. 570 : (A. I. R. (17) 1930 P. C. 267). It may also be assumed that a sovereign legislature, normally legislates for its own territory or its own subjects. It is however unnecessary to express any final opinion on these matters because what purports to have been done in this case is not on the footing that the States are dominion territory or that the dominion legislatures, either of the centre or of the province, have legislated for the states. What all has been done and purports to have been done is that the Dominion Government has assumed jurisdiction in purported exercise of jurisdiction ceded to it by the rulers of the states and the Dominion legislature intervened to regulate the method and manner of the exercise of that jurisdiction. There can obviously be no complaint about it by the rulers much less by the applicants inasmuch as the very agreement to cede jurisdicion provides that the jurisdiction may be exercised "in such a manner and through such agencies as the Dominion Government may think fit"

[84] Apart, however, from the wide terms of the integration agreements themselves as to the manner in which and the agencies through which the ceded jurisdiction can be exercised, can it be said that the regulation of the exercise of jurisdiction by the Extra-Provincial Jurisdiction Act is ultra vires?—The powers of the Dominion Legislature, which now a sovereign legislature have to be judged with reference to the terms of S. 6, Indian Independence Act of 1947 until altered. It provides for the power to make laws for the Dominion including laws having an extra-territorial operation. By the Extra Provincial Jurisdiction Act the Dominion has not legislated for any area outside the Dominion. It has only recognised the lawfulness of the acquisition of extra-provincial jurisdiction by the Dominion Government, and has regulated the method and the manner in which such jurisdiction is to be exercised. It has, therefore, legislated to regulate and control Dominion authority and has in that sense, legislated for the Dominion. The utmost that can be said is that the actual exercise of the extra-provincial jurisdiction by the Dominion Government, in terms of the Extra-Provincial Jurisdiction Act, has an indirect extra-territorial operation Whatever may be the nature and the extent of the extra-territorial jurisdiction of the Dominion legislature, it cannot be doubted that an enactment of the Dominion Legislature, which has only this indirect result, if at all, is well within the power of the Dominion legislature "to make laws for the Dominion including laws having extra-territorial operation." *Hemchand Devchand* v. *Azam Sakarlal*, 1906 A. C. 212 and *Macleod* v. *Attorney General for New South Wales*, 1891 A. C. 455 : (60 L. J. P. C. 55) which have been cited for the petitioner in this connection do not apply to the facts of this case. The Extra Provincial Jurisdiction Act, as has been pointed out, it modelled on the British Foreign Jurisdiction Acts, and there is no reason to think that Dominion Legislature, which is now a sovereign legislature, has no powers of legislation in respect of the dominion and for its purposes as wide as those of the British Parliament. The theory on which the Foreign Jurisdic-

tion Acts in England are based is that while it is the prerogative of the Crown to acquire jurisdiction in foreign territory, democratic constitutional property requires that the exercise of that jurisdiction by the executive authority on behalf of the Crown must be brought under democratic Parliamentary control and, therefore, requires to be regulated by the Parliament. Accordingly, the British Foreign Jurisdiction Acts recognise the prerogative of the Crown to acquire and exercise foreign jurisdiction and purport to regulate it. An Act, like the Extra-Provincial Jurisdiction Act, which follows the same constitutional precedent and practice, and is well within the four corners of S. 6, Indian Independence Act, cannot be made out to be ultra vires of the powers of the Indian legislature. It has been argued by learned counsel for the applicants that while the Foreign Jurisdiction Act in S. 1 states that it shall be lawful for Her Majesty the Queen, to hold and exercise any jurisdiction which Her Majesty has, or may have, within a foreign territory, in the same and as ample a manner "as if Her Majesty had acquired that jurisdiction by cession or conquest of territory", there is no such wording in the Extra Provincial Jurisdiction Act; that no cession or conquest of territory is contemplated by the Extra-Provincial Jurisdiction Act; and that therefore the exercise of the provincial jurisdiction that is sought to be provided for in the Act, can only be of a very limited character. It is urged that the acquisition of territory by conquest or cession is the prerogative of the Crown and that inasmuch as India is still only a Dominion the same prerogative cannot be presumed in favour of the Indian Dominion Government.

[85] As has been pointed out by my Lord, the Chief Justice, in his judgment, the conception of prerogative in not one that inheres only in the British Crown but is an attribute of all sovereign executive Governments. No authority has been cited for assuming that the prerogative of the Indian Dominion, as the sovereign executive authority for the dominion is for the purpose of the dominion anything less. At least in so far as the exercise of this prerogative in respect of extra-provincial jurisdiction is concerned, the preamble to the Extra-Provincial Jurisdiction Act recognises the lawfulness of its acquisition, and S. 3 thereof recognises the lawfulness of its exercise "in such manner as it (the Central Government) thinks fit" which has the same wide import as what is stated in S. 1, British Foreign Juridiction Act as jurisdiction "by cession or conquest". Whatever may be the position as far as territories geographically outside India are concerned, it is inherent in the situation of the Indian Dominion Government, after the lapse of suzerainty of the British Crown under S. 7, Indian Independence Act, that the States which form component parts of geographical India, and which are so completely interlinked with the Dominion of India may require to be integrated and properly administered in the interests of the dominion as well as of the states. The acquisition and exercise of such extra provincial jurisdiction in the States by the Dominion Government and the regulation of the exercise of that jurisdiction by the Dominions legislature in the interests of the Dominion and the States is not opposed to any known principle of international law and is supported by the precedent and practice of the British Crown in relation to India before 15th August 1947. Neither of them can be pronounced to be invalid. It is unnecessary to dilate on this aspect of the case any further since the matter has been so fully and ably dealt with by My Lord the Chief Justice, if I may say so with respect.

[86] In a supplementary case, lodged on behalf of the petitioners, it was argued that the executive authority of the Dominion Government in any acceding State, is limited to those matters in respect of which the Dominion Legislature has power to make laws by virtue of sub.s. (1) of S. 8, Government of India Act. It is enough to say, in answer to this, that this can have application only to the exercise of executive authority by virtue of an Instrument of Acceseion, and not to exercise of jurisdiction acquired in any other manner. Since, in this case, we have held that the integration agreement is not equivalent to an Instrument of Accession, there is no substance in this argument.

[87] For the reasons stated above, I respectfully concur in the result, that these petitions are to be dismissed.

[88] **Narasimham J.**— The petitioners in these cases are being prosecuted for offences under Ss. 6 and 11, Orissa Maintenance of Public Order Act, 1948, in the criminal Courts at Bamra and Kalahandi. The main point urged in support of the petitions for quashing the proceedings in the criminal Courts, is that the Orissa Maintenance of Public Order Act, 1948, was not validly applied to the States of Bamra and Kalahandi and that consequently any trial of the petitioners for contravening any of the provisions of the said Act was void.

[89] It will be useful to give a narrative of the important incidents connected with the integration of the Orissa States with the Province of Orissa and the exercise of administrative jurisdiction by the Government of Orissa in the said States.

[90] Prior to the passing of the Indian Independence Act, the States of Bamra and Kala-

handi did not form part of what was then known as "British India" as defined in S. 311 (1), Government of India Act, 1935, but they were "Indian States" as defined in the said section of that Act. The Rulers of the said States exercised limited internal sovereign powers subject to the control of the British Crown who was the paramount power.

[91] The relations between the two were governed partly by the various Sanands granted to the Rulers by the paramount power from time to time and partly by the various attributes of paramountcy which were invoked by the paramount power when necessity arose. In consequence of the passing of the Indian Independence Act, 1947, the British Crown ceased to exercise any kind of paramountcy over the said States. Soon after the Rulers signed the Instrument of Accession, acceding to the Indian Union and permitting the Dominion Legislature to legislate in respect of certain matters specified in the schedule to that Instrument. On 14th December 1947 the said Rulers entered into separate agreements with the Dominion Government ceding to that Government:

> "Full and exclusive authority, jurisdiction and powers for and in relation to the governance of the States"

and transferred the administration of the States to the Dominion Government with effect from 1st January 1948. The Dominion Legislature passed an Act known as the Extra-Provincial Jurisdiction Act, 1947, regulating the exercise of extra provincial jurisdiction which may be obtained by the Central Government by treaty, agreement or other lawful means. The Central Government, in exercise of the powers conferred by that Act, delegated those powers of governance of the Orissa States to the Government of Orissa in their Notification No. 111-IB, dated 23rd December 1947 which was subsequently modified by another Notification of the Central Government No. 172-IB, dated 23rd March 1948. By virtue of the aforesaid orders of delegation, the Government of Orissa claimed to have obtained

> "full and exclusive authority, jurisdicti n and powers for and in relation to the governance of the States"

of Bamra and Kalahandi. The Orissa Maintenance of Public Order Act was passed by the Orissa Legislative Assembly sometime in March 1948. That Act *extended* only to the areas known as "the Province of Orissa" and did not *proprio vigore* apply to any of the Orissa States But on 10th April 1948, the Government of Orissa, purporting to act as the delegated authority of the Central Government issued a Notification No. 1500-C. applying the said Act to all Orissa States including Bamra and Kalahandi. The main argument of the Advocate General is that by virtue of the agreement of the Rulers dated 14th December 1948 read with cl. (a) of sub-s. (2) of S. 4, Extra Provincial Jurisdiction Act, 1947 and the two orders of delegation issued by the Central Government, the Provincial Government of Orissa have full powers to determine what shall be the law in any Orissa State and that consequently by virtue of the Notification No. 1500 C. dated 10th April 1948 the Orissa Maintenance of Public Order Act became the law in all the Orissa States also.

[92] Mr. P. R. Das' main contention is that the agreement dated 14th December 1947 (hereinafter referred to as the agreement) did not cede to the Central Government legislative powers in Bamra and Kalahandi and that consequently neither the Central Government nor their delegated authority has the power to determine what shall be the law in the said States. He further urged that the said agreement should be construed as a supplementary Instrument of Accession as contemplated by sub-s. (3) of S. 6, Government of India Act. (As adapted by the India (Provisional Constitution) Order, 1947) and that consequently that agreement was also subject to the limitations imposed by S. 6 of that Act. I would respectfully agree with the reasonings given by my Lord the Chief Justice to show that the agreement is not a supplementary Instrument of Accession and is consequently not controlled by the limitations imposed by S. 6 of that Act. It is an agreement between two sovereign States in consequence of which one sovereign State agreed to surrender complete jurisdiction within his State to another sovereign State retaining to himself "nothing more than a bare, nominal, or dormant sovereignty" (Illbert's Government of India, Ed. 3, p. 426).

[93] The exercise of jurisdiction by one sovereign State within the territories of another sovereign State though there may not be actual cession of territory by the latter to the former, is not a new concept in international law. The various Foreign Jurisdiction Acts of the Parliament are all based on the existence of such jurisdiction and even now the Crown of England claims to exercise such jurisdiction within the Persian Gulf States and some other territories which do not form part of the British Dominion. Such jurisdiction seems to have been based on the prerogative of the Crown, though the exercise of such jurisdiction by the executive is regulated by the Acts of Parliament such as the Foreign Jurisdiction Act, 1890. (Keith's Constitutional Law, pp. 564-566 and Chalmers and Asquith Constitutional Law, pp. 390-391).

[94] As regards the Indian States also such jurisdiction was exercised by the Crown through

its Crown Representative prior to the passing of the Indian Independence Act. A full discussion about the nature of such jurisdiction will be found in Chap. V of Illbert's Government of India (Ed. 3) and Chap. XII of Lee-Warner's 'The Native States of India'. The nature of such jurisdiction varied from State to State. But as pointed out by Lee-Warner (p. 340) in most of the States the jurisdiction was in the nature of "delegated jurisdiction" meaning jurisdiction delegated to the paramount power either by agreement between the power and the Ruler or else based on sufferance. It was in exercise of this jurisdiction that the Crown Representative applied several laws that were in force in British India to the administered areas in the States which did not form part of British India. The exercise of such jurisdiction was regulated by the Indian (Foreign Jurisdiction) Order in Council issued under the Foreign Jurisdiction Act, 1890.

[95] With the lapse of the paramountcy of the British Crown, and the abolition of the office of the Crown Representative, neither the Foreign Jurisdiction Act nor the Indian (Foreign Jurisdiction) Order in Council, 1937, became operative in the States of India. The provisions of the Extra-Provincial Jurisdiction Act are taken mainly from the Foreign Jurisdiction Act and the said Order in Council. Even if, (as argued by Mr. P. R. Das) it be taken for granted that the Rulers of Bamra and Kalahandi retained full sovereign powers except those ceded to the Dominion Government by their Instrument of Accession of August 1947 there is nothing either in the international law or in the provisions of the Indian Independence Act or the Government of India Act (as adapted) to prevent the Rulers from surrendering almost all their remaining sovereign powers to the Dominion Government. Any agreement that may be entered into between the Rulers and the Dominion Government for that purpose will not be an agreement which comes within the scope of the Government of India Act (as adapted) but it will be completely outside the provisions of that Act. The jurisdiction thus obtained by the Dominion Government in the said States may, in one sense, be called "delegated jurisdiction" (as Lee-Warner puts it) of the Rulers themselves. There is nothing in the Indian Independence Act or the Government of India Act (as adapted) prohibiting the Dominion Government from entering into such agreement either with the States of India or with any other foreign power. In fact, the right to enter into treaties or agreements with other powers is one of the prerogatives of every sovereign State and he Dominion Government as the executive head of the Dominion has got this prerogative power. It cannot be seriously contended that some of the prerogatives of the Crown which prior to the passing of the Indian Independence Act were exercised by the British Crown are now exercised by the Dominion Government on behalf of the Crown. For instance, the priority of the Crown's debts over other dues, the exemption of the Crown from the Statutes unless there is any express provision binding the Crown, the power to proclaim martial law in times of emergency, are some of the prerogative rights which still subsist in the executive of the Indian Dominion. There is, therefore, no reason to assume that a similar prerogative right of entering into agreements either with the Rulers of the acceding States in respect of matters not covered by the Instrument of Accession, or with sovereigns of other countries does not vest in the Dominion Government. In the supplementary argument Mr. Misra relied on Proviso 2 to sub-s. (1) of S. 8, Government of India Act (as adapted) and argued that the executive authority of the Dominion Government in any acceding State is limited to those matters with respect to which the Dominion Legislature has power to make laws. This proviso, however, can hardly have any application in the present case where the Dominion Government purport to exercise the power as delegated authority of the Rulers themselves. As I have already pointed out, the agreement is outside the provisions of the Government of India Act.

[96] All that the Extra-Provincial Jurisdiction Act lays down is that if the Dominion Government acquires such jurisdiction by any lawful means such as treaty, agreement, usage or sufferance, such jurisdiction may be exercised in the manner set forth in that Act. But that Act does not confer such extra-Provincial jurisdiction on the Dominion Government nor has the Dominion Legislature ever assumed to itself the power to make laws for States of Bamra and Kalahandi.

[97] For the purpose of deciding these cases it is not necessary to consider whether, in effect, the agreement of 14th December resulted in the cession of the territories of Bamra and Kalahandi to the Dominion Government or else whether the agreement is revocable by the Ruler. It is also not necessary to consider whether by virtue of that agreement the Dominion Legislature can claim to legislate for the States. As already pointed out, the Dominion Legislature has not purported to legislate for the States nor has any argument been advanced before us on the ground that any Ruler has revoked the agreement. I may, however, observe that questions relating to the recognition by the

Dominion Government of the act of any Ruler in revoking the agreement and the withdrawal or refusal to withdraw any jurisdiction in any Orissa State consequent on the revocation of the agreement appear, *prima facie*, to be questions dealing with Acts of State which cannot be called in question in municipal Courts. But as there was no argument on these question, I would leave them open.

[98] As regard the construction of the agreement as to whether it confers on the Dominion Government powers to determine what shall be the laws in the States. I have nothing to add to the reasonings given by my Lord the Cheif Justice. The decision of the Privy Council in *Secy. of State* v. *Rustam Khan*, A. I. R. (28) 1941 P.C. 64: (68 I.A. 109), while interpreting the lease executed by the Khan of Kalat in favour of the British Crown, applies with full force to the present case also.

[99] I would, therefore, respectfully agree with my Lord the Chief Justice and hold that the Orissa Maintenance of Public Order Act has been validly applied to the States of Bamra and Kalahandi and that proceedings would lie in the criminal Courts of those States for contravention of any of the provisions of the said Act.

R.G.D. *Petitions dismissed.*

A. I. R. (37) 1950 Orissa 88 *[C. N. 13.]*

JAGANNADHA DAS AND PANIGRAHI JJ.

The King v. *Hari Baisakh* — *Accused* — *Respondent.*

Govt. Appeal No. 2 of 1949, Decided on 1st August 1949, from judgment of Sessions Judge, Cuttack, D/- 18th November 1948.

(a) Essential Supplies (Temporary Powers) Act (1946), Ss. 7, 17 — There must be evidence as to where cloth was being transported—Possession of passenger's ticket with person is no indication.

From the mere fact that the accused was arrested while boarding a train bound for Howrah with a ticket for Howrah, it cannot be said that the luggage which was not booked and which he was carrying was also destined for Howrah, in the absence of anything to connect the luggage with the destination. In such a case, in the absence of anything to indicate as to where the luggage which contained cloth, was being transported without permit, the accused cannot be convicted, only on his plea of guilty, under S. 7/17. [Para 1]

(b) Criminal P. C. (1898), S. 255—Plea of guilty—Lacuna in evidence — Offence not established by proper evidence — Conviction upon plea is bad — Criminal P. C. (1898), S. 243. [Para 2]

Annotation: ('46-Com.) Criminal P. C., S. 255 N 4 and 6; S. 243 N. 2.

Advocate-General — for the King.

A. N. Purohit — for Respondent.

Panigrahi J. — This is an appeal against an order of acquittal passed by the Sessions Judge, Cuttack. The respondent Hari Baisakh was charged with an offence under Ss 7/17 of Act XXIV [24] of 1946, of having attempted to remove 42 lbs of handloom cloth beyond the limits of the Orissa Province on 7th August 1948. The accused was found boarding the 5 Dn. Train at Cuttack on 7th August 1948 carring 42 lbs handloom cloth. P. W. 1 the Anti-Smuggling S. I. ascertained that the accused had no permit to transport the cloth from Orissa to Bengal. By a Notification No. 16100 ST dated 3rd June 1946 of the Government of Orissa the transport of handloom cloth without a permit from the Supply Department, beyond the limits of the province, is made punishable. The accused was therefore charged with having committed an offence in having contravened this Notification and was therefore punishable under S. 7 of Act XXIV of 1946. P. W. 1 and P. W. 2 merely prove that the accused had a ticket from Cuttack to Howrah and that he had also 42 lbs. of handloom cloth with him. On this evidence the accused was questioned as to whether he had attempted to remove the said cloth from Cuttack to Howrah, in the course of his examination under S. 342, Criminal P. C., and the accused replied 'Yes.' The accused also pleaded "guilty" to the charge framed by the Magistrate who tried him. The Magistrate accordingly convicted him on the plea of 'guilty' recorded by him. The accused appealed to the Court of Session in Criminal Appeal No. 580 of 1948 and the learned Sessions Judge held that that the act of the accused in boarding the train at Cuttack with the bundle of handloom cloth did not amount to an attempt to commit an offence. Accordingly he set aside the conviction and sentence passed by the Magistrate. It is strange that S. 412, Criminal P. C., was lost sight of by the Public Prosecutor as well as by the Court and the appeal was heard on merits. The Government have filed this appeal against the order of acquittal passed by the Sessions Judge on 18th November 1948. The contention of the learned Advocate-General for the Crown is that the purchase of a ticket by the accused to Howrah is sufficient to prove that the accused intended to proceed to Howrah. It is next urged that the carrying of the bundle of 42 lbs of handloom cloth in contravention of the Notification is indicative of the accused's intention to carry it to Howrah. I fail to appreciate the logic of this argument because it is just possible that the accused may have unburdened himself of his luggage at a wayside station. It does not follow that because he had a ticket to Howrah, the luggage that he was carrying at Cuttack was also destined for Howrah. It should be noted that the luggage was not booked and there is nothing to indicate as to where the cloth was going to be transported. We are, therefore, satisfied that there is no evidence on the side of the prosecution to connect the luggage with the destination.

[2] The question that has, however, given us considerable trouble is whether the plea of guilty recorded by the Magistrate is not sufficient to base a convication upon, and whether it is open to us, in revision, to set aside the conviction on the ground that the plea of guilty is not sufficient to warrant a conviction in the absence of any evidence of the offence. Neither the Advocate-General nor Mr. Purohit appearing for the respondent—accused has been able to cite any authority which lays down that in revision our powers are restricted or are not such as to justify our interference with a conviction improperly obtained. There is authority for the position that although a plea of guilty is recorded the conviction can be bad if there is a lacuna in the evidence and if the offence has not been established by evidence. We are satisfied, on the evidence, that the conviction is bad and that the plea of guilty recorded by the Magistrate is not sufficient to justify the conviction.

[3] In the result this appeal is dismissed and the order of the learned Sessions Judge is confirmed.

Das J.—I agree.

R.G.D. *Appeal dismissed.*

A. I. R. (37) 1950 Orissa 89 *[C. N. 14.]*

SPECIAL BENCH

RAY C. J., DAS AND NARASIMHAM JJ.

Saradhakar Naik and others — Petitioners v. The King.

Criminal Misc. Nos. 2, 3, 4 and 5 of 1948, D/- 1-10-1948.

Government of India Act (1935, as adapted) Ss. 207, 205 — High Court of Orissa exercising jurisdiction in Orissa States, by virtue of powers delegated by Dominion under Extra-Provincial Jurisdiction Act, is not High Court within meaning of Ss. 207 and 205—No appeal lies to Federal Court and no certificate can issue.

Per *Das and Narasimham JJ. (Ray C. J., contra)*: High Court of Orissa while exercising jurisdiction in Orissa States (Bamra and Kalahandi)—not being parts of Orissa—delegated to them by the Dominion of India under Extra-Provincial Jurisdiction Act, 1947, is not a High Court for the purposes of S. 207, Government of India Act and hence cannot attract the appellate jurisdiction of the Federal Court. [Paras 32, 43 and 44]

The Orissa High Court, in such cases is not a "High Court" within the meaning of S. 205, Government of India Act. (1913) A. C. 546, *Disting.*

No appeal lies to Federal Court in such cases, and no certificate can issue. [Paras 32, 43 and 44]

Annotation: ('46-Man.) Government of India Act, S. 205, N. 1.

P. Misra—for Petitioners.
Advocate-General, G. C. Das and B. Mohapatra — for Opposite Party.

Ray C. J. —The subject-matter of this order is a petition by the petitioners in Cr. Misc. Cases Nos. 2, 3, 4 and 5 of 1948, for a certificate under sub-s. (1) of S. 205, Government of India Act, 1935, as adapted.

[2] The question is not free from difficulty. It is due to an anomalous position arising out of the fact that the cases arise out of certain criminal proceedings, started against the petitioners, under laws extended to the areas of Bamra and Kalahandi States,—not being parts of the Province of Orissa—by the Government of Orissa, in exercise of a jurisdiction delegated to them by the Government of Indian Dominion under Extra Provincial Jurisdiction Act. The questions that call for solution are:

> "(a) Whether the Federal Court of India has jurisdiction in the areas in which the cases arose; and
>
> (b) Whethere the order of this Court, in relation to the States area, is subject to the appellate jurisdiction of the Federal Court."

[3] The Federal Court has been re-established as a Court for India (meaning the Dominion of India) by the Federal Court Order, 1947. The preamble of the Order reads:

> "In exercise of the powers conferred by S. 9 (1) (i) Indian Independence Act, 1947, and of all other powers enabling him in that behalf, the Governor-General is plesed to make the following order."

[4] Paragraph 4 (i) of the Order provides for establishing the Court in the following words:

> "The Federal Court shall, as from the appointed day, be the Federal Court of India and shall accordingly be deemed to have been duly constituted, as such, in accordance with the provisions contained in that behalf in the Government of India Act, 1935, as it applies in relation to india on and after that day."

[5] 'India' in this order, means 'The Dominion of India'. This paragraph of the Order settles the constitution and status of the Federal Court. For the purpose of determination of its jurisdiction—local, personal and in relation to questions, in dispute, between the parties—it shall have to be borne in mind that the 'Order' may have the same extra-territorial application as a law of the Dominion Legislature—(*see* S. 9 (4) (c), Independence Act). Paragraph 1 of the Instruments of Accession, executed by the Rulers of the concerned States, provide that the Federal Court shall have jurisdiction over the States in respect of such functions as may be vested in it by or under the Government of India Act, 1935, as in force in the Dominion of India on 15th day of August 1947. Extension of this jurisdiction until the States are included in the Indian Dominion is extra-territorial. There are no terms in the Instruments that would detract from this jurisdiction.

[6] The Dominion of India, according to S. 5, Constitution Act, is 'the Dominion of India

established by the Indian Independence Act, 1947' and it

"shall, as from 15th August 1947, be an Union comprising
(a) the Provinces hereinafter called Governors' Provinces;
(b) the Provinces hereinafter called Chief Commissioners' Provinces ;
(c) the Indian States acceding to the Dominion in the manner hereinafter provided ; and
(d) any other areas that may with the consent of the Dominion be included in the Dominion."

[7] There is hardly any dispute that the concerned States were, until the date of agreements providing for cession of full and exclusive authority, jurisdiction and power for and in relation to the governance of the concerned States and for transfer of their administration to the Dominion Government, by the respective Rulers, acceding States and, as such, within the Dominion of India within the meaning of the section. If it be held that there has been a complete cession of territory by virtue of that agreement, the concerned States shall be the parts of Indian Dominion in the category of S. 5 (1) (d) of the Act. It is also a question for serious consideration, whether yielding up of all attributes of sovereignty by the Rulers over the areas, in question, so as to leave nothing more than the bare nominal or dormant sovereignty in himself would amount to inclusion of the area in the Dominion for the purposes of exercise of such jurisdictions as are ceded, particularly for the purpose of jurisdiction relating to administration of justice including establishments of Courts. My answer to this is in the affirmative for such reasons as I have already given in my main judgment. At any rate, as parts of acceding States, they are within the Dominion.

[8] The Federal Court, according to the Consitution Act (hereinafter called the Act), has two kinds of jurisdictions : (i) Original and (ii) Appellate. The jurisdiction can also be divided into Civil and Criminal. We are concerned with its appellate jurisdiction in matters criminal. We have, therefore, nothing to do with the Federal Courts Enlargement of Jurisdiction Act (Act I [1] of 1948). It is to be noted, however, that the latter Act is limited in its operation to judgments of a High Court, as defined in Chap. II, Part IX, of the Act. This limitation has no application to its criminal appellate jurisdiction. By contrast, however, it indicates that in matters of criminal appellate jurisdiction, the words 'High Court' has wider or at any rate different signification.

[9] The matters in respect of which right of appeal exists has been specified in S. 205 of the Act. The sub-section (i) of the section only is material for our purpose. It reads :

"An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any Order in Council made·thereunder before the date of the establishment of the Dominion or any order made thereunder on or after the date, or as to the interpretation of the Indian Independence Act, 1947, or of any order made thereunder, and it shall be the duty of every High Court to consider in every case whether or not any such question is involved and of is own motion to give or to withhold a certificate accordingly."

[10] There can be no serious controversy that this appellate jurisdiction is restricted in its operation to (i) any judgment, decree or final order of a High Court; (ii) arising out of cases that must involve a substantial question of law as to the interpretation of the Act or any Order in Council or any order made thereunder either before or after the date of establishment of the Dominion ; and (iii) or interpretation of Indian Independence Act or of any order made thereunder. There is no dispute that the cases disposed of by our order, sought to be appealed against, to involve such questions, as (ii) & (iii) above. The only other question for consideration is if the Orissa High Court in exercise of its extended jurisdiction under para. 5 of the Administration of Orissa States Order is a High Court within the meaning of S. 205 of the Act. Before proceeding to consider this question, I shall advert to the difference in language between S. 205, as adapted, and the section, before adaptation, in relation to "High Court". Before, it was ". . . . . of a High Court in *British India*". Now it is only *High Court*. I shall deal with the intent and meaning of this change presently.

[11] The only controversy, as I have already said, centres round the question whether 'High Court of Orissa' functioning as a High Court in or in relation to the aforesaid area, is a High Court within the meaning of the section. That it is not a High Court in acceding States is clear from the fact that it has not been declared such in accordance with S. 217 of the Act in relation to provisions contained in S. 207 nor has it been established in or for an acceding State, as such. The question that still remains for consideration is if it is a High Court for any part of the Indian Dominion in exercise of its jurisdiction as extended by the Administration of Orissa States Order. Reference in this connexion may be made to para. 5 (a) of the said order, which reads :

"The High Court for the time being exercising jurisdiction in the province of Orissa shall, so far as circumstances admit, exercise the same jurisdiction in all Orissa States and shall have the same powers and functions in such States. Any reference to the 'High Court' in the laws applied or continued in force under para. 4 shall be construed as a reference to the High

Court for the time being exercising jurisdiction in the Province of Orissa".

[12] According to this paragraph read with the Schedule attached to the order enumerating the laws applied to the States, the Codes of Criminal Procedure is one of such laws. The Orissa High Court, in the instant case, is a High Court within the meaning of the Criminal Procedure Code, as extended in its application to those areas. The words 'High Court' has been defined both generally and specifically. The general definition is contained in S. 311 of the Act. The relevant portion of the section reads,

> "In this Act, unless the context otherwise requires, 'High Court' does not, except where it is expressly so provided, include a 'High Court' in an acceding State".

[13] The more limited definition of 'High Court' is contained in S.219 of the Act. That definition is applicable 'in relation to India. 'India' in S. 219 means 'Governors' Provinces and Chief Commissioners' Provinces' but does not include 'any acceding States'. I shall re-advert to the difference of language in S. 205, as adapted. Ordinarily, we should expect 'High Court in British India' to be replaced by 'High Court in India'. If it were so, then only the section would refer exclusively to 'High Courts' in Governors' and Chief Commissioners' Provinces as it is sought to be contended. *Prima facie*, therefore, 'High Court' in the section must have a wider signification though it would, under all circumstances, exclude High Court in acceding State in view of definition of S. 311 of the Act already referred to. In this context of how the word has been defined, there are conceived three classes of High Court in the Act, namely, (i) High Court in relation to Governors' and Chief Commissioners' Provinces; (ii) High Court in acceding States; and (iii) High Court in or in relation to any other areas within the Dominion and constituted otherwise than High Courts in relation to India and acceding States. My conclusion is that a High Court of class (iii) above is certainly a High Court within the meaning of S. 205 of the Act. I see no reason why Orissa High Court, as such, in its extra-provincial jurisdiction, would not belong to this class and be deemed a High Court within the meaning of S. 205. The High Court of Orissa in exercise of its extended jurisdiction may be conceived of in two different ways, namely, either High Court in India with extra-territorial jurisdiction or High Court for the States area that is any other area referred to above. Neither of these connotations can be ruled out as inappropriate or incorrect.

[14] In S. 219, the definition of the words 'High Court' is not subjected to any jurisdictional limitation. It has reference to the mode of its constitution with reference to the constituting authority. There is hardly any guarantee for the contention that the High Court constituted in India exercising extra-territorial jurisdiction will not be a High Court within the meaning of S. 219 or of S. 205.

[15] Conceived in this aspect, it will attract the principles laid down in the case of *National Telephone Co.* v. *Postmaster General No. 2*, 1913 A. C. 546 at p. 552 : (82 L. J. K. B. 1197) namely,

> "When a question is stated to be referred to an established Court without more, it, in my opinion, imports that the ordinary incidents of the procedure of that Court are to attach".

I shall here advert to the language employed in S. 4, sub-s. (ii) (c), Extra-Provincial Jurisdiction Act for determining the Court by whom the jurisdiction is to be exercised. The section reads :

> "The Central Government may make such order as may seem to it expedient for determining the Court by whom and for regulating the manner in which any jurisdiction consequential on the jurisdiction under the Act is to be *exercised within any Province.*"

[16] The language underlined (here italicised) imports that the added jurisdiction is to be judged in the light of jurisdiction in or in relation to the Province. In this view, the objection to the applicability of the doctrine laid down in the *National Telephone Co.'s case*, (1913 A. C. 546 : 82 L. J. K. B. 1197) based on difference of area noticed by my learned brother, Narasimham J. will disappear. It may also be stated in this connexion that the applicability of the doctrine has no intimate relation with the right of appeal conferred on a subject being either general or special. In this part of my judgment, I am assuming that the area is not included in Indian Dominion nor in the Province of Orissa. The jurisdiction is personal being extra-territorial. We had examples of such jurisdiction of British Indian Courts in Native States. The subject is dealt with in Chap. 5 of Illbert's Government of India from which I have made copious references in my main judgment in the case. The Merchant Shipping Act, 1894, The Slave Trade Act, 1876 (39 & 40 Vict. c. 46) afford instances of vesting Courts with extra-territorial jurisdiction. Exercise of such jurisdiction will not make the Court immune from such superintendence to which it is subject by its very constitution. Section 205 of the Act must be read as part of the constitution of 'High Court' referred to therein in relation to its functions and duties. In bestowing the extra-provincial jurisdiction upon this Court, the Administration of Orissa States Order—para. 5 (a) ordains that the 'High Court' shall exercise the same jurisdiction and shall have the same powers and functions as in Orissa Province. According to S. 205 of the Act, it is one of the duties of the High Court to consider whether

certificate for leave should be granted. This function of the Court stands out from what may be conceded of "as a right of appeal of a subject from the Court's judgment". In exercising our criminal jurisdiction, extra-provincially, as provided in Criminal Procedure Code which is extended and applied to the States, we are placed under the same functional obligation as in exercise of similar jurisdiction in the Province, provided the Federal Court has jurisdiction in or in relation to the areas, in question. I have held before, for reasons recorded that the Federal Court has jurisdiction over or in relation to the areas.

[17] Strictly speaking, however, in exercise of its extra-territorial jurisdiction, in relation to matters in respect of which the concerned States have not acceded by the Instruments of Accession, it is a High Court in or in relation to an area within the Indian Dominion but not having any reference to the affairs of India or of acceding States. In the absence of something compelling to force me to hold otherwise, I cannot come to any other conclusion.

[18] In the context of events already dealt with in the judgment, one particular area may form a State acceding to the Dominion in the manner provided in S. 6 of the Act, and at the same time it may be viewed as an area included in the Dominion with the consent of the Dominion for the purpose of certain jurisdiction other than those included in the Instrument of Accession. The Court's jurisdiction, as such, in reference to a territory relates to the persons resident in and cases arising out of a territory. Orissa High Court, therefore, is certainly a High Court for the area in the sense of its possession of jurisdiction in relation to the persons resident of and cases arising in that area under the laws extended and applied over there.

[19] In reference to these areas, it can be predicated with any amount of certainty that they have united with the Indian Union for the purposes of their governance, however qualified the Union may be from the Rulers point of view of his nominal and dormant sovereignty still existing or not. Definition of Indian Union in S. 5 has to be understood in terms of one united sovereignty for the purpose of internal governance and administration and in terms of the Law of Nations for the purpose of international membership but not in terms of ownership of territories as private properties. Considered in this light, my conclusion is that the areas concerned are areas united with Indian Dominion and form a part thereof.

[20] The simple position deducible is that the Orissa High Court in exercising the extra-territorial jurisdiction within the province in terms of S. 4 (c), Extra-Provincial Jurisdiction Act has an added jurisdiction to an established Court as contemplated in *National Telephone Co.'s case*, 1913 A. C. 546 : (82 L. J. K. B. 1197) and is subject to the appellate jurisdiction of the Federal Court. Alternatively, it is a duly constituted High Court in or in relation to an area inside the Indian Dominion over the whole of which the Federal Court had got (judicial) jurisdiction. Any High Court exercising such jurisdiction is in relation to its judgment, decree or final order fulfilling the conditions laid down in S. 205 of the Act is subject to its appellate jurisdiction.

[21] The main, if not sole, objection to the view, that I have taken, consists in that the Government of Indian Act, taken as whole, does not contemplate governance of areas other than Governors' or Chief Commissioners' Provinces and acceding States. It is pointed out, in this connexion, that any area, included within the Indian Dominion by consent, must be either included within any one of the aforesaid territories or be constituted into a Unit by itself. This is based upon the circumstances that there is no provision in the Constitution Act for any machinery for government of any such area. In this view, it tantamounts to say that the language, employed in the Act, must, have assigned to it only such meaning as it was capable of at the time when the Government of India Act was passed. That is to say, the Constitution is sought to be interpreted in accordance with the general rule governing statutory interpretation, namely, that a statute has to be read as having fixed meaning speaking from the date of its enactment. This contention overlooks the fact that the Constitution is not a mere casual piece of legislation but an instrument of Government intended to last for all time. True, the rule of construction of the Constitution that it must be interpreted by reference to the meaning is undoubted, but this does not involve the consequence that they are to be read as comprehending only such manifestation of the subject matters, named, as were known to the framers. On the contrary, the Constitution can be and is construed to include such new specific development of particular matters as may arise from time to time. In applying this mode of construction, the meaning of the terms of the Constitution does not not undergo any change, but it is made conformable to the progress of the Society side by side with human civilisation. The terms of the Constitution should not be construed in the light of the meaning which they bore when the Constitution came into being, but should be given broader construction from time to time in

order to include new circumstances arising with the progress of history.

[22] Another aspect that stands out as one of great consequence is that it is customary that in all Federal Constitutions, there is always a provision for a Court of whom the essential function and duty is to adjudicate upon the constitutional competence of any Federal or State Act or any other Governmental measures whenever any such falls for decision; every precaution is taken in the Constitution Act to ensure this jurisdiction of the Federal Court. The position is illustrated by the Constitution of Australian Commonwealth:

> "The High Court alone can finally determine in Australia questions of interpretation of the Commonwealth Constitution, subject to the exception mentioned hereafter. In one respect the position of the High Court is different from that of any other Dominion Court; no appeal is permitted from it to the Privy Council, 'upon any decision howsoever arising as to the limits *inter se* of the constitutional powers of Commonwealth and those of any State or States or as to the limits *inter se* of the constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by His Majesty in Council' such certificate may be granted 'for any special reason'. The obvious object of this provision was to make the High Court the sole interpreter of the Constitution, and a consequence is that the High Court is not bound to follow the decision of the Privy Council upon any such constitutional questions as to the limits *inter se*."

[23] Section 205, Government of India Act, has similar object in view. Acceding States apart, every other Court within the geographical and jurisdictional ambits of the Indian Dominion must be in its adjuducation of constitutional question subject to the appellate jurisdiction of the Federal Court.

[24] Another objection, according to the contrary view, is that the 'High Court', as understood in my judgment, cannot be made to fit in with Ss. 40, 86, 206, 228, 242, 253, 254, 255 and 303 of the Act. To me, it looks like a logical short cut but it is not sound. Most of those sections are in relation to Governor's or Chief Commissioners' Province and accordingly S. 219 of the Act shall govern the meaning. With regard to others as in relation to the general view of the question as a whole, I should apply the doctrine of "generic interpretation" which asserts no more than that new developments of the same subject and new means of executing an unchanging power do arise from time to time and are capable of control and exercise by the appropriate organ to which the power has been committed. In other words, while the power remains the same, its extent and ambit may grow with the progress of history. The question whether a novel development is or is not included in the terms of the Constitution finds its solution in the application of the above doctrine. This principle is also known as "progressive interpretation". By this the meaning of the terms of a Constitution does not undergo a change, for *the nature of* a grant of a power remains the same. Consistently with the genius of common law a constitutional system, based upon English Jurisprudence, must be adapted by application of the aforesaid doctrine to the development of every day life. In the background of the Dominion Government of India of to-day, as a Federal State, it is a real State side by side with its member States and its organs have a direct power over the citizens of those member States.

[25] In this connexion, it would not be a diversion to refer to some case law illustrating how the terms used in a constitution document should be adapted so as to embrace subjects, though different in various of its aspects, but being of the same nature or belonging to the same category as the subject of grant of power. In the Australian Constitution, in S. 51 (v), the power of legislation of the Commonwealth Parliament extended to "Postal, Telegraphic, Telephonic and other like services". At the time when the Constitution was framed, the extent to which the radio broadcasting has developed in recent years was obviously not in contemplation of the framers. The question arose whether "wireless telegraphy" or "broadcasting" shall be deemed to be included within the term "service". The Court found that in applying the ordinary rules of interpretation based upon 'fixed meanings' of the word the matter would depend upon a greater variety of considerations but having regard to *the nature of "broadcasting"* itself and the meaning of the word "service" in the Constitution, it must be remembered that not only the sending but also of reception of messages of this kind must be included in its "service" for as pointed out by the Privy Council in the *Canadian Broadcasting Case*, 1931 A. C. 304, it would not be practicable to separate the receiving from the transmitting apparatus both being essential parts of integral unit. The Court, in solving the problem, observed:

> "It is clear that from the nature of the case the whole power in respect of "wireless telegraphy" must be vested in either the Commonwealth or the States, for divided control would be impossible in respect of receiving apparatus. It follows that that the doctrine under review (i. e, generic interpretation) might not be successfully invoked to support the exercise of a power which involves control over matters having a far wider extension than it is comprehended by the terms of the grant but in every case the inherent nature of the subject-matter . . . . . must be fully considered in relation to the subject of enactment."

[26] To quote the words of Issacs J. in *Hardinge* v. *Federal Commissioner of Taxa-*

tion, 23 Com. L. R. 119 at p. 132, there is a marked conceptional distinction between "two aspects of the same thing or two different things in the same aspect". In my view, the High Court of Orissa functioning for the Province of Orissa and functioning in relation to the extra-territorial jurisdiction of the Province of Orissa are not two different things but constitute two aspects of the same thing. Exercise of such jurisdiction by the High Court of Orissa is not outside its constitution (*Vide* last paragraph of the Order). It follows, therefore, that in exercise of such added jurisdiction conferred upon by an appropriate authority it does not become constitutionally a different Court.

[27] If I have not been able to concur with my learned brothers, it is for the reasons, summarised below:

(i) I could not otherwise explain the intendment of the legislative difference between the meanings of the words 'High Court' as specified in Ss. 219 and 311, Constitution Act, particularly that the words "in relation to India" occurring in S. 219, do not further restrict the meaning of "High Court", in S. 311, for the limited purpose of the affairs of Governors' and Chief Commissioners' Provinces.

(ii) Neither could I reconcile myself to the position that the Federal Court Order 1947 (an Order having extra-territorial application as much as laws of Dominion Legislature in India) lacks jurisdiction over, or, in relation to, any area within the geographical and Governmental ambits of the Indian Union, irrespective of any such area, having been included or not in the Dominion, in the sense of its being either a Governor's or a Chief Commissioner's Province or of an acceding State, as such, that is, in respect of subjects or power acceded, however much the nature and character of its jurisdiction may continue the same as before.

(iii) Neither could I understand that 'an area' has any distinctive political existence apart from 'a State' in which all elements of sovereignty, all powers and jurisdiction of governance and administration are vested nor that the jurisdiction, exercised in the area, in question, does not constitute a different aspect of the Province of Orissa, as one of the member States of the Union of Indian Dominion.

(iv) Nor could I comprehend that "the same functions", assigned to the Orissa High Court, in relation to the said area, in respect of the laws applied to them under para. 5 of the Administration of the Orissa State Order, 1948, should not be inclusive of, or the same as, the function assigned to the Orissa High Court like any other High Courts of India under S. 205 of the Act, namely,

> "it shall be the duty of every High Court to consider in every case whether or not any such question is involved of its own motion to give or to withhold a certificate accordingly."

in administering the self-same laws in the Province of Orissa.

(v) Likewise, I could not conciliate to the view that the exercise of jurisdiction or powers and functions of the Orissa High Court in the States, though exercised within the Province of Orissa according to the Extra-Provincial Jurisdiction Act, did not constitute one of the two aspects of the said High Court, but constituted it an altogether different Court and that, if the former, it will not feed the conception underlying S. 205 of the Act that all constitutional problems shall have their final arbitrament in the Federal Court (Privy Council apart) except in regard to acceding States in relation to the subject-matter of accession.

[28] In my judgment, therefore, certificate should be granted to the petitioners for the purpose of an appeal to the Federal Court. But the majority view being to the contrary, the order of the Court would be to withhold the certificate accordingly.

[29] **Das J.**—I have had the benefit of reading the judgments of my Lord the Chief Justice and Narasimham J. In view of their differing opinions I have considered the matter, assisted by their judgments with anxiety. The question for decision is a difficult one and since I have come to my conclusion after considerable hesitation, I consider it desirable to set out briefly my reasons for the same out of deference to both the learned Judges.

[30] Under S. 205, Government of India Act, an appeal lies to the Federal Court from any judgment, decree or final order of a High Court, if the High Court certifies that the case involves a substantial question of law of the kinds specified therein. It is further provided that it shall be the duty of every High Court to consider in every case whether or not any such question is involved and of its own motion to give or to withhold a certificate accordingly. Since in this case we are agreed that questions of law of the kinds specified in the section are involved we can withhold the certificate only if we reach the compelling conclusion that the High Court dealing with this matter is not a High Court within the meaning of S. 205.

[31] The jurisdiction of the High Court in dealing with this matter is derived from para. 5 of the Orissa States Administration Order. This, in effect, states that the High Court of Orissa shall exercise the same jurisdiction in all Orissa States as it exercises in the Province of Orissa and it also states that reference to a High Court

in any of the laws applied to the States (including therein S. 435, Criminal P. C., under which we were invited to exercise our jurisdiction in this case), shall be construed as a reference to the High Court of Orissa. The question that arises is whether the High Court, as so vested with jurisdiction, comes within the purview of S. 205. This involves a further question whether the effect of para. 5 of Administration of States Order is to be taken as constituting notionally a separate High Court or as vesting additional jurisdiction in the existing Orissa High Court. It is a matter on which I express no opinion. But it is clear that the High Court in this case is a High Court exercising jurisdiction outside the Province of Orissa and in an area which is not comprised in any other province of India. The meaning of the words 'High Court' for the purpose of the Government of India Act has been set out in S. 219, Government of India Act, and that meaning must apply also to the words 'High Court' in S. 205. In setting out the meaning of the words "High Court" sub-s. (1) of that section states that certain specified High Courts, of which Orissa High Court must now be taken to be one, shall "in relation to India" be deemed to be a High Court for the purpose of the Act and the word "India" has been defined in sub-s. (3) of S. 219 as referring to the various provinces. What has given me considerable difficulty is the correct import of this phrase "in relation to India" as used in this section. Can it be taken to include in its connotation a High Court which by its constitution is a High Court for one of the provinces of India, but by some arrangement exercises extra-provincial jurisdiction outside India as defined when acting in the exercise of such extra-provincial jurisdiction.

[32] A close examination of the provisions of the Government of India Act makes me think that the High Court in the exercise of such extra-provincial jurisdiction cannot be brought in within the terms of the connotation given to it in S. 219. The scheme of the Government of India Act, clearly indicates that it contemplates and makes provision for only two classes of High Court — High Courts for and within the provinces and High Courts functioning for and within the acceding States and declared as such under S. 217, Government of India Act. There is no provision for a third category of High Courts exercising extra-provincial jurisdiction. A reference to the various other sections in the Government of India Act, namely, Ss. 40, 86, 206, 228, 242, 253, 254, 255 and 303 makes it difficult to fit in a High Court exercising extra-provincial jurisdiction into the frame work of the Government of India Act. It therefore seems to me that whatever may be the import of the phrase "in relation to India," it cannot be construed to have reference to a High Court when exercising extra-provincial jurisdiction. The situation is one which has not been envisaged by the Government of India Act as such and has not been specially provided for in the Orissa States Administration Order. It therefore seems to me that the words "High Court" in S. 205 must refer only to the High Court of Orissa functioning with reference to its constitution for the province of Orissa and not with reference to its added extra-provincial jurisdiction. The case in *National Telephone Co's case*, 1913 A. C. 546: (82 L. J. K. B. 1197) cannot be of any help if the conclusion is reached, that S. 205 cannot apply to the High Court in the present case. If I had been able to persuade myself that irrespective of the connotation of the words "High Court" in S. 205, the Federal Court is a Court with general jurisdiction over the entire Dominion of India including areas which have not yet been incorporated in to any other provinces and for which no High Court as in an acceding State is provided for by declaration under S. 217, I should have found myself able to support the right of appeal. But I am unable to feel convinced that whether the terms of the Federal Court Order, 1947, or the omission of the words "British India" from S. 205, are sufficiently strong reasons for bringing about such a result which does not appear to have been contemplated in the Government of India Act as it stood before the Indian Independence Act. In the result therefore I am obliged with regret to come to the conclusion that no appeal lies to the Federal Court and that no certificate can issue. I agree also that there is no right of appeal in this case under S. 207.

[33] **Narasimham J.**—This is a petition for grant of a certificate under sub-s. (1) of S. 205, Government of India Act, 1935 (as adapted) with a view to enable the petitioners to file an appeal to the Federal Court against the judgment of this Court dated 9th September 1948 in Cri. Misc. Cases Nos. 2, 3, 4 & 5 of 1948.

[34] At the outset I may point out that the aforesaid cases involve a substantial question of law as to the interpretation of Ss. 6 & 8, Government of India Act, and if it could be reasonably held that S. 205 of that Act is applicable, I would have no hesitation in granting the certificate asked for.

[35] The Federal Court is a creation of the Statute and cannot claim any inherent jurisdiction over the High Courts of India. Therefore unless it can be held that the High Court of Orissa while exercising jurisdiction in the States of Bamra and Kalahandi (which or outside the territorial limits of the Province of Orissa) is a

"High Court" for the purposes of S. 205, Government of India Act, it will not be competent for that High Court to grant the certificate, nor will the Federal Court obtain jurisdiction to hear an appeal from the decision of that High Court. As pointed out by their Lordships of the Federal Court in *Pashupati Bharti* v. *Secy. of State*, A. I. R. (25) 1938 F. C. 1 : (I L. R. (1939) Kar. F. C. 1) and reiterated in *Lakhpat Ram* v. *Behari Lal*, A. I. R. (26) 1939 F. C. 42 : (I. L. R. (1939) Kar. 96) the nature of appellate jurisdiction of the Federal Court is strictly limited by Statute :

> "A Court cannot by the exercise of its inherent powers extend its appellate jurisdiction or increase its revisional authority over other Courts . . . The relation between the Federal Court and the High Courts of British India bears no resemblance to the relation between the High Courts, and Courts subordinate to them."

Therefore the observations of the Privy Council in *Hemchand Devchand* v. *Azam Sakarlal Chhotam Lal*, 1906 A. C. 212 at p. 238 regarding the right of a person aggrieved by an order of a Court administering justice on the King's behalf (whether that Court may exercise jurisdiction) to apply to the Privy Council to redress his wrong, will have no application to the present case. Mr. Misra, on behalf of the petitioners, frankly conceded that if his argument as regards the applicability of S. 205, Government of India Act, is not substainable, his petition for grant of a certificate must necessarily fail.

[36] The High Court of Orissa was constituted by the Governor-General by the Orissa High Court Order, 1948, which is an Order made under S. 229, Government of India Act. The Para. 1 of Art. 3 of that Order make it clear that the jurisdiction of the High Court of Orissa is limited to the areas known as "the Province of Orissa", which expression means the districts of Cuttack (including Angul), Puri, Balosore, Ganjam, Koraput and Sambalpur which were constituted as a separate Province by the Government of India (Constitution of Orissa) Order and such areas as may be added to the Province by an order of the Governor-General under S. 290, Government of India Act—*see* the Orissa (Enlargement of Area and Alteration of Boundaries) Order, 1948. It is thus abundantly clear that the jurisdiction of the High Court of Orissa as constituted under S. 229, Government of India Act does not extend to the areas which are outside the Province of Orissa.

[37] Soon after the execution of the agreement between the Rulers of Orissa States and the Dominion Government on and after 14th December 1947, the Dominion Government delegated their powers of administration of the said States to the Government of Orissa under the provisions of the Extra-Provincial Jurisdiction Act. The Government of Orissa (as the delegated authority) made an order known as the Administration of Orissa States Order, 1948 (hereinafter referred to as the States Order) in exercise of the powers conferred by S. 4, Extra-Provincial Jurisdiction Act. In exercise of the powers conferred by Cl. (a) of sub-s. (2) of S. 4 of that Act the Provincial Government determined the law and the procedure in the States and this will be found in Para. 4 of the States Order. Similarly in exercise of the powers conferred by S. 4 of that Act the Provincial Government determined the Court which shall exercise the powers of a High Court in the said States. This will be found in Para. 5 of the States Order which says that the High Court exercising jurisdiction in the Province of Orissa shall, so far as circumstances admit, exercise the same jurisdiction and shall have the same powers and functions in Orissa States. From 1st January 1948 till the date of the Constitution of the High Court of Orissa in July 1948, the High Court of Patna exercised jurisdiction in the Province of Orissa and by virtue of the said paragraph of the States Order that High Court exercised jurisdiction on Orissa States also. But from 26th July 1948 the High Court of Orissa began to function in the Province of Orissa by virtue of the Orissa High Court Order, 1948 and from that date it began to exercise jurisdiction in Orissa States also by virtue of Para. 5 of the States Order. That High Court while exercising such powers and functions gave its judgment in Cri. Misc. Cases Nos. 2, 3, 4 and 5 of 1948, which arose out of certain proceedings pending in the Courts of the Magistrates in Bamra and Kalahandi which are two of the Orissa States.

[38] The main question for decision is whether an appeal will lie to the Federal Court against the judgment of the High Court of Orissa while exercising jurisdiction in any Orissa State by virtue of Para. 5 of the States Order. The answer to this question will obviously depend on the interpretation of the expression "High Court" occurring in sub-s. (1) of S. 205, Government of India Act. In the interpretation clause to that Act (S. 311 (2)) the said expression has been defined as follows :

> " 'High Court' does not, except where it is expressly so provided include a High Court in an Acceding State."

The expression "Acceding State" has been defined in sub-s. (5) of S. 6 of that Act and Bamra and Kalahandi are also Acceding States because the Rulers of those States signed the Instruments of Accession in August 1947. The fact that in December 1947, they surrendered full and exclusive authority and jurisdiction in the said States to the Dominion Government will not in any

way remove them from the class of "Acceding States" inasmuch as the instruments of Accession still subsist and they have not been superseded by the December agreement. Therefore, if the definition of the expression "High Court", as given in the S. 311 (2), is applied, it would appear that in S. 205 the expression "High Court" means the High Court exercising jurisdiction in any of the Provinces of India as distinct from a High Court exercising jurisdiction in any of the Acceding States.

[39] Sub-section (1) of S. 219, Government of India Act enumerates various High Courts which *for the purposes of the Government of India Act* and *in relation to* "India" shall be deemed to be High Courts. Though the High Court of Orissa is not specified in that sub-section it should be deemed to have been included in it from the date of its Constitution under S. 229 (*vide* the proviso to that sub-section). The expression "India" occurring in Chap. 2 of Part 9, Government of India Act (in which S. 229 is found) had been given a restricted interpretation in sub-s. (3) of S. 219. That is to say, for the purposes of that chapter "India" means only the Governors' Provinces and Chief Commissioners' Provinces and does not include an Acceding State. Therefore, the combined effect of sub-ss. (1) and (3) of S. 219 when read along with the provisions of the Orissa High Court Order is that *in relation to* the Governors' Provinces and Chief Commissioners' Provinces, the High Court of Orissa shall *for the purposes of the Government of India Act* be deemed to be a High Court. Even if the widest possible meaning is given to the words "in relation to" there can be no doubt that in the context, those words mean "in respect of any matter relatable to." That is to say, any case that comes up for decision before those High Courts must be relatable to the Provinces of India as distinct from areas which lie outside the Provinces of India. So far as the High Court of Orissa is concerned, the effect of S. 219 is that in whatever provision of the Government of India Act the expression "High Court" may occur, that expression should be construed as referring to the High Court of Orissa while sxercising jurisdiction in respect of matters arising out of the Province of Orissa. When such High Court is exercising jurisdiction in any of the Orissa States it is not a "High Court" for the purposes of the Government of India Act.

[40] My Lord the Chief Justice seems to take the view that the meaning of the expression "High Court" as given in S. 311 is wider than the meaning given to that expression in S. 219. With great respect I find myself unable to agree with this view. The definitions of the said expression in Ss. 311 and 219 are mutually complementary and one is no more restrictive than the other. While the former section says what are not High Courts, the latter section says what are High Courts for the purposes of the Act. Doubtless in S. 219 and the subsequent sections which occur in Chap. 2 of Part 9 the expression "India" has been given a restricted meaning. But the meaning given to "High Court" is made applicable to all the provisions in the Government of India Act wherever that expression may occur. This seems to be the significance of the words "for the purposes of the Act" occurring in sub-s. (1) of S. 219. A scrutiny of the various provisions of the Government of India Act where the expression "High Court" occurs (Ss. 40, 86, 200 (3), 205, 206, 207, 210, 211, 217, 218, 219, 231, 242 (4), 253, 254, 255 and 303) shows clearly that the following three classes of High Courts alone were contemplated under that Act. (i) High Courts in Governors' Provinces (ii) High Courts in Chief Commissioners' Provinces ; and (iii) High Courts in Acceding States. So far as the Federal Court was concerned, appellate jurisdiction was conferred over all those High Courts. But Ss. 205 and 206 refer to its appellate powers over the High Courts of the Provinces whereas Ss. 207, 211 and 217 refer to its powers over the High Courts in Acceding States. Section 218 has no direct bearing on the subject under discussion in asmuch as that refers to a High Court exercising appellate jurisdiction from a Court outside the Dominion of India. The States of Bamra and Kalahandi are within the Dominion of India and consequently S. 218 has no application. There is thus no provision in the whole of Chap. 1 of Part 9 conferring on the Federal Court appellate jurisdiction over a High Court while exercising jurisdiction under an order made under Extra Provincial Jurisdiction Act in an acceding State.

[41] This leads to the next question as to whether the High Court of Orissa while exercising jurisdiction in the States of Bamra and Kalahandi can be said to be a High Court in an Acceding State so as to attract the appellate jurisdiction of the Federal Court under S. 207. There is no doubt that the States of Bamra and Kalahandi are Acceding States as described in S. 6 (5) because the Rules executed the Instruments of Accession in August 1947 and those Instruments still subside notwithstanding the subsequent surrender of jurisdiction by those Rulers to the Dominion Government in December 1947. But there is no declaration by the Governor-General as required by S. 217 and consequently for the purposes of S. 207 this High Court cannot be considered to be a High Court in an Acceding State.

[42] A study of the relevant provisions of the Government of India Act prior to the adaptations made by the India (Provisional Constitution) Order, 1947, will lead to the same result. In the unadapted S. 205, the High Court was expressly referred to as "High Court in British India". Similarly in the old S. 219 the words "High Courts in British India" were found. There was thus no doubt that the High Court over which the Federal Court exercised appellate jurisdiction under S. 205 was a High Court as described in S. 219. At the time of making the adaptations the words "British India" were omitted in both Ss. 205 and 219. But nothing was substituted in their place in S. 205 whereas in 219 the expression "India" was substituted and a new sub-s. (3) was inserted giving a restricted meaning to the expression "India" as referring to Governors' Provinces and Chief Commissioners' Provinces. The restricted defintion of the expression "India" in sub-s. (3) of S. 219 (as adapted) refers to no other territories except those which were formerly known as "British India." How can it be said that in consequence of these adaptations the jurisdiction of the Federal Court under S. 205 has been enlarged so as to include appellate jurisdiction over High Courts functioning in areas outside the Provinces? The adaptations were made with a view to bring the provisions of the Government of India Act in conformity with the provisions of the Indian Independence Act. No adapting authority while exercising the limited powers of adaptation could widen the jurisdiction of the Federal Court. In the Federal Court Order, 1947, also no wider jurisdiction is given to the Federal Court under S. 205. But on the contrary from a scrutiny of para. 4 (1) of that Order it is clear that the provisions in the Government of India Act, 1935 (as adapted) would continue to apply. Thus neither the India (Provisional Constitution) Order, 1947, nor the Federal Court Order, 1947, widened the scope of the jurisdiction of the Federal Court under S. 205 and such jurisdiction now remains the same as it was before the passing of the Indian Independence Act.

[43] For the purpose of this appeal, it is unnecessary to consider the effect of Federal Court (Enlargement of Jurisdiction) Act, 1947, because that Act is restricted to civil cases only. But in S. 2 (a) of that Act, the expression "High Court" has been defined with reference to S. 219, Government of India Act. That Act was made by the Dominion Legislature in exercise of the powers conferred by S. 206, Government of India Act. Apparently, the Legislature desired that the definition of the expression "High Court" in the Federal Court (Enlargement of Jurisdiction) Act, 1947, should be in conformity with the meaning given to that expression in S. 206, Government of India Act so that the appellate jurisdiction conferred by that Act may be exercisable by the Federal Court over all classes of High Courts contemplated by S. 206. Therefore the conclusion is inescapable that in S. 206, Government of India Act also the High Court that is referred to is the High Court as described in S. 219. For obvious reasons the same meaning should be given to the expression "High Court" in Ss. 205 and 206. There seems to be thus no doubt that in S. 205 also the High Court that is referred to is the High Court as described in S. 219.

[44] For some reason or other, while constituting the Courts for Orissa States, the competent authority did not choose to confer on the Federal Court appellate jurisdiction over the High Court similar to that conferred by S. 205, Government of India Act. If it is desired by the Dominion Goverment (or their delegated authority) that the Federal Court should have appellate jurisdiction over the High Court of Orissa while exercising jurisdiction in Orissa States there is nothing to prevent them from making an appropriate order to that effect under S. 4, Extra-Provincial Jurisdiction Act.

[45] Though in para. 5 of the States Order the Provincial Government have made every effort to equate the powers and functions of the High Court of Orissa in relation to the Province of Orissa and in relation to the Orissa States, it is obvious that the two powers and functions cannot be identical. The source from which the jurisdiction of the High Court in the two areas is derived is different. The laws which the said High Court has to interpret and administer in the two areas are also different. This is the main reason why the expression "so far as circumstances admit" has been deliberately inserted in sub-para. (a) of para. 5 of the States Order. This will be clear from the following illustrations.

(i) The Indian Bar Councils Act, 1926, is in force in the Province of Orissa and the High Court of Orissa while exercising jurisdiction in the Province has certain powers under that Act. But that Act has not yet been applied to any Orissa State and consequently the High Court of Orissa will have no powers under that Act in any Orissa State.

(ii) Some of the statutory laws made by the Rulers in Orissa States have been preserved by sub-para. (b) of para. 4 of the States Order. It may be that in some of those Statutes specified powers have been conferred on a High Court. Those powers will now vest in the High Court of Orissa by virtue of para. 5 of the States Order. But those powers will not vest in that High Court while exercising its powers and functions in the provinces of Orissa because those Statutes are not in force in the Province.

(iii) Any fee or other money received by the High Court while exercising jurisdiction in the Province will become part of the revenues of the Province under

S. 228, Government of India Act and will be subject to the vote of the Orissa Legislative Assembly. But any fee or money realised by the said High Court while exercising jurisdiction in the States will not form part of the revenues of the Province and the Orissa Legislative Assembly as such will have no control over the same.

[46] The above illustrations are given to show that though there is only one High Court exercising jurisdiction both in the Province of Orissa and in Orissa States, it performs dual functions derived from two different sources and that though both the functions are very similar there is a fine but real distinction in the exercise of those functions.

[47] I may now refer to *National Telephone Co. v. Post Master-General No. 2*, 1913 A. C. 546 at p. 552 : (82 L. J. K. B. 1197) on which some reliance has been placed by the learned advocate for the petitioners. In this case it was observed by Viscount Haldane L. C.:

> "When a question is stated to be referred to an established Court and without more, it, in my opinion, imports that the ordinary incidents of the procedure of that Court are to attach, and also that any general right of appeal from its decisions likewise attaches."

On the basis of this decision, it was argued that when the jurisdiction of the High Court of Orissa was extended to Orissa States by para. 5 of the States Order without any express provision in that Order taking away the appellate jurisdiction of the Federal Court, the right of appeal under S. 205, Government of India Act which attaches to the decisions of the High Court of Orissa in relation to the Province of Orissa likewise attaches. The answer to this argument is that the principle of the aforesaid decision would apply if the additional powers that were conferred on the Court were not relatable to matters arising from an area outside the territorial limits of jurisdiction of that Court. For instance, at present even in the Province of Orissa the nature of the jurisdiction of the High Court is not uniform. In the agency tracts of Ganjam and Koraput, where the Civil Procedure Code does not apply, the powers of the High Court are very much restricted. But those areas form part of the Province and if in future the Civil Procedure Code is extended to those areas the High Court of Orissa will get additional powers and applying the principle of aforesaid decision it may be held that the appellate jurisdiction of the Federal Court likewise attached.

[48] I would, therefore, reject the petition for the grant of a certificate under S. 205, Government of India Act (as adapted).

R.G.D. *Petition rejected.*

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* A. I. R. (37) 1950 Orissa 99 [*C. N. 15.*]

SPECIAL BENCH

RAY C. J., JAGANNADHADAS AND NARASIMHAM JJ.

Basudev Moharan—Defendant—Appellant v. Ogadhu Ponda—Plaintiff—Respondent.

A. F. A. D. No. 60 of 1945, D/- 18-10-1949, from decision of A. S. J., Berhampur, D/- 28-11-1944.

(a) Interpretation of Statutes—History of legislation may be considered.

Though the words of the section are the best guide in the matter of construction, the Court should not be oblivious of the history of the legislation. Although the Court may not be at liberty to construe an Act of Parliament by the motive which influenced Legislature, yet when the history of law and legislation tells the Court what the object of the Legislature was, the Court is to see whether the terms of the section are such as fairly to carry out that object and no other, and to read the section with a view to finding what it means and not with a view to extending it to something that was not intended. [Para 2]

Annotation: ('44-Com.) Civil P. C., Pre. N. 7.

* (b) Orissa Hindu Religious Endowments Act (IV [4] of 1939), S. 54 (1)—Applicability—"Person having interest" does not include trustee—Suit by trustee for possession against trespasser — S. 54 (1) (a) does not apply—Civil P. C. (1908), S. 92.

A trustee (whether hereditary or not) of a religious endowment is not a "person having interest" within the meaning of sub-s. (1) of S. 54.

Even if such a trustee is held to be a "person having interest", the provisions of S. 54 will not apply to suits instituted by such a trustee in respect of matters specified in sub-s. (1).

Clause (a) of sub-s. (1) of S. 54 does not apply to a suit for possession against a person claiming dehors the trust and in the position of a trespasser : A. I. R. (35) 1948 Pat. 133, *Approved*; *Case law discussed.* [Para 34]

Annotation: ('44-Com.) Civil P. C., S. 92 N. 2, 4.

B. K. Rath and K. Patnaik—for Appellant.
P. Mishra and B. Das—for Respondent.

Ray C. J.—This reference arises in Second Appeal No. 60 of 1945. One Basudev Moharan, Secretary of Hathotto Co-operative Society, (defendant-appellant) preferred this appeal against the confirming judgment of the Additional Subordinate Judge of Berhampur upholding the decree of the Munsif in a suit for declaration of title and either confirmation or recovery of possession of the disputed Inam lands. The same lands had been the subject of attachment and sale at the instance of the appellant-Society in execution of a decree against a member of the Society, a brother of Ogadhu Ponda, the trustee of Sri Jagannath Mohaparabhu of Hathotto village. The decree was passed against the former, qua, an individual as distinguished from a trustee. Admittedly, the endowment was not bound by the debts, far less, by the decree, the execution, the attachment, the sale and the proceeding for delivery of possession that followed. The contention, *inter alia*, that the plaintiff was not entitled to sue, was reiterated in the second appeal which was heard by a Division Bench constituted by Das and Narasimham J. The question, that was very seriously pressed before them, was that non-compliance with the requirements of S. 54, Orissa Hindu Religious Endowments Act (Orissa Act IV [4] of 1939) interposed an effectual bar to the institution of the suit. In the course of the arguments at the Bar, a decision of the Patna High Court, reported in *Upendra Prasad* v. *Akhandaleswar*, A. I. R. (35) 1948 Pat. 133 : (13 Cut. L. T. 54), was cited. My learned brothers felt dubious as to the correctness of that decision. The decision had been recorded by me sitting singly in the Cuttack Circuit of the Patna High Court. Hence this reference. Their Lordships have framed the following questions in their referring judgment. The questions referred to the Special Bench to which I concurred are:

1. (a) Whether the trustee (whether hereditary or not) of a religious endowment is a "person having interest" within the meaning of sub-s. (1) of S. 54, Orissa Hindu Religious Endowments Act, 1939.

(b) Even if such a trustee as described in (a) is held to be a "person having interest", will the provisions of S. 54 of the said Act apply to suits instituted by such a trustee in respect of matters specified in sub-s. (1) ?

2. Whether cl. (a) of sub-s. (1) of S. 54 applies to a suit for possession against a person claiming dehors the trust and in the position of a trespasser.

3. Whether consent obtained subsequent to the institution of the suit is sufficient compliance with the provisions of S. 54.

[2] The answers to the questions, as formulated, necessarily depend the construction of S. 54, Orissa Hindu Religious Endowment Act (hereinafter referred to as 'the Act') so far as it bears on its applicability to the present suit. Though the words of the section are the best guide in the matter of construction, the Court should not be oblivious of the history of the Legislation. Although the Court may not be at liberty to construe an Act of Parliament by the motive which influenced Legislature, yet when the history of law and legislation tells the Court what the object of the Legislature was, the Court is to see whether the terms of the section are such as fairly to carry out that object and no other, and to read the section with a view to finding what it means *and not with a view to extending it to something that was not intended.* Section 54 of the Act is a word for word reproduction of S. 73, Madras Hindu Religious Endowments Act (Act I [1] of 1926) (hereinafter referred to as the 'Madras Act') as amended as it then stood except, if any, in some very minor details. It would not be far from correct to adopt the view taken by the Madras High Court, of the meaning of the corresponding section in its application to suits of the nature contemplated therein. Section 73 of the Madras Act historically descends from S. 92, Civil P.C. (hereinafter referred to as the Code) which it replaces, so far as it goes. On account of inartistic drafting, the section has presented some difficulty of construction as will appear from the Madras decisions that shall be reviewed presently in this judgment. For facility of reference, S. 92 of the Code is reproduced here :

"92. Public Charities—(1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General, may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the Provincial Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate to obtain a decree :

(a) removing any trust; (b) appointing a new trustee; (c) vesting any property in a trustee ; (d) directing accounts and inquiries; (e) declaring what proportion of the trust-property or of the interest therein shall be allocated to any particular object of the trust; (f) authorising the whole or any part of the trust-property to be let, sold, mortgaged or exchanged; (g) settling a scheme; (h) granting such further or other relief as the nature of the case may require :

(2) Save as provided by the Religious Endowments Act, 1863 (XX [20] of 1863), no suit claiming any of the reliefs specified in sub s. (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section."

[3] In this connexion, it has to be borne in mind that the Legislature, in enacting S. 54 of the Act, like the Madras Legislature in legislating S. 73 of the Madras Act, has rendered nugatory S. 92 and certain other relevant provisions of the Code, in their application to any suit claiming any relief in respect of the administration or management of religious endowment *vide* sub-s. (2) of S. 54 of the Act which corresponds to sub-ss. (3) and (4) of S. 73 of the Madras Act (as amended up-to-date).

[4] A priori to the extent, the field of S. 92 of the Code is replaced by it, S. 54 of the Act must be taken to have covered it. The opening words of sub-s. (1) of S. 92 of the Code are sufficiently indicative of the nature of the suits or proceedings contemplated therein. According to these words, occasion for exercise of the right of suit conferred or created thereby would arise either in the case of any alleged breach of public trust or where there is need for direction of the Court for its administration. The reliefs contemplated in S. 54 of the Act, are, mainly if not wholly, the same as those in S. 92 of the Code. The reliefs, enumerated in cls. (f) & (g) of sub-s. (1) of the Code, have, however, though not imported into the section, been provided for in the Act otherwise than in S. 54, that is, S. 58 of the Act

deals with alienation of immovable trust-properties by way of sale, mortgage, exchange or lease, and S. 33 vests the Commissioner with the power of framing scheme of administration — Court's interference in the matter being confined to either modification or cancellation of the same: *vide* sub-s. (5) of the section. All the rest are found carried over bodily into the S. 54 of the Act, besides one innovation introduced into sub-s. (1) (a) of the section. This relief, however, is absent from S. 73 of the Madras Act. I have my great doubts if this relief is appropriate to the intendment, so far as it is not warranted in the interest of administration or management of the trust. It should be borne in mind that neither the Commissioner nor "any person having interest" in the trust is entitled to remain in possession of the trust-property. I shall, in this connexion, refer to S. 61 of the Act, which prohibits the Provincial Government or any of its Executive Officers from undertaking or assuming the superintendence of *any land or any other property granted* for the support or otherwise belonging to any Muth or temple. This prohibition, however, is subject to the condition indicated in "save as provided in this or any other Act". This saving clause notwithstanding, *prima facie*, the general power of superintendence assigned to the Commissioner under S. 11 of the Act hardly entitles him either to be in possession of any trust-property or to engage himself in the actual management thereof. He must not intrude upon a trust himself except when his measure is intimately connected with maladministration or non-administration of the trust. The relief seems to be out of keeping with the object of the section. The very comprehensive language, in which it has been expressed, might very often be a source of difficulty of construction as it is in the instant case. Sub-s. (2) of the section and the nature of the reliefs enumerated are sufficiently indicative of the identity of the scope of S. 92 of the Code and the section, under consideration, in relation to their respective fields of operations in relation to Hindu Religious Endowment of public character.

[5] In the case of *Hasarimull Chandkuchand* v. *N. R. Vodachal Chettiar*, 55 Mad. 549 : (A. I. R. (19) 1932 Mad. 234), it was observed by Beasley C. J. :

> "It seems to me that there is nothing in S. 92, Civil P. C. which has not been taken bodily out of that section and placed either in S. 73 or in other sections of the Madras Hindu Religious Endowments Act."

[6] If I may say so with great respect I am in entire agreement with these observations. I do not think that the same thing cannot be said of the Act and particularly with regard to S. 54, notwithstanding addition of cl. (a) in the sub-s. (1) of the section. This clause, I have no hesitation in thinking, was not meant for extending the operational orbit of S. 54 but was added only by way of clarification of a doubtful point. This relief of recovery of possession of trust property is either incidental or cognatic to the relief of vesting of any property in a trustee, the former being pre-requisite of the latter.

[7] I owe it to a commentator of Madras Act (Mr. P. Ramnath Iyer) that that Act had, for its model, in some of its essential features, the English Charitable Trusts Act, 1853. This induced me to embark upon some investigation into the working out of that Act. Section 17 thereof is pertinent to the purpose in land. The section may be re-stated here, as far as is material for this case :

> "Before any suit, petition or other proceeding for obtaining any relief, order, or direction concerning or relation to any charity or the estate, property, or income thereof, shall be commenced, presented, or taken, by any person whomsoever, there shall be transmitted by such person to the said Board (the Charity Commissioners), notice in writing of such proposed suit, petition, or proceeding, and such statement, Information, and Particulars as may be requisite or proper, or may be required from time to time, by the said Board, for explaining the nature and objects thereof; and the said Board, if upon consideration of the circumstances they so think fit, may, by an order of certificate signed by their Secretary authorise or direct any suit, petition, or other proceeding to be commenced, presented, or taken with respect to such charity, either for the objects and in the manner specified or mentioned in such notice, or for such other objects, and such manner and form, and subject to such stipulations or provisions for securing the charity against Liability to any costs or expenses, and to such other Stipulations or Provisions for the protection or benefit of the charity, as the said Board may think proper;.... (save as herein otherwise provided) no suit, petition, or other proceedings for obtaining any such relief, order, or direction as last aforesaid shall be entertained or proceeded with by the Court of Chancery, or by any Court of Judge, except upon and in conformity with an order or certificate of the said Board. . . . . ."

[8] The meaning of this section had to be determined in several Chancery suits, or proceedings in the Court in England. To mention a few of them will not be without profit. It is common knowledge that the statutes in India have so far been inspired by and to a large extent modelled upon the pre-existing legislation of the British Parliament on the identical subjects. The principles underneath the parliamentary statutes have formed a ground work for Indian statutes, either Central or Provincial, always however subject to such variations as are dictated by the local, social and environmental conditions that prevail in India. It can, therefore, be vouchsafed, without any fear of contradiction, that S. 92 of the Code owed its origin to the law prevailing in England in relation to the Court's power over administration, or management of public char-

itable trusts. Under the Charitable Trusts Act, 1853, the Attorney-General, ex-officio, has right to commence a suit, petition, or other proceeding concerning or relating to any charity or estate, funds, property, income thereof. Within the purview of S. 92 of the Code, the Advocate. General has similar powers. The same has now descended upon the Hindu Religious Endowments Commissioner under the scheme set up in the provisions of the Act. It will not be out of place, therefore, to refer to some decisions of the Chancery Division of the Supreme Court of England. As I find from the Reports, the case of *Holme* v. *Guy* is the leading case on the subject. It is reported in (1877) 5 Ch. D. 901: (46 L. J. Ch. 648). The facts giving rise to this case were that the governor of an endowed school commenced an action against the master to restrain him from presenting himself at the school or continuing to occupy the schoolhouse, on the ground that he had never been properly appointed to the mastership, was unfit to fulfil its duties, and had been removed by a resolution of the governors. The master demurred, on the ground that it did not appear that the action had been sanctioned by the Charity Commissioners. It was held that the sanction of the Charity Commissioners to a proceeding of this nature was not requisite. The decision was arrived at on a construction of S. 17, Charitable Trusts Act, 1853, already quoted. The Master of the Rolls (Jessel M. R.) described the form of the action in the following words:

> " This is simply what would formerly have been termed an action of ejectment, and nothing else. It is substantially an action to turn the school-master out of possession of the house to which he has no right whatever; it is a legal demand of possession and nothing else. It is properly nothing but an action for the recovery of land . . ."

[9] After thus defining what the action in substance was, the Master of Rolls proceeds:

> "If you bring an action for trespass, for breaking into and entering the close of a charity, it is an action for trespass, though in a sense it relates to the property of the charity, but only in a sense. The action is for a disturbance of the possession. It would be speaking in a very vide sense to call that an action asking for relief relating to a charity and estate of a charity."

[10] This decision of Jessel M. R. was upheld by the Court of appeal. James L. J., in defining the scope and object of the S. 17, Charitable Trusts Act, 1853, observed:

> "It is, in my judgment, clear that the S. 17, Charitable Trusts Act 1853, was never intended *to interfere with the rights and powers of the trustees of a charity in their character of owners of property, or to interfere with their rights in the character of masters who are employing servants. Its object was to prevent strangers from coming in as relators in suits in Chancery, or as Petitioners under Sri Samuel Romilly's Act, to complain of the management of a charity, unless the Charity Commissioners are first satisfied that such proceedings ought to be taken.* It was not intended to prevent the trustees of a charity from bringing an action of ejectment against a tenant holding over, or an action of covenant against a tenant who would not pay his rent, or to prevent their taking proceedings by way of disgress against a defaulting tenant, or to prevent their taking proceedings against a man, who, as according to the statement in the claim in the case here, never was properly appointed to an office, but will persist in retaining it, and in thrusting himself on the property of the charity as a trespasser."

[11] The next case, that largely depends upon the decision of *Holme* v. *Guy*, (1877-5 Ch. D. 901: 46 L. J. Ch. 648) is the case of *Rendall* v. *Blair*, (1890) 45 Ch. D. 139: (59 L. J. Ch. 641). The master of charity school brought an action in the Chancery Division against the managers of the school for an injunction to restrain them from dismissing him from his office and from ejecting him from the schoolhouse. The question raised by the action was whether the managers had been properly appointed. The plaintiff had not obtained, under S. 17, Charitable Trusts Act, 1853, the leave of the Charity Commissioners to bring the action. Bowen and Fry L. JJ., held :

> "Although the action might incidentally involve the consideration of the deed of trust of the Charity, it was not such an action as required the consent of the Charity Commissioners."

[12] It was held:

> "Even if the consent of the Charity Commissioners were necessary, it was not necessary to obtain it before the commencement of the action, and that it would not be right to dismiss the action without giving the plaintiff opportunity of ascertaining whether the Commissioner would give their consent."

[13] A passage from the judgment of Bowen, L. J., is worth quoting in this connexion:

> "Speaking broadly, I think that this section does not deal with or touch actions which are brought to enforce common law rights, whether such rights arise out of contract or out of tort or out of *common law duty*, I ought rather to say."

[14] The same view was taken as to the meaning and requirement of S. 17, Charitable Trusts Act, in the case of *Fisher* v. *Jackson*, (1891) 2 Ch. D. 84: (60 L. J. Ch. 482). In that case, the plaintiff, who was appointed master of an endowed school, in terms of a deed of trust establishing it, by the vicars of three specified parishes, commenced an action against the two vicars who had signed the notice of his dismissal and moved for an interlocutory injunction to restrain them from removing him from his office. The defendants demurred. They took the plea that the action was not maintainable as the consent of the Charity Commissioners to the bringing of the action under S. 17, Charitable Trusts Act had not been obtained. North J. held :

> "In my opinion, that leave is not required for the present application. The plaintiff seeks to remain in the position of schoolmaster, to which he was validly appointed, and which he still holds unless that position has been effectually determined by what has taken place."

[15] He said:

> "The observation of Lord Justice Bowen (in the case of *Rendall* v. *Blair*, (1890) 45 Ch. D. 139: 59 L. J. Ch. 641) already referred to in this judgment) apply exactly here, because the plaintiff's right is really a common law one depending on a contract, viz., the right to keep the place to which he has been validly appointed, until he is turned out of it by persons who have observed the necessary formalities for that purpose."

[16] It has been said on high authority that the object of the Act (Charitable Trusts Act, 1853) was to stop enormous abuses which had grown up in the administration of charities in reference to proceedings which used to be instituted to the good of no one (per The Lord Chancellor Lord Cranworth *in the matter of Lister's Hospital* (1855) 43 E. R. 1202 : (6 De. G. M. & G. 184).

[17] The object of S. 92 of the Code, and the sections like S. 73, Madras Act and S. 54 of the Act which later took its place in the Statute Books of the Provinces is almost similar or rather the same I would say.

[18] In the case of *Abdur Rahim* v. *Abu Mahomed Barkat Ali*, 55 Cal. 519 : (A. I. R. (15) 1928 P. C. 16) Lord Sinha, delivering the judgment of their Lordships of the Privy Council, spoke, as to the meaning of S. 92 of the Code:

> "It is unlikely that in a Code regulating procedure the Legislature intended without express words to abolish or extinguish substantive rights of an important nature which admittedly existed at that time."

[19] This case arose out of a suit for declaration that the property belonged to a wakf. It was objected that the sanction of the Advocate-General had not been obtained. It was held that the relief prayed for was not within the S. 92 of the Code, and, to that extent, was not a suit of a representative character.

[20] I shall next refer to a few cases of the Madras High Court dealing with the point, in issue, arising first under S. 92 of the Code and then under S. 73, Madras Act. There had been three Full Bench decisions of that Court dealing with applicability of S. 92 of the Code. They are: (i) *Appanna* v. *Narasingha*, 45 Mad. 113: (A. I. R. (9) 1922 Mad. 17 F. B.); (ii) *Saminatha Pillai* v. *Sundaresa Pillai*, 14 M. L. W. 238: (A.I.R. (8) 1921 Mad. 479 (F. B.)); & (iii) *Tirumali Tirupati Devasthanams Committee* v. *Krishnayya Shanbhaga*. A. I. R. (30) 1943 Mad. 466: (I. L. R. (1943) Mad. 619 (F. B.)).

[21] The latest of them is the case of *Tirumalai Tirupati Dewasthanams Committee* v. *Krishnayya Shabhaga*, A. I. R. (30) 1943 Mad. 466 : (I. L. R. (1943) Mad. 619 F. B.). The facts of that case were that the trustee of a certain temple having had, *qua* trustees, the right of recovering from the trustees of another temple moneys which the latter had collected, on behalf of the former temple, filed a suit against the latter to compel them to render account of receipts and to deliver what was found due. They had not clothed themselves with the sanction of the Advocate-General. The relief that they prayed for in the suit was one of those enumerated in S. 92 of the Code and was in relation to a trust fund. The question arose if S. 92 of the Code was applicable. The Full Bench decision of that Court, *Swaminath Pillai* v. *Sundaresa Pillai*, 14 M. L. W. 238 : (A. I. R. (8) 1921 Mad. 479 F. B.), was relied upon in respect of the proposition that the case fell under S. 92. This case, however, was distinguished by Leach C. J., who delivered the judgment of the Full Bench, with the following words:

> "While it may be accepted that the general trustee of a temple may not sue a special trustee except under the provisions of S. 92, when the general trustee is seeking relief, which, if granted, will lead to a change in the management of the special trust, it is quite a different matter when the general trustee seeks to recover for the benefit of the temple moneys in the hands of the special trustee, which the special trustee is in duty bound to pay over to the general trustee."

[22] His Lordship quoted with approval the observation of Kumarswami Sastriar J. in the case of *Appanna* v. *Narasingha*, 45 Mad. 113 : (A. I. R. (9) 1922 Mad. 17 F. B.), that is :

> "Directing account and enquiries in cl. (1) (d) of S. 92, should be confined to suits by the Advocate-General or by two or more persons with his consent, against all the trustees for an account of their management, and not one or more trustees against others, as each trustee has a right to call upon the other to account to him for trust funds which he has received, even though the other trustee commits no breach of trust."

[23] His Lordship also accepted the view taken by himself and Vardachariar J. in the case of *Sanmukham Chetty* v. *Govinda Chetty*, I. L. R. (1938) Mad. 39 : (A. I. R. (25) 1938 Mad. 92). This decision was to the effect that S. 92 of the Code deals merely with the procedure to be adopted in a representative suit for relief in respect of a public trust; that to come within the section, there must be a breach of trust or the necessity for the direction of the Court with regard to the administration of a trust; that there must be, at least, two plaintiffs (unless of course the Advocate-General himself sues) and the Advocate-General must give his sanction to the institution of the suit; and that it is not every suit claiming any of the reliefs specified in sub-s. (1) of S. 92, that should be brought with the consent of the Advocate-General, but those suits only which, besides claiming any of those reliefs, *are brought by individuals as representatives of the general public.*

[24] The learned Chief Justice summed up the position accepted by the Full Bench in the following words:

> "After hearing the arguments of learned counsel in the present case, we can see no reason for disagreeing

> with anything said in *Sanmukham* v. *Govinda*, I. L. R. (1938) Mad. 39 : (A. I. R. (25) 1938 Mad. 92). On the other hand we find ourselves in full agreement with the opinion of Vardachariar J. that in deciding whether a suit falls within S. 92, the Court must go beyond the reliefs and have regard to the capacity in which the plaintiffs are suing and to the purpose for which the suit is brought. The judgment of the Privy Council in *Abdur Rahim* v. *Abu Mahomad*, 55 Cal. 519 : (A. I. R. (15) 1928 P. C. 16), lends no support for the opinion expressed by the Full Bench in *Janaki Bai* v. *Vinayakar of Melmandai*, 58 Mad. 988 : (A. I. R. (22) 1935 Mad. 825 F. B.)."

Their Lordships overruled the Full Bench decision reported in *Janaki Bai* v. *Vinayakar Melmandai*, 58 Mad. 988 : (A. I. R. (22) 1935 Mad. 825 F. B.).

[25] A very illuminating passage occurring in the Full Bench (Division Bench?) decision of *Venku Chettiar* v. *Doraiswami Chettiar*, 14 M. L. W. 38 : A. I. R. (8) 1921 Mad. 403, is worth quoting:

> "Section 92, governs . . . . not suits for vindicating the plaintiff's right of management and getting possession for the purpose of management of the trust properties."

[26] In the result, according to the settled view of the Madras High Court, a trustee, as such, in enforcing any of the rights inherent in the position and status that he holds, did not then stand in need of Advocate-General's consent in order to commence an action for such reliefs as fall under S. 92 of the Code.

[27] Next, I shall refer to the cases of that Hon'ble Court which are more directly in point. In the case of *Manjeswar Srimad Anantheswar Temple* v. *M. Vaikunta Bhakta*, A. I. R. (30) 1943 Mad. 228 : (207 I. C. 547); Horwill J., after a careful review of the authorities, held that S. 73 of the Madras Act was modelled very closely upon S. 92 of the Code and that the type of suits contemplated by S. 73 of the Madras Act are precisely those contemplated by S. 92 of the Code and that a suit by trustee-in-office against ex-trustees for an account of their trustiship with allegations of misfeasance, non-feasance and mal-feasance is maintainable under the general law, and that S. 73 of the Madras Act does not bar such a suit.

[28] In the case of *Narasimha Rao* v. *Suranna*, A. I. R. (34) 1947 Mad. 334 : (1947-1 M. L. J. 117), Horwill and Bell JJ. held that S. 73, of the Madras Act is to the same effect as S. 92 of the Code, and its implications and therefore the decisions relating to S. 92 of the Code can usefully be employed in considering the meaning of S. 73. With regard to the suit which the plaintiff, a duly appointed trustee of a temple, brought for possession of temple lands in possession of the defendant who was de facto trustee prior to his appointment, their Lordships held that the suit was not one contemplated by S. 73 of the Madras Act. The plaintiff was not a person having an interest in the sense that he was a member of the public who wished to see that the temple and the trust-properties were properly administered but he was a person who was bound in law to recover the property having been appointed as trustee of it. He was endeavouring to exert his right to possession of the trust-property and to cost the defendant who, by reason of the plaintiff's appointment, had become no more or less than a trespasser.

[29] In the case of *Venkatacharayulu* v. *Vasireddi Harihar Prasad*, A. I. R. (22) 1935 Mad. 964 : (158 I. C. 883), Vardachariar J. held that the bar under S. 73 of the Madras Act is only in respect of suits relating to the administration or management of the trust, that is, proceedings against the trustee and not in respect of proceedings against the person who is wrongly in possession of the property in which the trust is interested. The suit in that case was brought by a trustee of a temple for a declaration that the defendant had acquired no right under the sale-deed taken by him on the ground that it was inalienable being burdened with a service to the temple; Vardachariar J. held that such a suit was not barred by S. 73 of the Madras Act.

[30] In the case of *Vythilinga Pandara Sannadhi* v. *Ranganatha Mudaliar*, 1933 M. W. N. 1235 : (A. I. R. (21) 1934 Mad. 126), it was held that suits merely to recover money found due by the defendant on the taking of accounts or to recover property belonging to the trust but in the possession of the defendant or to recover damages for a tort committed by the defendant would always be maintainable under the general law, as they would not be suits relating to the administration and management of religious endowments.

[31] In consideration of the premises aforesaid, I shall conclude that a suit in order that it may fall under the purview of S. 54, of the Act would not only embrace any one or more of the reliefs enumerated in it but would also relate to and be intimately connected with the administration and management of the trust and that it should have been commenced either by the Commissioner or by "person having interest in the trust."

[32] "A person having interest in the trust," it has been strenuously urged, includes 'a trustee' either hereditary or non-hereditary, or appointed within the meaning of the Act. Referring to the plain grammatical meaning of the terms, the argument may carry some measure of conviction ; but it is inconsistent with the scope of the section. The section purports to regulate the procedure for certain classes of actions. It lacks express words that would amount to cutting

down substantive rights pre-existing. Another aspect from which the construction of the section can be approached is that it enables certain persons to commence a suit in the interest of a trust in order to ensure its due administration and management. It can never be interpreted to have any reference to those who possess unfettered right of suit not only in fulfilment of their duties but also in virtue of their status and for the purpose of vindication thereof. A trustee is the person who, *virtue officii*, has right of management and possession of the trust-property and such rights do include right of suit. It is open to a Legislature to cut down those rights and to reduce him to the position of a 'person having interest' and then to clothe him with a permissible right of suit. But the question is has the Legislature thought fit to do so? A trustee's right and obligations have been left unimpaired for the purpose of this Act (*vide* S. 14). The only curtailment, if at all, of his rights may be his subjugation to all lawful directions (under the provisions of the Act) which a competent authority may issue in respect of the administration of the affairs and application of the funds and properties of an endowment. Strictly speaking, this may not be a curtailment, as under the previous law, he was subject to the direction of the Court when invoked. He has been enjoined to deal with the affairs, funds or properties of an endownment with such care as a man of ordinary prudence, if they were his own. In sub-s. (2) of the section, his powers incidental to the provident and beneficial management of the religious endowment and to do all things necessary for the due performance of the duties imposed upon him have been left unimpaired. In view of this provision, it would be begging the question to say that under the provisions of S. 54 of the Act, he is endowed with right of suit subject to consent of the Commissioner. It is hardly likely that the Legislature would place him at the mercy of what (to use words of Bowen J. in the case of *Rendall* v. *Blair*, (1890-45 Ch. D. 139 : 59 L. J. Ch. 641)), may turn out to be an irresponsible tribunal or an irresponsible department of the State in order that he may exercise his common of right. That the Legislature did not so intend as to the meaning and operation of S. 54 in relation to the rights and obligations of a trustee is abundantly clear from the definitions of the two words "(i) person having interest, and (ii) trustee" *vide* S. 6 (10) and (14). For the purpose of the Act, they belong to the categories in relation to their respective status as assigned to them. A trustee has certain obligations attached to its office, and these, mainly if not solely, correlate to his rights. Throughout the Act, these terms are used in juxta-position as describing two separate entities. The sections, in which they have been assigned different roles, are 20, 93, 38, 39, proviso to S. 39 (c), 41 and 42 (1) and (2) amongst many others. In sub-s. (2) of S. 20, any person having interest in the muth or temple as it is provided therein, has to obtain the consent of a trustee or a Commissioner in order that he may apply to the Collector for resumption of an inam. "Any person having interest" has been used in several sections in different parts of the Act. The object of defining a word for the purpose of the Act is to ensure unanimity of meaning and uniformity of the provisions. According to S. 33 (1), the Commissioner in settling a scheme has to consult 'the trustee' and 'the person having interest.' If the 'trustee' was included within the person having interest, 'the Legislature would be guilty of redundancy in wording the section in the manner in which it has been done. The same criticism can be employed to S. 39 (1). The proviso to S. 39 (c) would make predominately clear that 'trustee' can never mean 'a person having interest.' The proviso is to the effect that 'persons having interest' in a muth can be associated with 'trustee or trustees' for participating or assigning in its administration. I do not wish to dilate upon this point any further and it is self-evident according to the texture and frame-work of the Statute.

[33] In short, S. 54 of the Act provides for a measure of expediency. It enables persons other than those who have implicit in their statute right of suit to sue for various reliefs beneficial to and called for by the trust interest. This is by way of abundant caution. A trust is pre-eminently represented by the trustee. Qua trustee, he has certain right and obligations. He, however, is not irremovable nor immune from interference. When he derelicts from his duty to the impairment of trust-interest, the law in S. 54 provides a machinery for its protection a factor that needs inevitably a right of suit. Such suits are *ex concesso* representative suits orelse there may be endless litigation on the same subject-matter entailing enormous abuses of trust-funds. Who can represent the public or the public-trust is specified in the section. One of such persons is Commissioner who represents the sovereign power, who is the ultimate arbiter in the matter of upkeep of public trust, and others are persons having interest as defined in the Act. The definitions of 'trust' and 'person having interest' are mutually exclusive. As in the case of next friend or guardian-ad-litem of an infant, the law provides minimum of requirements to be fulfilled before one can represent the trust or the public, as the case may be, in a suit having for its object certain reliefs specified

in the section. A trustee, by far at the least, does not require any clothing of powers for the purpose, as he already *virtue officii* owns them.

[34] The present is a suit instituted by a trustee as against a stranger to the trust for having it declared that the order of attachment and sale of the trust-property is invalid and not binding upon the trust, and, as ancillary relief, he wants to recover possession thereof. In substance, it is a suit in ejectment which he is bound to maintain in fulfilment of his duties qua trustee. From the nature of the suit and from his status, the suit is outside the purview of S. 54 of the Act. I should, therefore, hold that the view taken in *Upendra Prasad* v. *Akhandaleswar*, A. I. R. (35) 1948 Pat. 133 : (13 Cut. L. T. 54), is correct and answer the questions referred in the following manner : (1) (a) A 'trustee,' whether hereditary or not, of a religious endowment, is not 'a person having interest' within the meaning of sub-s. (1) of S. 54 of the Act; (b) Does not arise. Even if it arises, I would answer it in the negative ; (2) My answer would be in the negative and (3) Does not arise, and the question need not be answered.

[35] **Jagannadhadas J.** — After having had the benefit of reading the learned and exhaustive judgment of my Lord the Chief Justice (if I may say so with respect), I do not think I need do anything more than express my agreement with the same. I have never had any doubt about the correctness of the general principle as expounded by my Lord the Chief Justice in its application to S. 92, Civil P. C. The only reason for reference of this case to the Full Bench was the doubt raised with reference to the definition of "person having interest" as comprehensive enough to include "a trustee." But as has been pointed out by my Lord the Chief Justice, the Act itself uses in various sections the "trustee" and "the person having interest" as distinct It is therefore clear that the opposite view suggested is untenable.

[36] I think it right, however, to notice one matter, while expressing my full concurrence with the judgment of my Lord the Chief Justice. My Lord has expressed the view that the relief specified in cl. (a) of sub-s. (1) of S 54 is either incidental or cognatic to the relief of vesting any property in a trustee. I am inclined to agree with it, but would prefer not to express any final view on the matter as the question has not been raised and argued before us.

Narasimham J.—I agree with my Lord the Chief Justice.

V.B.B. *Reference answered.*

A. I. R. (37) 1950 Orissa 106 *[C. N. 16.]*

PANIGRAHI AND NARASIMHAM JJ.

Govindha Majhi — Petitioner v. *Arobinda Kar— Opposite Party.*

Criminal Revn. No. 235 of 1949 D/- 24-10-1949, from order of Addl. Dist. Magistrate, Balasore, D/- 14-4-1949.

Penal Code (1860), S. 379 — Fish in tidal and navigable river are not in possession of anybody — Third person catching fish without permission does not commit theft.

In a tidal and navigable river the fish can always come from and go into the sea though, for a time they live in the river. The fish are therefore in a state of nature and cannot be held to be the property of anybody until they are caught. The licensee of the fishery from Government obtains nothing more than a right to fish in a particular area. If anybody other than the licensee catches fish, his act may amount to an invasion of the right of the licensee to fish. But the intention of the third person cannot be characterized as dishonest because he does not intend to cause any wrongful loss to the licensee, the fish not being in his possession. The elements of the offence of theft are not made out in such a case : *Case law referred.* [Para 3]

Annotation : ('46-Man.) Penal Code, S. 379, N. 6.

S. N. Dasgupta — for Petitioner.

L. K. Dasgupta—for Opposite Party.

Panigrahi J. — The petitioner has obtained this rule against the appellate judgment of the Additional District Magistrate, Balasore, confirming the judgment and sentence of fine of Rs. 25 passed against the petitioner under S 379, Penal Code, by the Magistrate, 3rd Class, Balasore.

[2] The case against the petitioner is that he caught fish in Panchpara river on 10th December 1947 without taking the permission of the complainant who claims to be the licensee of the fishery from Government. The admitted facts are that Plot No. 1326 in Mouza Bahalpur is recorded in the name of Government and is part of a tidal and navigable river. At the previous settlement it was recorded in the name of the local landlord and the fishery right had been assessed at Rs. 9. At the Current Settlement the plot was recorded as a public river in the name of Government. Both the Courts below have proceeded on the assumption that it is a tidal and navigable river. The petitioner claims to have a common law right of fishing in the waters as the river remains tidal and navigable throughout the year. The question therefore for decision is whether the act of the petitioner in catching fish constitutes theft.

[3] The law on what constitutes the offence of theft of fish is more or less well settled. Fish in an enclosed space or in a tank closed on all sides is the property of the owner of the tank, the test being whether the fish are confined within a limited space. If on the other hand the fish are in a state of *feræ naturæ*, they can

escape and go wherever they like. In such condition it is difficult to say that they can constitute property until they are caught. In a tidal and navigable river the fish can always come for and go into the sea though, for a time they live in the river. The fish are, therefore, in a state of nature and cannot be held to be the property of anybody until they are caught. In my opinion, the lessee of the fishery has obtained from Government nothing more than a right to fish in a particular area. If anybody other than the licensee catches fish his act may amount to an invasion of the right of the lessee to fish and may constitute an act of trespass. There is also clear authority for the view that such an act does not constitute criminal trespass. Whether the act amounts to an invasion of a civil right or not, or whether the licensee obtained an exclusive right to fish by reason of his lease are matters that do not require to be considered in this petition. The offence charged against the petitioner is the offence of theft. The elements of this offence are dishonest removal from the possession of an owner. The catching and removal of the fish being admitted in this case the question is whether the fish were in the possession of the complainant at the time of their removal and whether the removal was dishonest. As I have said already the fish were in a state of *feræ naturæ* and were not in the possession of the complainant. The intention of the petitioner cannot be characterized as dishonest because he did not intend to cause any wrongful loss to the complainant, the fish not being in his possession. I am, therefore, satisfied that the elements of the offence of theft have not been made out and that the conviction of the petitioner cannot be upheld.

[4] The petition is accordingly allowed and the conviction and sentence are set aside. The fine, if paid, shall be refunded. The rule is made absolute.

[5] **Narasimham J.**—I agree and wish to add a few words.

[6] Theft being an offence against possession it is clearly the duty of the prosecution to show that the fish which the petitioner removed from the river were in the possession of the complainant. But in view of the admitted fact that the river is a tidal and navigable river it cannot be said that the fish in the river were in the possession of the complainant because they were free to go anywhere they liked. This point has been well settled in a series of decisions reported in *Queen* v. *Revu Pothadu*, 5 Mad. 390; *Bhagiram Dome* v. *Abar Dome*, 15 Cal. 388; *Maya Ram Surma* v. *Nichaia Katani*, 15 Cal. 402, which has been followed in a later Patna decision reported in *Elahi Bux* v. *Emperor*, A. I. R. (23) 1936 Pat. 152: (37 Cr. L. J. 452). As has been well put in *Manchu Paidugadu* v. *Kadimsetti*, 15 Cr. L. J. 77: (A. I. R. (1) 1914 Mad. 453), the test seems to be "Could the fish escape?" In this particular case, there can be no doubt that the fish could easily escape into the sea because of the tidal nature of the river and, as pointed out by Horwill J. in *Krishna Reddi* v. *Muniappa Reddi*, A. I. R. (30) 1943 Mad. 84: (44 Cr. L. J. 173)

> "the fish are free and in a state of nature and so no more belong to the owner of the pond than a bird that settles on a tree in a person's garden belongs to that person."

I would, therefore, agree with my learned brother that the offence of theft is not made out.

[7] Whether on the facts of the present case civil action would lie against the petitioner is a matter on which it is not necessary for us to express any opinion.

D.H. *Revision allowed.*

A. I. R. (37) 1950 Orissa 107 *[C. N. 17.]*

FULL BENCH

RAY C. J., JAGANNADHADAS, PANIGRAHI AND NARASIMHAM JJ.

Prahalad Panda — Petitioner v. *Province of Orissa — Opposite Party.*

Criminal Misc. Petn. No. 152 of 1949, D/- 14-11-1949.

(a) Criminal P. C. (1898), S. 491 — Application under — Valid order of detention produced — Court cannot direct release merely because there was no valid cause for detention at some prior stage: A. I. R. (32) 1945 F. C. 18, *Rel. on.* [Para 4]

Annotation: ('46-Com.) Criminal P. C., S. 491, N. 7.

(b) Public Safety — Orissa Maintenance of Public Order Act (IV [4] of 1948), S. 2 (1) (a) and (2) — Prior invalid order under S. 2 (2) — Subsequent order under S. 2 (1) (a) — Validity.

Where a detenu is arrested under an invalid order of detention of a District Magistrate under S. 2 (2), a subsequent order of detention under S. 2 (1) (a) passed by the Provincial Government on substantially different grounds is not an extension of the previous order and cannot be pronounced invalid for that reason. [Para 5]

(c) Criminal P. C. (1898), S. 151 — Scope — Power under, if analogous to power of preventive detention — Arrest of person belonging to Communist party — Validity.

(*Per* Full Bench; Ray C. J., dissenting) — The authority of a police-officer under S. 151, Criminal P. C., is only a limited and exceptional power to prevent the commission of a cognizable offence by the individual concerned and is in no sense analogous to the power of preventive detention. Neither has the police-officer power to keep a person under arrest in anticipation of and pending a contemplated order of detention. A mere general information about the programme or tendency of the Communist Party to commit offences even if they are cognizable is not enough to justify the invoking of the powers under S. 151. What is required is "knowledge" of a design i. e., of a plan for the commission of a particular offence and the particular person sought to be arrested must have been a party to that design i. e., must have been associated with it in some way, however slight. To arrest a person because he belongs to a party and that party has a programme to commit some offences in general is to exercise the power of preventive detention and is an abuse of the powers under S. 151. [Para 11]

(d) Public Safety—Orissa Maintenance of Public Order Act (IV [4] of 1948), Ss. 2 and 3—As amended by Act (VI [6] of 1949)—Prior invalid order of detention—Detenu released — Subsequent camouflaged order on substantially same grounds — Validity—Contempt of Court.

Where a detenu was released by the High Court on the ground of invalidity of order of detention and was immediately re-arrested under a camouflaged order of detention containing substantially the same grounds of detention for the earlier illegal order without existence of any fresh material giving rise to fresh occasion for passing the order:

Held that the second order of detention must be held to be illegal especially when it is not attempted to be justified by invoking the provisions of the Amending Act (VI [6] of 1949). [Para 12]

Held further that even if the order of the District Magistrate might have been passed with the best of motives in view of the apprehension that the detenu, after release, might go underground, it would none the less be contempt of Court prima facie. (Rule *nisi* for contempt issued.) [Para 15]

(e) Public Safety—Orissa Maintenance of Public Order Act (IV [4] of 1948), S. 2 — Want of bona fides on part of Government—Onus.

The commission of illegalities by subordinate officers is not by itself any reason for imputing bad faith to the Provincial Government. Before the order of the Government can be pronounced to be a fraudulent exercise of its power, the same must be proved like any other fact. [Para 14]

The burden of substantiating the plea of want of bona fides is on the detenu. It may be that the burden on the detenu to make out the want of bona fides on the part of the Government is not so heavy as the burden would be on the Government to prove its bona fides, in case there is sufficient material on the side of the detenu to shift the onus on to the Government. But mere suspicion and conjecture cannot take place of tangible material required for shifting the onus. [Para 14]

M. Mohanty and V. Pashayat—for Petitioner.
Advocate-General—for Opposite Party.

Das J.—This is an application under S. 491, Criminal P. C., by a friend of one Baishnab Charan Patnaik who has been arrested on 22nd August 1943 and kept in Cuttack Jail, complaining that the said arrest and the jail custody are illegal. For purposes of convenience, the said Baishnab Charan Patnaik may be treated as the petitioner and will be referred to as such in the following.

[2] The petitioner was originally detained under S. 2, Orissa Maintenance of Public Order Act, 1948, by an order of the Provincial Government dated 28th October 1948. The said order was due to expire on 28th April 1949. Before its expiry, however, the Provincial Government passed another order of detention against him on 20th April 1949 for a further period of six months, on substantially the same grounds as those on which the first order of detention was made. The validity of this second order of detention was challenged by an application made to this Court in Cr. Misc. Application No. 119/49. This Court being of the view that the second order of detention dated 20th April 1949 was virtually an extension of the period of earlier detention beyond the statutory six months and therefore illegal, directed on 22nd August 1949 the release forthwith of the petitioner reserving to a later date the pronouncement of the reasons for the order. The judgment setting out the reasons was actually delivered on 14th September 1949. It would appear, however, that on the evening of 22nd August 1949 at 6 p. m., when he was brought out of the jail gate on release in pursuance of the orders of this Court, he was arrested by the Sub-Inspector of Lalbag Police Station under S. 151, Criminal P. C. It is stated in the affidavit filed in support of this application that on such arrest by that Sub-Inspector of Police, the petitioner was taken to the police station in the jail motor van which was waiting at the jail gate with a posse of constables and that he was subsequently brought back to the Cuttack Jail on the same night and lodged there. This assertion has not been denied on behalf of the Government. It is further stated to us at the time of the hearing, and is not denied, that on 22nd, an order of the District Magistrate of Cuttack, dated 22nd August 1949, purporting to be under S. 2 (2), Orissa Maintenance of Public Order Act, 1948, was served on the petitioner while in the Police Station, and that the grounds of this order of the District Magistrate were served on the petitioner in jail on 26th August 1949. A copy of the District Magistrate's order dated 22nd and the grounds dated 26th have been furnished to us by the learned Advocate-General appearing for the Government. On 26th August 1949, the present application which is under consideration before us has been filed in this Court as stated at the outset by a friend of the petitioner making any reference to the District Magistrate's order, presumably in ignorance of the fact that subsequent to the arrest by the Sub-Inspector on 22nd an order of detention was passed by the District Magistrate and that the grounds thereof were furnished on the 26th. On the 26th itself this Court admitted the application and made the following order :

> "Admit. Issue rule to show cause why the detenu shall not be produced before us and be set at liberty and why the authority concerned should not be proceeded against for contempt of Court."

[3] On the very same day the Provincial Government appear to have passed an order for

detention of the petitioner under cl. (a), sub-s. (1) of S. 2, Orissa Maintenance of Public Order Act, 1948. This order is stated to have been served on the petitioner in the jail on the next day, that is, 27th. The grounds of the said order of detention were drawn up on 5th September 1949, and are stated to have been served on 13th September 1949. It is on these facts that the legality of the detention of the detenu falls to be considered.

[4] It will be noticed that there are three stages relating to the present custody of the petitioner : (1) The arrest by the Sub-Inspector of Police at 6 P. M. on 22nd; (2) detention under an order of the District Magistrate dated 22nd August 1949 ; (3) detention under an order of the Provincial Government dated 26th August 1949. The application as filed calls in question only the legality of the first step. But in view of what has happened since, it is the legality of the third stage of the present custody that has to be considered if the petitioner is to get any relief. Learned counsel for the petitioner strenuously contended that the arrest of the petitioner by the Sub-Inspector on 22nd and the order of detention of the District Magistrate dated 22nd under which the petitioner was in custody by the date this application was filed were illegal and that the subsequent order of the Government dated 26th which was served on the petitioner on 27th cannot validate the custody which was illegal at the start and that the custody continues to be illegal. He contends, therefore, that all that is necessary for him to show is the illegality of the first two steps stated above. This contention, however, is opposed to the decision of the Federal Court in *Basant Chandra* v. *Emperor*, 1945 F. C. R. 81 at p. 90 : (A. I. R. (32) 1945 F. C. 18: 46 Cr. L. J. 559), where their Lordships stated as follows :

> "If at any time before the Court directs the release of the detenu, a valid order directing his detention is produced, the Court cannot direct his release merely on the ground that at some prior stage there was no valid cause for detention. The question is not whether the later order validates the earlier detention but whether in the face of the later valid order the Court can direct the release of the petitioner."

[5] It has also been attempted to be argued that if it be shown that the order of detention by the District Magistrate dated 22nd August 1949 is invalid, the order of the Government dated 26th August 1949 which is in the nature of an extension of the District Magistrate's order is also invalid. For that proposition, reference has been made to the case in *In re Jayantilal Nathubhai*, A. I. R. (36) 1949 Bom. 319: (51 Bom. L. R. 653 F. B.). While no doubt an order of a District Magistrate under sub-s. (2) of S. 2 is usually made as a preliminary to one under sub-s. (1) (a) by the Provincial Government it is not necessarily so, and the Provincial Government's order cannot be treated *ipso facto* as a mere extension. Whereas in this case, the order of the Government dated 26th August 1949, is based on grounds substantially different from those for the order of the District Magistrate, it is clear that it is not an extension and cannot be pronounced invalid for that reason. The substantial question for consideration therefore is whether the order of detention by the Provincial Government dated 26th August 1949 is a valid order. The petitioner, however, is undoubtedly entitled to rely on the illegality, if any, of the arrest by one Sub-Inspector of Police and of the order of detention by the District Magistrate as circumstances which may justify his argument that his detention under the later order of the Government is not bona fide and therefore illegal.

[6] The learned Advocate-General contends that in view of the latest amendment of the Orissa Maintenance of Public Order Act, 1948, by Orissa Act of VI [6] of 1949, this Court is precluded from canvassing the validity of the order of the Government made under S. 2 (1) (a) of the Act. The said amendment substitutes for the previous S. 4 a new section numbering it as S. 3 and it is as follows:

> "As soon as may be after a person is detained in pursuance of an order made under cl. (a) of sub-s. 2 (1), of S. 2, the authority making the order may, on application of the person affected by the order, communicate to him, so far as such communication can be made without disclosing facts, which the said authority considers to be against the public interest to disclose, the grounds on which the order has been made and such other particulars as are in its opinion sufficient to enable him to make a representation to the Provincial Government against the order; and such person may, within such time as may be specified by the Provincial Government make a representation in writing to them against the order and it shall be the duty of the Provincial Government to inform him of his right to make such representation and to afford him opportunity of doing so:
>
> Provided that neither the said order of detention nor the detention of the said person thereunder shall be deemed to be invalid or unlawful or improper on the ground of any defect, vagueness or insufficiency of the communication made to such person under this section."

[7] What is relied on is the proviso as above set out. The learned counsel for the applicant admits that the grounds of detention furnished by the Provincial Government do not suffer any defect or vagueness or insufficiency—indeed they are meticulously elaborate and fairly precise. He contends, however, that the order is not a bona fide one but is a fraudulent exercise of the statutory power in order to get behind the order of release made by this Court on 22nd August 1949. His contention virtually is that since the Court has adopted the view that a fresh detention on

substantially the same grounds was invalid, a number of new grounds have been set forth in the statement of grounds dated 5th September as supporting the order of detention dated 26th August 1949, with a view to secure validity for its order dated the 26th without any basis in fact for any of these additional grounds and is thus a fraudulent exercise of its power. His argument is that the proviso above referred to does not take away the power of the Court to scrutinise all the circumstances and the facts relating to an order of detention and to pronounce the order as illegal, if it is satisfied that it is not bona fide, but is a fraudulent exercise of the power. The learned Advocate-General has not disputed that the proviso does not affect the authority and the duty of this Court to examine the bona fides of the order and to pronounce it invalid and direct the release of the detenu if it finds that the order is a fraudulent exercise of the Government's statutory power. Indeed this authority of the Court is so well established that the contrary can scarcely be contended. That the existence of bona fides in the exercise of the statutory power is the foundation for its validity is recognised in the leading cases in *Liversidge* v. *Sir John Anderson*, 1942 A. C. 206 : (1941-3 ALL E. R. 338) and *Greene* v. *Secretary of State for Home Affairs*, 1942 A. C. 284 : (1941 3 ALL E. R. 388). The Federal Court in its judgment in *Basantchandra* v. *Emperor*, 1945 F. C. R. 81 : (A. I. R. (32) 1945 F. C. 18: 46 Cr. L. J. 559), also recognise this in the following passage at p. 87:

> "It was no doubt open to the detenu to show that the order was not in fact made by the Governor of Bihar or that it was a fraudulent exercise of the power."

See also *Kamlakant* v. *Emperor*, 23 Pat. 252 : (A. I. R. (31) 1944 Pat. 354). The question, therefore, is whether this has been made out in this case.

[8] The statement of the grounds of detention dated 5th September 1949 sets out that the plaintiff is an avowed communist; that he had contacts with revolutionary and terrorist workers of Bengal and Assam since 1942; that his contacts in Bengal, Assam and Bombay have gone underground and are preparing themselves for an armed insurrection in pursuance of the policy of the Communist Party of India and that he is eminently suited to link Orissa with Bengal for organising the Communists of this Province for an armed rebellion in furtherance of the plan; that in the event of his "release" at this juncture he would go underground and along with others foment agrarian trouble and sabotage food procurement policy and smuggle fire arms and ammunitions to this Province etc., etc., that the underground Communist Organisation has circularised fort he starting and fomenting of an "Agricultural Revolution" and that there is information of an intended raid on police stations and that during the last two months, instances of forcible possession of lands and looting of granary by Communists had come to notice and that in view of all the above circumstances, it is detrimental to peace and order of the country to allow the petitioner to remain at large. The prior order of detention dated 20th April 1949 is not based on any of these grounds and as appears from the affidavit filed on behalf of the Government, the information relating to these grounds is said to be based on reports received subsequent to the order dated 20th April 1949. The contention of the learned counsel for the petitioner is that these new grounds and the reports on which they are said to be based, have been merely put forward without any basis in order to evade the previous decision of this Court. Learned counsel for the petitioner puts his argument in this way to substantiate the above. The arrest by the Sub-Inspector of Police is illegal and the order of the District Magistrate dated 22nd August 1949, is illegal. These illegalities are not mere matters of accident. They must have been committed under instructions from the Government, when it became known on 22nd August 1949, that the detenue was directed by the High Court to be released, because the Government were bent on not allowing the petitioner to be at large until they could prepare and pass a fresh order. When, however, this application was filed and it became known that a rule *nisi* was issued on 26th, the present order of detention, it is suggested, was post haste that very day. When it was later realised that the Court had also given notice for proceedings in contempt, the necessity for elaborate and fresh grounds became apparent. Consequently, it is said that after the lapse of ten days, fresh grounds must have been produced which there is every reason to believe were nonexistent by the 26th. These suggestions require careful consideration. The alleged illegality of the arrest of the Sub-Inspector and of the detention order of the District Magistrate which is the foundation for these suggestions may now be considered.

[9] The Sub-Inspector has filed an affidavit before this Court in which he states that as Sub-Inspector of Police in Angul Police Station in 1942 and Athgarh Circle in 1948, he was aware of the violent and subversive activities of the petitioner and of his organizing capacity for the purpose; that the immediate policy and programme of the Communist Party of India is to create lawlessness in the country and sabotage and to keep an underground organisation for the purpose. That the Communist leaders and wor-

kers in Orissa have gone underground in large numbers to carry on such lawless activities and that some Communist leaders after their release under writs of habeas corpus have gone underground to carry out such lawless activities. He further states in the affidavit as follows :

> "That in order to prevent him from joining and pursuing the policy and programme of violence and lawlessness of the Communist Party of India, I arrested him under S. 151, Criminal P. C. on 22nd August 1949 at 6 P. M."

[10] It is contended that there is no suggestion in the affidavit of the Sub-Inspector that he was aware of any design either of the Communist Party or of this petitioner to commit any offence and that a mere vague allegation that it was the policy of the Communist Party to create lawlessness by sabotage or an allegation that in the year 1942, he was aware of the subversive activities of the petitioner, are not at all enough to bring the case under S. 151, Criminal P. C., and to clothe the police officer with the authority to arrest without a warrant from the Magistrate. There is considerable force in this contention. Section 151, Criminal P. C., is in these terms :

> " A Police Officer knowing of a design to commit any cognizable offence may arrest, without orders from a Magistrate and without a warrant, the person so designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented."

Under this section, therefore, it is necessary :— (1) There must be a design to commit an offence and the offence so designed must be cognisable. (2) The Police-officer must have knowledge of that design ; (3) The person arrested must be a party to that design ; (4) It must appear to the police-officer that the commission of the offence cannot be prevented otherwise than by such arrest.

[11] It has been held in a recent case by a Bench of the Madras High Court in *In re Om Prakasha Gupta*, (1949) 1 M. L. J. 554 : (A. I. R. (36) 1949 Mad. 744), that the question whether the police officer had the knowledge required and whether the commission of the designed offence could have been prevented otherwise than by the arrest are matters entirely within the purview of the police officer and are not capable of independent investigation by the Court. It is unnecessary to say whether this is correct. (See *Gaman* v. *Emperor*, A. I. R. (17) 1930 Lah. 348: (31 Cr. L. J. 294).) But no such difficulty arises where as in this case there is an affidavit from the very police officer who has made the arrest setting out his own justification for the arrest. It appears to me clear under S. 151 that a mere general information about the programme or tendency of the Communist Party to commit offence even if these offences were cognizable is not enough to justify the invoking of the powers under S. 151. What is required is " knowledge " of a design i. e., of a plan for the commission of a particular offence and the particular person sought to be arrested must have been a party to that design, i. e., must have been associated with it in some way, however slight. To arrest a person because he belongs to a party and that party has a programme to commit some offences in general, is to exercise the power of preventive detention. The authority of a police officer under S. 151, Criminal P. C., is only a limited and exceptional power to prevent the commission of a cognizable offence by the individual concerned and is in no sense analogous to the power of preventive detention. But that is exactly what has been done on the Sub-Inspector's own showing when he says in his affidavit that he arrested the petitioner "in order to prevent him from joining and pursuing the policy and programme of voilence and lawlessness of the C. P. I. "Neither has the police officer power to keep a person under arrest in anticipation of and pending a contemplated order of detention; but that is what has been done in this case as appears from what the Government itself has stated in its grounds for detention, dated 5th September 1949, wherefrom it appears that the petitioner " has been arrested *for fresh detention* " because there is information of his intention to escape from jail and to go underground. It is, therefore, clear to my mind that the arrest of the petitioner by the Sub-Inspector of Police at 6 P.M., on 22nd August 1949, is illegal and is an abuse of his alleged powers under S. 151, Criminal P. C.

[12] The next point raised is that the order of the District Magistrate, dated 22nd August 1949, is also illegal. It is pointed out that the statement of grounds for the District Magistrate's order, dated 26th August 1949, furnished to the petitioner, show that his order of detention was based on the same grounds as those for the prior order of detention, dated 20th April 1949, which was declared illegal by this Court by its order of release, dated 22nd August 1949. It certainly is surprising that a comparison of the grounds of detention for the order, dated 20th April 1949, and those, dated 5th September 1949, for the order of detention, dated 26th August 1949, discloses remarkable identity, the paragraph in each one of the statements of grounds specifying the actual grounds consists of seven sentences. The sentences are identical with the only difference that there has been transposition in the serial order of the sentences. Thus, sentence No. 1 in the present grounds is No. 2 in the earlier grounds and *vice versa*. Sentence No. 4 in the present grounds is No. 5 in the earlier grounds and *vice versa*. Sentences Nos. 3, 6 and 7 retain their order, but in sentence No. 6, there is slight inconsequential addition. It is obvious,

therefore, that the criticism of the petitioner's counsel appears justified that not only are the grounds same, but there is deliberate attempt to camouflage by transposing the order of the sentences. It is said that the District Magistrate could not have been unaware (though the actual grounds of the order of release of the petitioner by this Court on 22nd August 1949, were not pronounced until much later) that the Court was inclined to uphold the view taken by one of us in the prior judgment of this Court in Cr. Misc. Cases Nos. 61, 70, 71, 73, 74, 75, 82, 89, 98, 99 and 102 of 1949, dated 8th June 1949, to the effect that a second order on the same grounds amounts virtually to an illegal extension of the period of detention and is accordingly illegal. Whether or not the imputation that there was deliberate attempt to camouflage is strictly made out, there can be no doubt that the order of the District Magistrate, dated 22nd is illegal in view of the decision of the Special Bench of this Court in Cr. Misc. Case Nos. 119, 120 and 128 of 1949 pronounced on 14th September 1949. In the judgment of the single Judge, it was held that the fact of the fresh order of detention being on the same grounds as those for the prior order of detention, would show that the second order is *prima facie* illegal, but in the judgment of the Special Bench, dated 14th September 1949, the Court was prepared to consider that the Government would have been justified in passing fresh orders of detention, though on the previous grounds, if it appeared that there was fresh material giving rise to fresh occasion for passing the fresh order of detention. But in this case the order of the District Magistrate, dated 22nd August 1949, has not been attempted to be justified before us even on this limited footing. We are also conscious that the order of the District Magistrate has been passed subsequent to the amendment of the Act by Orissa Act VI [4] of 1949, but the order has not been attempted to be justified by invoking its provisions, obviously because the procedure specified therein under amended S. 4 thereof for extension of the period of detention has not been adopted. We have, therefore, no hesitation in holding that the order of the District Magistrate dated 22nd August 1949 is illegal.

[13] In view of these illegalities committed by the Sub-Inspector and the District Magistrate, which according to the petitioner's counsel must have been patent to them if they bestowed any thought, the learned counsel argues that the said illegal action must have been taken thoughtlessly and recklessly as a result of inspiration from above. The learned counsel relies on the passage in the grounds of detention dated 5th September 1949, furnished by the Government to the detenu in which the following passage occurs:

> "Under the circumstances and as there was an information of your intention to escape from jail to go underground it is considered detrimental to the peace and order of the country to allow you to remain at large *and so you have been re-arrested for fresh detention.*"

It is suggested that this would indicate if it does not prove that the arrest by the Sub-Inspector and the order of detention by the District Magistrate have been specifically inspired by instructions from Government with a view to give themselves time for finding out fresh grounds for detention; that the higher authorities must have made up their mind on receiving intimation of the High Court's order of release that the petitioner should not be allowed to have his liberty at all in spite of the High Court's order. It is also said that if there were in fact additional grounds for detention by 22nd or 26th, it is most unlikely that the District Magistrate would not have known them or not have been informed about them and that the grounds furnished by him on 26th to the petitioner would not have disclosed them. It has also been pointed out that under the amended S. 2 (3) when an order is made by the District Magistrate, he should report forthwith the fact to the Provincial Government together with the grounds on which the order has been made. It is said that these grounds furnished by the District Magistrate on 26th to the petitioner must have been available to the Government immediately and that if on 26th, the Government had all the grounds which they purport to set out in their statement of grounds dated 5th September, it is most unlikely that they would not have immediately taken step to point out the same to the District Magistrate and instructed him to rectify the same. It is also pointed out that the District Magistrate and indeed the Government themselves, as the law stands under the amended Act, are under no obligation to furnish the grounds and that therefore if they had at the time different grounds in their possession, they would even have stopped the service of the grounds on the petitioner on 27th.

[14] The whole chain of the above argument, however, depends on various links every one of which is a mere conjecture and a bare assumption. The first assumption is that the arrest by the Sub-Inspector of Police and the order of the District Magistrate have been inspired by the Government. The second is that the District Magistrate would have put himself in communication with the Government when passing his order of detention dated 22nd and before furnishing his grounds dated 26th. The third assumption is that the grounds furnished by the District Magistrate would have been forwarded and received by the Government on that very

day and that the Government would have taken steps to prevent communication of the grounds to the petitioner. There is absolutely no foundation for any of these assumptions. Apart from the bare facts that the arrest by the Sub-Inspector of Police and the detention order of the District Magistrate dated 22nd are found to be unauthorised and illegal, there is no material to connect these illegalities with the action taken by the Government later and nothing at all in support of the various conjectures suggested above. The commission of illegalities by subordinate officers is not by itself any reason for imputing bad faith to the Provincial Government. It must be remembered that before the order of the Government can be pronounced to be a fraudulent exercise of its power, the same must be proved like any other fact. It has been suggested that all that a detenu under these circumstances has to do or can do is to place material before the Court which would raise suspicion and that once this is done, the onus is on the Government to make out that the order is prefectly bona fide and is not a fraudulent exercise. It is said that this is the more so, because all the relevant material can only be in the possession of the Government. This view of the onus however cannot be accepted. As has been laid down in the *Liversidge case*, (1942 A. C. 206 : 1941-3 ALL E. R. 338) and the *Greene's case*, 1942 A. C. 284: (1941-3 ALL E. R. 388), the burden of substantiating the plea of want of bona fides is on the detenu. It may be that the burden on the detenu to make out the want of bona fides on the part of the Government is not so heavy as the burden would be on the Government to prove its bona fides, in case there is sufficient material on the side of the detenu to shift the onus on to the Government. Such a position may conceivably be maintained on the analogy of the case in *Rex* v. *Carr-Briants*, 1943-1 K. B. 607: (1943-2 ALL E. R. 156). But even in such a view mere suspicion and conjecture cannot take place of tangible material required for shifting the onus. The argument that since the relevant material will normally be within the knowledge and possession of the Government the onus is to be thrown on the Government has been noticed and repelled by the Federal Court in *Basanta Chandra* v. *Emperor*, 1945 F. C. R. 81 at p. 87 : (A. I. R. (32) 1945 F. C. 18 : 46 Cr. L. J. 559). Apart, however, from any question of burden of proof, there is in this case, the affidavit of the Additional Home Secretary filed by the Government in Para. 3 of which he has categorically stated that there were confidential reports and information received after the previous order of detention dated 20th April 1949, which were placed before the Hon'ble Minister in charge, when the order dated 20th August 1949 was passed and on which the Hon'ble Minister was satisfied that the detention order was necessary as a preventive measure against the petitioner engaging himself in subversive activities. There is absolutely no reason not to accept the truth of this affidavit. It has been suggested that if such confidential reports were available, their existence would have been mentioned to this Court in the affidavit filed before this Court by the Additional Home Secretary on 22nd August 1949, at the hearing of the prior application Cr. Misc. No. 119/49. It must, however, be pointed out that what we then required was not information as to any material that may have been received subsequent to the order of detention dated 20th April 1949 but reports in between the first order of detention dated 23rd October 1948 and the second order of detention dated 20th April 1949 on which the second detention might have been based. There is, therefore, no scope for any suggestion that the affidavit of the Additional Home Secretary filed in this application is not to be accepted. On the other hand, a perusal of the grounds of detention dated 5th September 1949 which is comprehensive in its details is itself in some measure convincing that the information contained therein was not likely to have been faked up. Indeed if we remember that under the amended Act, the Provincial Government were not at all bound to furnish to the petitioner the grounds of detention, the very fact that they did furnish the grounds to the petitioner is the clearest indication of the *bona fides* of the order. It must, therefore, be held that there is absolutely no reason for pronouncing the order of detention of the Provincial Government against petitioner Baishnab Chandra Patnaik to be invalid or to direct his release from custody. The petition is accordidgly rejected.

[15] Before closing the case, however, it is necessary to mention two things. I have held that the arrest by the Sub-Inspector of Police in this case under S. 151 is illegal. Other instances of similar use of S. 151 as a step preliminary to a formal order of detention have come to my notice in dealing with similar applications. It is, therefore, necessary to draw the attention of the authorities to the fact that this is an abuse of powers. The Orissa Maintenance of Public Order Act itself does not contain any such provision for an anticipatory arrest in view of an order of detention. The lacuna, if any, cannot be made up by the abuse of powers under S. 151 which are meant for a totally different purpose. One can understand the anxiety of the Government to re-arrest a person of this kind forthwith on release in view of what is stated to be their

previous experience of such persons with reference to their propensity and capacity to go underground. But the apprehension of the Government in this behalf cannot be justification for illegal arrest. The Legislature may be taken to have thought that a judicious use of some of the other provisions of S. 2 (1) of the Act are enough to meet such a situation. The second matter that requires more serious notice is the illegality committed by the District Magistrate in passing the order of detention dated 22nd. As already pointed out above, it is based on the same grounds with what appears as an attempt to camouflage by transposing the order of the sentences in the grounds. Such an attempt if deliberate is an insult to the intelligence of any judicial tribunal that may be called upon to scrutinise it. The order may have been passed even with the best of motives in view of the apprehension that the detenu, after release, may go underground. But it would none the less be contempt of Court *prima facie*, if any authority, however high placed, directed the immediate re-arrest of a person who has been ordered to be released by this Court, by passing a camouflaged fresh order of detention on the same grounds which have been pronounced to be invalid. That a person who has been released from custody on a writ of habeas corpus, cannot be subjected to a second detention on the same grounds has been recognised in the case in *Rex* v. *Secretary of States for Home Affairs*; *Ex parte Budd*, 1942-2 K. B. 14 : (1942-1 ALL E. R. 373). That a re-arrest on the same grounds amounts to contempt of Court is also laid down as early as in Qeen Elizabeth's time in the English Courts: *vide Searches Case*, (74 E. R. 65.) We cannot, therefore, let the matter rest without adequate explanation from the District Magistrate concerned. A rule *nisi* for contempt committed by him by his order dated 22nd August 1949 must accordingly issue.

[16] **Narasimham J.**—I agree.

[17] **Panigrahi J.**—I agree.

[18] **Ray C. J.**— I have considered the judgment of my learned brother Das J. I agree with his conclusions except that the arrest by the Sub-Inspector under S. 151 was illegal. Das J. is of opinion that it must be the Police Officer's knowledge of a design to commit a particular (specific) offence that will entitle him to effect the preventive arrest. I am not at one with him in this respect. In every* . . . there is a political party who for the purpose of fulfilment of their party objects have the settled design of committing various acts of voilence in order to bring about confusion and chaos into the society and in order to obstruct the citizens in their lawful pursuit of avocations and to sabotage the transport facilities, food supplies and the regular supply of other essential services, necessary not only for the social but also administrative upkeep of the country, it would amount to quite good a design within the meaning of the section to commit cognizable offences. If a Police Officer has good reasons to believe, that any particular person unless detained will join the same party and partake of the same design for the purposes of commission of such offences I do not think he will exceed his jurisdiction in arresting him without a warrant in order to prevent the commission of the offences about the likelihood of which he is, to the best of his discretion, thoroughly convinced.

K.S. *Application dismissed.*

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*The certified copy supplied to us contains obviously an omission. In I. L R. (1949) 1 Cut. 821 at p. 838 the sentence runs as follows: "In every statute the singular includes plural. Besides, where there is a political party . . . ."

A. I. R. (37) 1950 Orissa 114 *[C. N. 18.]*

SPECIAL BENCH

RAY C. J., JAGANNADHADAS AND NARASIMHAM JJ.

State v. *Haricharan Rakshit* — *Accused* — *Respondent*.

Government Appeal No. 3 of 1947, D/ 28-10-1949, from order of S. J., Ganjam-Puri, D/- 17-5-1947.

(a) Defence of India Rules (1939), R. 81 (4) — Government of Bihar Notification No. 16100-S.-T. dated 3-6-46, Cl. 3 (a) — Attempt to transport — Accused travelling in through train from Puri to Howrah — New cloth weighing 14 lbs found in his possession—No plea that cloth was not being taken to Howrah — Accused held attempted to transport cloth to Howrah — Even if he merely prepared to transport cloth accused held was guilty in view of R. 121—Defence of India Rules (1939), R. 121.

An attempt to commit an offence does not cease to be an attempt merely because after the attempt is made and before the actual completion of the offence the offender may be able to prevent its completion by doing some other act in pursuance of a changed intention. The question to consider is whether an act was done which if not prevented would have resulted in the full consummation of the act attempted: A. I. R. (7) 1920 Cal. 478 (S. B.) and A.I.R. (36) 1949 Pat. 326, *Rel. on.* [Para 6]

The accused was travelling from Puri to Hawrah in a Second Class compartment with a Second Class ticket. The train was a through train to Howrah and new cloth weighing more than 14 lbs. was found inside the compartment as part of his personal luggage though not booked as such. Neither in his examination under S. 342, Criminal P. C, nor in his written statement did he take the plea that the cloth was not meant to be taken by him to Howrah but was meant to be delivered to some other person within the Province of Orissa:

Held that it could be reasonably inferred from the above facts that the accused attempted to transport cloth from Orissa to Howrah in contravention of the Notification: [Para 6]

Held further that even if it be held that the accused merely prepared and not attempted to transport cloth by rail outside Orissa even then he was guilty of contravening the Notification in view of R. 121, D. I. Rules: A. I. R. (37) 1950 Orissa 88, *Disting.* [Para 5]

(b) Cotton Textiles (Control of Movement) Order (1946), Cl. 3 — Government of Bihar Notification No. 16100, S. T. dated 3-6-46, Cl. 3 (a)—There is no conflict between Cl. 3 of Order and Cl. 3 (a) of Notification—Prosecution of accused for contravening Notification — Sanction under Cl. 10 of Order is not necessary — Cotton Textiles (Control of Movement) Order (1946), Cl. 10.

Clause 3 of the Order and any general permit issued under that Order will apply only in those cases where the transport of the cloth by rail is through an agency other than the railway passenger himself. Clause 3 (a) of the Notification however applies to the transport of cloth by rail by the passenger himself. There is thus no conflict between the Notification and the general permit issued under Cl. 3 of the Order. The Notification covers a ground quite different from that covered by Cl. 3 of the Order and as such the sanction contemplated by Cl. 10 of the Order is not necessary for prosecuting an accused person for contravening the Notification. A. I. R. (33) 1946 Pat. 285, *Rel. on*; A. I. R. (32) 1945 Pat. 375 and A. I. R. (33) 1946 Pat. 285, *Ref.* [Paras 8 and 10]

Advocate-General—for the State.

P. C. Chatterjee—for Respondent.

Narasimham J. — This is a Government appeal against the order of acquittal passed by the Sessions Judge of Ganjam-Puri on an appeal from the conviction and sentence passed by a First Class Magistrate of Puri.

[2] The respondent was found travelling in a Second Class coupe compartment of the Puri-Howrah Express on 20th July 1946. His compartment was searched by the S. I. Anti-smuggling (P. W. 3) at Khurda Road Railway Station and new cloth consisting of *dhoties, sarees*, ready-made garments, napkins, etc., were recovered from the compartment. The respondent had a Second Class ticket No. 2,197. Another lady who was said to be the mother of the respondent was also travelling in the same compartment with him. The Sub-Inspector seized the cloth and on weighing the same found the weight to be about 22 lbs. Subsequently, however, when the cloth was weighed by the Court Sub-Inspector of Puri Sadar (D. W. 1) the weight was found to be 14 lbs., 4½ ounces. As rightly pointed out by the learned Sessions Judge this glaring discrepancy in the weight of the cloth is indeed very intriguing. Either some of the cloth was subsequently pilfered by unauthorised persons or else the weighing at the time of seizure was done vary carelessly. Whatever that may be, the Crown launched prosecution against the respondent for contravention of the Government of Orissa Notification No. 16,100 S. T., dated 3rd June 1946 (hereinafter referred to as the impugned notification) banning the transport by rail of any cloth from the Province of Orissa to any place outside the Province except in accordance with a permit granted by the Controller of Supply and Transport. As the respondent had no permit with him the learned Magistrate convicted him under R. 81 (4) read with R. 121, Defence of India Rules for contravention of the impugned notification. But on appeal the learned Sessions Judge acquitted him observing that there was a conflict between the impugned notification of the Government of Orissa on the one hand and an Order of the Central Government known as the Cotton Textiles (Control of Movement) Order, 1946 (hereinafter referred to as the Central Order) and that the said Central Order should prevail. He further held that the previous sanction of the appropriate authority as provided by Cl. 10 of the Central Order, was necessary before starting prosecution and that in the absence of such sanction the case must fail.

[3] The essential facts are practically unchallenged. The respondent was a Second Class passanger travelling in the Puri-Howrah Express on 20th July 1946 with new cloth in his compartment which on weighing was found to be about 14 lbs. 4½ ounces. His mother was also travelling in the same compartment. Even if it be assumed that the cloth belonged jointly to the respondent and his mother it is clear that each of them was in possession of more than 7 lbs. of new cloth. Some argument was faintly advanced to the effect that the evidence to show that all the pieces of cloth seized from the compartment were *new* cloth was not very satisfactory and in support of this argument the entry in the search list (Ex. 2) was relied upon. But from the evidence of the S. I. (P. W. 3) there seems to be no doubt that all the pieces of seized cloth were new cloth and as much as such would come within the definition of 'cloth' as given in the impugned notification of the Provincial Government. The respondent had no luggage ticket with him and though in his written statement he denied that the seized cloth was part of his personal luggage, there can be no doubt that he was transporting the pieces of cloth as part of his personal luggage in view of his clear admission in his examination under S. 342, Criminal P. C. "I was carrying about 14 lbs. of cloth *with me.*"

[4] The impugned notification prohibited the transport of cloth by rail from any place in the Province of Orissa to any place outside the Province except under and in accordance with the terms of a permit granted by the Controller of Supply and Transport, Orissa. Clause 3 (a) of that notification, however, exempted from its operation the transport by rail by a railway

passenger of cloth and apparel as part of his personal luggage if such cloth and apparel do not together exceed in weight 5 lbs. This clause, however, cannot in any way help the respondent because the weight of the cloth of the respondent and his mother was more than 10 lbs. The impugned notification was issued by the Provincial Government in exercise of the powers conferred by R. 81 (2), Defence of India Rules which were then in force. Though the Defence of India Act had since expired, the liability for any penalty for contravention of any of the rules or orders made thereunder still continues to exist by virtue of the amendment made to sub-s. (4) of S. 1, Defence of India Rules, by Ordinance XII [12] of 1946.

[5] The Advocate-General's main contentions were that there was no conflict between the impugned notification and the Central Order and that for contravention of the impugned notification previous sanction as required by Cl. 10 of the Central Order was not necessary and that on the facts of the case the respondent was guilty of *attempting* to transport cloth in contravention of the impugned notification. On behalf of the respondent Mr. Chatterjee, however, urged that (i) the sanction of the appropriate authority was necessary under Cl. 10 of the Central Order and (ii) the facts proved in the case merely show that there was a *preparation* and not an attempt to contravene the impugned notification and that in any view of the case the acquittal was justified. In support of this argument he has relied on a recent Division Bench decision of this High Court in Govt. Appeal No. 2 of 1949, *The King* v. *Hari Baisakh*, A.I.R. (37) 1950 Orissa 88, where on similar facts it was held that the mere fact that a railway passenger holding a ticket for Howrah was found in possession of certain quantity of cloth in his compartment at Cuttack was not sufficient to show that he attempted to transport that cloth from the Province of Orissa to Howrah. But there is one important distinguishing feature between that case and the present appeal. In that case the prosecution was under S. 7 read with S. 17 of Act XXIV [24] of 1946 whereas in the present appeal the prosecution is for an offence under R. 81 (4), Defence of India Rules. Rule 121, Defence of India Rules says clearly that the doing of any act preparatory to a contravention of any of the provisions of the said Rules shall be deemed to be a contravention of the provision. That is to say, though under the criminal law preparation to commit an offence is not ordinarily an offence, R. 121, Defence of India Rules expressly made preparation also punishable in the same manner as the completed offence. On the other hand, in Act XXIV [24] of 1946 there is no provision corresponding to R. 121, Defence of India Rules and the general priniciples of criminal law which ordinarily render preparation to commit an offence not culpable, may apply. But in view of the distinguishing feature in the Defence of India Rules, the respondent cannot escape liability even if it be held that the evidence led by the prosecution merely shows that the respondent was preparing and not attempting to transport cloth by rail outside Orissa.

[6] Apart from reliance on R. 121, Defence of India Rules, I think on the facts as proved by the prosecution it can be reasonably inferred that the respondent attempted to transport cloth from Orissa to Howrah in contravention of the impugned notification. He was found travelling to Howrah in a second class compartment with a second class ticket. The train was a through train to Howrah and the cloth was found inside the compartment as part of his personal luggage though not booked as such. Neither in his examination under S. 342, Criminal P. C., nor in his written statement did he take the plea that the cloth was not meant to be taken by him to Howrah but was meant to be delivered to some other person within the Province of Orissa. When a person travels in a through train from Puri to Howrah with a ticket for Howrah and takes some articles into his compartment as part of his personal luggage the only reasonable inference that can be made is that he intended to take those articles also with him to Howrah. It is doubtless possible that the articles may not have been destined for Howrah and the passenger may deliver them to some friend or other person whom he might meet in any of the railway stations within the Province of Orissa. But here there is nothing on record to justify the surmise that the respondent intended to leave the cloth in Orissa itself. There was no label on the cloth to show that it was meant for some other person in Orissa nor has the respondent himself taken any such plea. Though the difference between 'preparation' to commit an offence and an 'attempt' to commit an offence is one of degree there is an essential distinction between the two which has been fully brought out in the following passage from *In the matter of Amrita Bazar Patrika Press* 47 Cal. 190 at P. 234 : (A. I. R. (7) 1920 Cal. 478 S. B.):

> "Attempt is an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing except for failure to consummate, all the elements of the substantive crime; in other words, an attempt consists in the intent to commit a crime, combined with the doing of some act adapted to, but falling short of, its actual commission; it may consequently be defined *as that which if not prevented*

would have resulted in the full consummation of the act attempted."

In a recent Patna decision reported in *Province of Bihar* v. *Bhagwat Prasad*, A. I. R. (36) 1949 Pat. 326 : (50 Cr. L. J. 682), Shearer J. observed:

> "An attempt to commit an offence is, as I understand it, an act or series of acts, which leads inevitably to the commission of the offence unless something which the doer of the act or acts neither foresaw nor intended happens to prevent this. An act done towards the commission of the offence which does not lead inevitably to the commission of the offence unless it is followed or, perhaps, preceded by other acts, is merely an act of preparation."

In the present case the contraband cloth had been put in the second class compartment of the Puri Express. Nothing more was required for its transport to Howrah and in the usual course it would have reached the place of destination. Doubtless the respondent might prevent the completion of the offence by throwing away the articles before the train crosses the boundary of the Province of Orissa. But an attempt to commit an offence does not cease to be an attempt merely because after the attempt is made and before the actual completion of the offence the offender may be able to prevent its completion by doing some other act in pursuance of a changed intention. As pointed out in the aforesaid two decisions the question to consider is whether an act was done which if not prevented would have resulted in the full consummation of the act attempted. Here the placing of the contraband cloth in a compartment of the through train from Puri to Howrah with the intention of taking it to Howrah renders the attempt complete, because that act would inevitably lead to the commission of the offence. What the offender might do at subsequent stages of the journey for frustrating the completion of the offence, due to fear of detection or other reasons, is quite immaterial.

[7] With great respect to the learned Judges who decided the Govt. Appeal No. 2 of 1949, *The King* v. *Hari Baisakh*, A. I. R. (37) 1950 Orissa 88, I may add that the conclusions in that judgment were too broadly stated. In that case the accused was found boarding a train at Cuttack carrying 42 lbs. of handloom cloth. He had not booked the luggage separately but had purchased a railway ticket for Howrah. The learned Judges observed that it cannot be reasonably held that the accused's intention was to carry the cloth to Howrah because it was just possible that he may have unburdened himself of his luggage at a way-side station. In considering what was the intention of the accused at the time of his entering the train with some luggage in his possession it may not be safe to rely on what he might possibly do at subsequent stages of the journey. The cloth was being carried as part of his personal luggage inside the compartment and he himself was travelling to Howrah. There was nothing on the article to show that it was meant for some other place. The only reasonable inference that can be drawn is that the accused intended to take the article to the same place to which he was going, namely, Howrah. Apparently the learned Judges relied on *Narayanaswami* v. *Emperor*, A. I. R. (19) 1932 Mad. 507 : (33 Cr. L J. 582). It is, however, not necessary to elaborate this point in the present appeal because by virtue of R. 121, Defence of India Rules, the respondent's contention must in any case fail.

[8] Next it was argued that the impugned notification must give way to the Central Order and that the absence of sanction from the competent authority as required by Cl. 10 of the Central Order was fatal to the whole case. The lower appellate Court was much impressed by this argument chiefly because of two decisions of the Patna High Court reported in *Kapildeo* v. *Emperor*, A. I. R. (32) 1945 Pat. 375 : (47 Cr. L. J. 190) and *Manohar Lall* v. *Emperor*, A. I. R. (32) 1945 Pat. 477 : (24 Pat. 487). But I find no repugnancy between the Central Order and the impugned notification. Clause 3 of the Central Order runs as follows :

> "No person shall *offer for transport* by rail, *or cause to be transported* by rail, any cloth or apparel except under and in accordance with
>
> (i) a general permit notified in the Gazette of India by the Textile Commissioner . . . ."

In pursuance of this clause the Textile Commissioner notified the general permit in No. 107/1-TA/45 (ii) dated 5th January 1946, para. 3A of which runs as follows :

> "A Railway passenger may offer for transport by rail or cause to be transported by rail cloth and apparel as part of his luggage if such cloth and apparel do not together exceed in weight 13 lbs."

Mr. Chatterjee has relied on this para. 3A and urged that if under the general permit issued under the Central Order a passenger was entitled to carry 13 lbs of cloth as luggage, any provision in the Provincial Order restricting the quantity of cloth to less than 13 lbs must necessarily be repugnant to the Central Order. This argument, however, overlooks a very important difference in the language of the Central Order and the impugned notification. The relevant words in the Central Order, 'offer for transport or cause to be transported.' Paragraph 3A of the general permit also uses the very same words. Those words indicate that the agency for the transport of the cloth must be some person other than the passenger himself. For instance, if the luggage was booked and despatched in the brake-van it may be said that the passenger caused the luggage to be transported but when the passenger was taking the cloth in his compartment without booking it as luggage at all how can it be said that he *caused* the cloth to be transported? All that can be reasonably said is that he himself transported the cloth. In the Central Order there is another clause (Cl. 6) which deals with a case of transport of cloth by the person himself. Under that clause the Textile Commissioner may by notification prohibit the transport of cloth from any place within such area as may be specified in the notification to any place outside that area by rail. If under this clause the Textile Commissioner had issued a notification and fixed a different maximum limit of permissible transport there may be some repugnancy between that notification and the impugned notification. But I have not been shown any notification issued by the Textile Commissioner under Cl. 6 of the Central Order dealing with the transport of cloth by rail. My attention was drawn to a notification of the Textile Commissioner (No-101-TA/46 (ii) dated 16th February 1946) which refers to the transport of cloth by *road*: That notification has obviously no application to the present case. Therefore my conclusions may be summarised thus : (i) Clause 3 of the Central Order and any general permit issued under that Order will apply only in those cases where the transport of the cloth by rail is through an agency other than the railway passenger himself. (ii) Clause 3 (a) of the impugned notification however applies to the transport of cloth by rail by the passenger himself : (iii) There is thus no conflict between the impugned notification and the general permit issued under Cl. 3 of the Central Order. (iv) There might be a conflict between the impugned notification and a notification that may be issued by the Textile Commissioner under Cl. 6 of the Central Order regarding transport of cloth by rail but as no such notification has been brought to my notice it is unnecessary to discuss which notification will prevail if there is such a conflict.

[9] In 1948 the Central Government issued another order known as the Cotton Textile (Control of Movement) Order, 1948 repealing the 1946 Order. In the 1948 Order the language of Cl. 3 is slightly different as will be clear from the following extract :

> "No person shall transport or cause to be transported by rail, road, air, sea or inland navigation any cloth, yarn or apparel except under and in accordance with
>
> (i) a general permit notified in the Gazette of India by the Textile Commissioner . . . . . ."

It will be noticed that the words 'offer for transport' occurring in Cl. 3 of the 1945 Order have been replaced by 'transport' in 1948 Order. But the 1948 Order has no application to the present case because the offence was said to have been committed on 20th July 1946 and the judgment of the appellate Court also was delivered in 1947 long before the commencement of the 1948 Order. It is, therefore, unnecessary to discuss the effect of the 1948 Order so far as the legal question involved in this appeal is concerned.

[10] In view of the aforesaid conclusion it is unnecessary to consider the correctness of the decisions reported in *Kapildeo* v. *Emperor*, A. I. R. (32) 1945 Pat. 375 : (47 Cr. L. J. 190) and *Manoharlal* v. *Emperor*, A. I. R. (32) 1945 Pat. 477 : (24 Pat. 487). I would rely on *Gogan Ram* v. *Emperor*, A. I. R. (33) 1946 Pat. 285 : (47 Cr. L. J. 892) and hold that the impugned notification covers a ground quite different from that covered by Cl. 3 of the Central Order and as such the sanction contemplated by Cl. 10 of the Central Order is not necessary for prosecuting the respondent for contravening the impugned notification.

[11] I would, therefore, allow the appeal, set aside the order of acquittal passed by the Sessions Judge and restore the conviction of the respondent under R. 81 (4) P/121, Defence of India Rules and sentence him to a fine of Rs. 100 in default to undergo rigorous imprisonment for two months.

[12] The order of the trying Magistrate confiscating the seized cloth is also restored. A somewhat lenient sentence is passed because of the interval that has elapsed since the date of the occurrence and also because the seized cloth has been forfeited to the Government.

[13] **Das J.**—I agree that the appeal is to be allowed and that the conviction of the respondent and the order of forfeiture of the cloths seized should be restored. I agree also that the accused should be sentenced to a fine of Rs. 100 and for two months' rigorous imprisonment in default.

[14] There is no question of any repugnancy between the relevant Provincial Order and the Central Order in this case as pointed out in my learned brother's judgment What the legal position would be, if there had been any repugnancy, is a matter on which it is unnecessary to express any final opinion in this case, more so, as we had not the benefit of a full and exhaustive discussion at the bar on the matter.

[15] On the footing that the Provincial Order applies to this case, the only question is whether on the facts, an offence has been committed. In Govt. Appeal No. 2 of 1949, *The King* v. *Hari Baisakh*, A. I. R. (37) 1950 Orissa 88 decided by my learned brother Panigrahi J., and myself, we held on almost identical facts that no offence had been committed. That, however, was a case relating to an alleged offence committed on 7th August 1948 and was punishable, if established, under Act XXIV [24] of 1946. There is no provision in the said Act corresponding to R. 121,

Defence of India Rules, making even preparation for an offence punishable as for the main offence. That case, therefore, can be distinguished on this ground. I must, however, recognise that it has been contended that the reasoning in our prior judgment was wrong. That decision proceeds on two assumptions ; (1) that the offence committed in breach of Orissa Notification No. 16100 (S. T.), dated 6th March 1946 is not complete until after the articles are moved out of the province ; (2) that where a person with a railway passenger ticket to a place beyond the province carries with him some luggage without a luggage ticket to indicate that the luggage was also being carried to a place outside the province he cannot be presumed to be carrying the luggage to the place of his own destination. It is argued that both these assumptions are erroneous. As far as the first assumption is concerned, it has been pointed out that the word used in the relevant notification is "transport" and not "export" and that the word "transport connotes a continuous act from the start to the destination. It has also been contended that the Legislature could not have intended to prohibit an act which becomes completed only when the articles reach the other side of the province and go outside its jurisdiction. There is no doubt considerable force in these arguments. But it appears to me that while the word "transport" may not necessarily bear the same connotation as "export" if the relevant notification intended to prohibit the very act of carrying the articles (provided of course that the intention was to carry it out of the province), then it should have been expected that the word "carries" or some such equivalent term would have been used instead of the word "transport" in the notification. On the other hand the notification in terms prohibits transport from a place in Orissa to a place outside the province and it is difficult to say that so long as a person is still inside the province with the goods, he can be said to have transported the same to a place outside the province merely because he intends to do so. It is, however, unnecessary to express a final view on this matter since in any view, the facts proved, would either amount to an attempt or preparation to commit the offence.

[16] On the question whether the facts in this case amount to an attempt or preparation, in our judgment in Govt. Appeal No. 2 of 1949, *The King* v. *Hari Baisakh*, A. I. R. (37) 1950 Orissa 88, we were inclined to the view that the analogous facts in that case would not amount to an attempt. But we had no doubt (though it was unnecessary to say so for the purpose of that case) that it would amount to preparation provided that the facts could be taken to have established the intention to carry the luggage to the passenger's destination. There has been discussion at the bar as to what amounts to an attempt in such cases. In spite of a good deal of effort in the various decided cases to delimit the demarcation line between an attempt and preparation, it ultimately resolves itself into one of degree depending on the facts of each case. In a case of this kind I would hesitate to hold that the stage of attempt had been reached except when the train was about to leave the halting station just prior to the one on the other side of the border of the province. But there can be no doubt that from the moment the passenger boards the train, the "preparation" is complete, if the facts prove clearly that the goods were intended to be carried outside the province.

[17] The further question that remains is whether the fact of the passenger holding a railway ticket showing his destination to be a place outside the province is enough evidence to put accused on the defence. In our judgment in Government Appeal No. 2 of 1949, *The King* v. *Hari Baisakh*, A.I.R. (37) 1950 Orissa 88 we must be taken to have decided that it is not. Having heard the matter more fully argued, I am inclined to agree with the view taken by my learned brothers that where a person who holds a ticket showing his destination outside the province, carries with him goods which are shown or admitted to be his personal luggage and where he is travelling in a train which in the normal course would reach that destination without a break, these are facts *prima facie* sufficient to put the accused on his defence. There may be other circumstances which might equally support such a *prima facie* inference. What needs, however, to be recognised is that it is ultimately a question of fact and not one for raising a legal presumption either one way or the other. With these remarks as to the effect of our earlier judgment, I concur with the order proposed by my learned brother.

[18] **Ray C. J.** — I agree that this appeal shall be allowed and the respondent convicted and sentenced as proposed by my learned brother Narasimham. I am also in agreement with his line of reasoning.

[19] In view of the importance of the subject and the need for accuracy of expression in some of the conceptions involved in the question, I wish to add a few words.

[20] With great reluctance, though, I differ from brother Das in thinking that in the facts of this case but for R. 121, Defence of India Rules, conviction could be recorded of the contravention of the rule concerned. In this connection, I differ from his observation: "But it appears to me that while the word 'transport'

. . . . because he intends to do so." My reasons are as follows: 'Transport' means (*vide* the Concise Oxford Dictionary) 'convey (person, goods, troops, baggage, etc.), from one place to another.' The conceptions of two terminii and the act of conveying from one to the other, are implicit in its connotation. An act of transport cannot be undertaken and even contemplated without them. Two specific places each at one end and the other must form the terminii. In the case of transport by rail, any of the intermediary stations does not come into the picture as a terminus, except for one who has to detrain there. Every moment that the train proceeds on its way, it is transporting a passenger with his luggage to where he is goving to alight. It cannot be predicated that until the station is reached and the passanger alights, the act of transport is neither done nor undertaken. No doubt, the act of transport earlier begun and all the while continuing is completed at the destination. 'Transport,' from the very conception inherent in it, cannot be a momentary act. 'Transport' begins at one place and ends at another. Between these two places it is continuing. Besides the two terminii, the concept of 'motion' is also implicit in its connotation. 'Transport,' as a noun, means 'conveyance;' e. g., 'A transport vessel' means 'a vessel empoloyed to carry soldier, stores, etc., to destination.' In consideration of the meaning attached to the word, 'carry' as distinguished from 'transport,' to my mind, would not have been an apt expression in enacting the rule or expressing the notification, as the case may be. I can carry a thing without the remotest idea of conveying it from place to place. The argument that in the circumstances of the case the act of 'transport' does not begin till the provincial boundary is crossed suffers from the defect as if the intention to contravene the concerned rule begins to form not till then. This is hardly a tenable argument. To argue that there only the intention is manifest may carry some measure of conviction. Taking the limited view of its connotation, it would be difficult to predicate, in the case of one who is charged with "transporting the cloth, in question, from Puri to Howrah," that he is guilty of the offence charged until he reaches "Howrah." Because, by parity of reasoning, it could be successfully urged in his defence that he could throw off the goods a mile or two before the train reaches the destination. If it is held to amount to 'transport' for the purpose of the charge from where the train crosses Orissa boundary till any station before Howrah, I see no reason why it does not amount to such 'transport' from any station inside Orissa in the direction of Howrah.

[21] Now, I shall address myself to whether the respondent's action, in the present case, was merely a preparation for or an attempt to 'transport.' The line of distinction between the two, in its irreducible minimum, is no doubt very thin, but it is real and subsisting. It is more easy to discriminate one from the other in concrete instances than to define by expression of general applicability. If preparation for a crime is not punishable, it is because mere intention to commit an offence is not indictable. The intention must manifest itself in an overt act before an offence or an attempt to commit an offence can be said to have been perpetrated. The act must be immediately connected with the offence, not that it must necessarily result in accomplishment of the act that makes the offence. It has been authoritatively laid down in the case of *R.* v. *Brown*, (1890) 16 Cox. C. C. 715: (24 Q. B. D. 357) that it is no defence to an indictment for attempting to commit a crime to prove that it was physically impossible to complete the offence. The most illuminating way of expressing it would be to adopt the definition (Art. 74 of the Draft Criminal Code of England prepared by Lord Blackburn, and Barry, Lust and Stephen JJ.):

> "An attempt to commit an offence is an act done or omitted with intent to commit that offence, forming part of series of acts or omissions which would have constituted the offence if such series of acts or omissions had not been interrupted either by the voluntary determination of the offender not to complete the offence or by some other cause."

[22] To prove that if no interruption had taken place the prisoner could have completed the offence attempted is wholly irrelevant to the issue (See *R.* v. *Brown*, (1890) 24 Q. B D. 357: (16 Cox. C. C. 715.)

[23] The question in each case is whether the acts relied on as constituting the attempt were done with intent to commit the complete offence, and as one or more of a series of acts or omissions directly forming some of the necessary steps towards completing that offence, but falling short of completion by the intervention of causes outside the volition of accused or because the offender of his own free will desisted from completion of his criminal purpose for some reason or other than mere change of mind. When one stops only at preparation for a crime and does not take any step towards its commission, he is credited with being penitent and giving up the design by mere change of mind. This change of mind may come too late and that after being influenced by extraneous causes or circumstances. In the latter case, the offence of attempt to commit a crime is complete. Suppose, a passenger for fear of detection unburdens himself of the luggage containing contraband cloth at some

station before the inter-provincial border, he cannot held to have been transporting from place inside the Province to another though he designs to make it appear like that. He must be held to have been transporting and not merely attempting to transport the goods across the provincial boundary. In some instances, the essence of an offence consists in the result achieved, such as, murder, causing, hurt or grievous hurt and in others even attempt to do certain acts or omissions towards completion of an injury is made complete offence. Reduction of the Province's store of cloth by above 5 lbs. is not the gist of the offence but mere attempt to reduce or deprive by means of transport is the kernel of the offence. In such circumstances, as would lead inevitably to the conclusion that transport had been undertaken to carry goods beyond the Province, the offence, it is plain to my mind, is complete. The prosecution need not prove that if no interruption had taken place the prisoner could have completed the offence. (*R.* v. *Brown*, (1890 24 Q. B. D. 357 : 16 COX. C.C. 715 ante.). That in the instant case the circumstances were present has been shown by Narasimham J. In my judgment, the respondent is guilty and the Crown must succeed in this appeal.

V.R.B. *Appeal allowed.*

A. I. R. (37) 1950 Orissa 121 *[C. N. 19.]*

PANIGRAHI AND NARASIMHAM JJ.

V. Verabhadralu — Petitioner v. *State — Opposite Party.*

Criminal Revn. No. 165 of 1949, D/- 10-10-1949, from order of S. J., Ganjam-Nayagarh, D/- 20-4-1949.

(a) Defence of India Rules, (1939), R. 81 (4) — Cotton Cloth and Yarn (Control) Order (1945), cl. 18 (2) — 'Normal requirement' — Determination of — Dealer at place N in Madras found with 113 pieces of cloth on road at place H in Orissa — His explanation not believed — Held cloth was not within normal business or personal requirement.

The expression 'normal requirements' in cl. 18 (2) has nowhere been defined in the Order. The clause applies to a dealer or any other person other than a manufacturer. This seems to indicate that the expression 'normal requirements' would include the business requirements of a dealer or the personal requirements of a person other than a dealer such as a private individual. Moreover, the use of the word 'normal' restricts his requirement to something that is regular or usual as opposed to his requirement for an unusual occasion. The Court is required to judge from the facts of each case whether the quantity of cloth found is in excess of the normal requirements. Various factors have to be taken into consideration in deciding what the personal or business requirements of a person are. [Paras 6 & 7]

The normal business requirements of a dealer must be judged with special reference to the place of his business and the place where the stock of cloth is found. If at the place where the stock is found such a person is not a 'dealer' in accordance with the Provincial Law in force there this factor should also be taken into consideration along with the other factors in deciding whether it can be reasonably held that the seized stock is within his normal business requirements. [Para 8]

A dealer in cloth at place *N* in Madras Presidency while proceeding in a motor car was found with 113 pieces of handloom cloth at place *H* in Orissa Province. The cloth was purchased by him at place *B* in Orissa and he had no permit for possession or transport of the cloth. In his trial for contravention of cl. 18 (2), Cotton Cloth and Yarn (Control) Order, 1945, the question was whether the cloth found with him was in excess of his 'normal requirement'. His explanation was that he was proceeding to a place *P* in Orissa for distributing the cloth free to the poor because of his vow which was not believed in by both the lower Courts:

Held, even assuming that the explanation was true, such requirement would not be 'normal requirement' but only an abnormal requirement for an unusual occasion and as such could be outside the exemption contained in cl. 18 (2). The stock could not represent his normal business requirement as a dealer as he was not a dealer where the cloth was found. In view of all the circumstances, the stock found with him exceeded his 'normal requirement' and he had thus contravened cl. 18 (2) of the Order. [Paras 7 to 8]

(b) Criminal P. C. (1898), S. 537— Errors in framing charge — Effect — Charge under certain Order of 1945 mentioning identical Order of 1943 which was replaced by former Order — Use of words 'normal consumption' for 'normal requirements'— Errors held did not materially prejudice accused.

Where in framing a charge for an offence of contravening cl. 18 (2), Cotton Cloth and Yarn (Control) Order 1945 the Magistrate referred to the Cotton Cloth and Yarn (Control) Order, 1943, which was in almost identical terms and was repealed by the Order of 1945 which was the appropriate Order in relation to the offence and instead of using the expression 'normal requirement' contained in cl. 18 (2) the Magistrate used the expression 'normal consumption' which was nowhere used in the Order:

Held, that these errors in the charge did not materially prejudice the accused. [Para 4]

Annotation: ('46-Com.) Criminal P. C., S. 537, N. 10.

H. Mohapatra— for Petitioner.
Advocate-General— for Opposite Party.

Narasimham J.—The petitioner was convicted of an offence under R. 81 (4), Defence of India Rules for contravention of cl. 18 (2), Cotton Cloth and Yarn (Control) Order, 1943 and sentenced to rigorous imprisonment for six months and fine of Rs. 1,000 in default to undergo rigorous imprisonment for four months more by a Deputy Magistrate, 1st class, Berhampur. The learned Magistrate further convicted the petitioner under R. 81 (4), Defence of India Rules for contravention of the Government of Orissa Notification No. 11693 S. T. dated 23rd December 1943. But on appeal the learned Sessions Judge while maintaining the conviction and sentence for contravention of the Cotton Cloth and Yarn (Control) Order set aside the conviction for contravention of the Government Notification mentioned above.

[2] The facts as found by both the Courts are as follows: On 13th May 1946 at about 5 P. M. the petitioner was found proceeding in a motor car from Berhampur towards Ichhapur. The car stopped at a Railway Level Crossing on the Trunk Road near Haldiapadara village and there some police constables searched the car and found 113 pieces of new handloom cloth in it. The petitioner is a dealer in cloth in village Narsanapeta in Madras Presidency and the cloth was purchased by him at a cheap rate at Berhampur. The petitioner had no permit for the transport of cloth from Orissa to Madras Presidency nor did he have any special permit from the Textile Commissioner to be in possession of so many pieces of cloth. He was prosecuted for contravening the Notification No. 11693 S. T. dated 23.12.43 of the Government of Orissa prohibiting the transport of cloth from any place in the Province to any place outside the Province except in accordance with the permit issued by a competent authority and also for contravening clause 18 (2) of the Cotton Cloth and Yarn (Control) Order, 1943. The learned Sessions Judge acquitted him of the former contravention observing that from the facts as proved by the prosecution witnesses it may not be reasonable to hold that the petitioner was actually attempting to transport the pieces of cloth to Madras Presidency. But he maintained his conviction for contravention of sub-cl. (2) of cl. 18 of Cotton Cloth and Yarn (Control) Order, 1945 because he considered that the quantity of cloth in his possession was far in excess of his normal requirements.

[3] The explanation which the petitioner put forward before the trying Court to account for his possession of such a large quantity of cloth was that he was preceeding to village Panchama (in Orissa province) for the purpose of distributing the pieces freely to poor persons there because he had made a vow (Mansik) before the deity there. He also examined a witness (D. W. 1) in support of this plea. But both the Courts rejected this explanation as quite unconvincing. It is not open to the petitioner to challenge this findings of fact before us in this revision petition.

[4] Before discussing the point raised by Mr. Mohapatra on behalf of the petitioner, I may point out one or two minor irregaluritie committed by the trying Magistrate in the charge which he framed against the petitioner. In that charge he has referred to the Cotton Cloth and Yarn (Control) Order, 1943, whereas the appropriate Order is the Cotton Cloth and Yarn (Control) Order, 1945, which was made on 21st July 1945 after repealing the 1943 Order. But the two Orders are almost identical and the petitioner has not been prejudiced in any way by quoting the wrong year in the charge. Similarly the learned Magistrate did not state in the charge that the quantity of cloth recovered from the petitioner was in excess of his 'normal requirements' as required by cl. 18 (2) of the said Order. He used the expression, 'normal consumption' which is not found in cl. 18 (2) of the Order. This error has also not materially prejudiced the petitioner because he did lead evidence to show that he was a dealer in cloth and that on the particular occasion he was taking the cloth for a specific purpose, namely, for distributing to the poor in Pancham village.

[5] Mr. Mohapatra's main contention is that the presecution totally failed to show what quantity of cloth was within the 'normal requirements' of the petitioner and that consequently it cannot be reasonably held that 113 pieces of handloom cloth were in excess of the petitioner's normal requirements.

[6] Clause 18 (2), Cotton Cloth and Yarn (Cnotrol) Order, 1945, runs as follows:

> "No dealer or other person not being a manufacturer shall save with the permission of the Textile Commissioner at any time hold stocks of cloth or yarn in excess of his normal requirements."

The expression 'normal requirements' has nowhere been defined in the Order. But an indication as to what it means may be obtained from a scrutiny of the explanation to cl. 18 (2) which explains what quantity shall be deemed to be the nornal requirements of a person engaged in manufacturing ropes, tapes etc. from cloth. Again in cl. 13 (1) (c), (d) & (f) of the said Order the expression, 'personal requirements,' is used while referring to a person other than a manufacturer or a dealer. The expression 'dealer' has been defined in cl. 3 (b) as a person engaged in carrying on the business of selling cloth whether wholesaler or retailer. Clause 18 (2) applies to a dealer or any other person other than a manufacturer. This seems to indicate that the expression 'normal requirements' would include the business requirements of a dealer or the personal requirements of a person other than a dealer such as a private individual. Moreover the use of the word 'normal' restricts his requirement to something that is regular or usual as opposed to his requirement for an unusual occasion. The Court is required to judge from the facts of each case whether the quantity of cloth found is in excess of the normal requirements.

[7] A decision of this question is doubtless difficult because as pointed out in *Peare Lal* v. *Emperor*, A.I.R. (31) 1944 ALL. 168: (45 Cr. L. J. 738) various factors have to be taken into consideration in deciding what the personal or business requirements of a person are. In the present case, however, it cannot by any stretc

of imagination be said that 113 pieces of handloom cloth were within the normal personal requirements of the petitioner, whatever may be the size of his family and his social status. The petitioner seems to have realised this difficulty and has therefore put forward the plea that he wanted to distribute those pieces of cloth to the poor at Panchama in fulfilment of his religious vow. This plea has, however, been disbelieved by both the Courts. Apart from this concurrent adverse finding, even if this plea is accepted, such a requirement cannot be the *normal* or usual requirement of the petitioner. It will be an abnormal requirement for an unusual occasion and as such outside the scope of the exemption contained in cl. 18 (2) of the Order.

[8] Mr. Mohapatra thereupon argued that the said 113 pieces of cloth may be within the normal business requirements of the petitioner as a dealer in view of the finding to the effect that he is a dealer in handloom at Narsanapeta village in Madras Presidency. But the normal business requirements of a dealer must be judged with special reference to the place of his business and the place where the stock of cloth is found. If the said 113 pieces of cloth had been found, say, at Narsanapeta or in any other place where the petitioner usually stores his stock of cloth such an argument may have some weight. But how can it be said that 113 pieces of cloth found inside a motor-car on a road near the Railway Level Crossing at Haldiapadar village where the petitioner has obviously no interest can be within his normal business requirements? That place is inside the Province of Orissa where admittedly he is not a dealer. He has no permit either for possession of so many pieces of cloth or permit to sell such cloth in the Province of Orissa as required by the Orissa Cotton Cloth and Yarn (Control) Order, 1943. It was urged on his behalf that though the petitioner may not be dealer within the meaning of the Orissa Cotton Cloth and Yarn (Control) Order, 1943, he is a dealer within the meaning of the Cotton and Yarn (Control) Order, 1945 (which is a Central Order) and that the fact that he had contravened the Orissa Order is wholly irrelevant in considering his normal business requirements. I am, however, unable to accept such a broad proposition. One of the several factors to be taken into consideration in deciding about the normal requirements of a dealer is the place where the stock is found. If at that place such a person is not a 'dealer' in accordance with the Provincial Law in force there this factor should also be taken into consideration along with the other factors in deciding whether it can be reasonably held that the seized stock was within his normal business requirements. The factors against the petitioner are, firstly, the seizure of cloth from inside a motor-car on a road leading from Orissa to Madras Presidency; secondly, the absence of any permit from the competent authority either for possession or for transport of the cloth; thirdly, the unbelievable explanation which the petitioner himself put forward to account for his possession of so many pieces of cloth; and fourthly the complete absence of any connecting link between the place of seizure of the cloth on the one hand and the place where the petitioner carries on his business on the other. Taking all these into consideration I would hold that in this particular case the said 113 pieces of cloth were not within the normal business or personal requirements of petitioner and that he has therefore contravened Cl. 18 (2), Cotton Cloth and Yarn (Control) Order, 1945.

[9] It is unnecessary in this petition to consider whether the learned lower appellate Court was justified in acquitting the petitioner of the charge of transporting 113 pieces of cloth in contravention of the Government of Orissa Notification No. 11693 S. T. dated 23-12-1943. But we do not wish it to be understood that we accept as correct the reasons given by the learned lower appellate Court for acquitting the petitioner of that charge.

[10] The sentence is not excessive and the revision petition is accordingly dismissed.

Panigrahi J.—I agree.

D.R.R. *Revision dismissed.*

A. I. R. (37) 1950 Orissa 123 [*C. N. 20.*]

PANIGRAHI AND NARASIMHAM JJ.

Bhimsen Mahapatra—Plaintiff—Appellant v. *Ramachandra Das and others — Defendant —Respondents.*

A. F. A. D. No. 206 of 1946, Decided 27th October 1949, from a decision of Sub-J., Puri, D/- 10th August 1946.

Evidence Act (1872), S. 115—Benami conveyance executed to perpetrate fraud — Fraud carried out—Real owner not to challenge title of ostensible owner.

After fraud has been perpetrated no party to the fraud can take advantage of his own act and the real owner shall not be permitted to challenge the title of the ostensible owner if a benami conveyance was executed in order to perpetrate a fraud. [Para 6]

Annotation: ('46-Man.) Evidences Act, S. 115 N. 20, 21.

M. S. Rao — for Appellant.
B. Mohapatra — for Respondents.

Panigrahi J.—This appeal arises out of a suit filed by the appellant for possession of 2.89 acres of land in Khata 158 in Mouza Raikera. His case is that the suit lands which originally stood recorded in the name of a deity, Guru Grantha Saheb, were put up for sale in execution of a rent decree and were purchased by defendant 6, Padma Matha, on 26th April 1937 for Rs. 72;

that the appellant (plaintiff) purchased the same from defendant 6 by a registered sale-deed, dated 18th August 1941, for a sum of Rs. 200 and that he was disturbed in his possession by defendants 1 to 5. Defendant 1 is the main contesting defendant and defendants 2 to 5 are his tenants.

[2] The case of defendant 1 is that an ancestor of his Mahant Saheb Ram Das, gifted .57 of acre in plots 275 of the suit lands to one Madhusudan Tripathy. But neither the said Madhusudan nor his son Chintamoni paid the rent due to the zamindar. Defendant 1's Guru Mahant Madhab Das deliberately defaulted in payment of the rent and induced the landlord to file a suit for arrears of rent. A rent suit was accordingly filed and in execution of the rent decree the entire holding measuring 2.89 acres was put up for sale and Mahant Madhab Das who succeeded Saheb Ram Das purchased the same in the name of defendant 6, Padma Matha, who was residing in the Math and who, it is said, was in the active confidence of Madhab Das. The point for decision is whether the purchase by Padma Matha was for the benefit of the Mahant and whether she was really a benamidar for the judgment-debtors against whom the rent decree was obtained. The Courts below were largely influenced by the fact that there was some evidence that defendant 6, Padma Matha, was residing in the Math prior to the date of the sale, for about 15 to 20 years, and that she was enjoying the confidence of the late Mahant Madhab Das. In fact defendant 1, the present Mahant, giving evidence as D. W. 6 deposed that she was the late Mahant's mistress. This fact appears to have coloured the view of both Courts below and in appreciating the evidence on this point they have come to the conclusion that in all probability the sale in the name of Padma Matha was benami for the benefit of the late Mahant Madhab Das.

[3] In second appeal, Mr. M. S. Rao appearing for the plaintiff-appellant has attached the finding of the Courts below as contrary to the evidence and the bulk of his argument centres round the suggestion that the evidence falls far short of making out a case of benami sale; that this is at least consistent with the late Mahant's desire to benefit defendant 6 by providing for her future maintenance; and that the defendant should not be heard to allege his own fraud in bringing about the rent suit and the subsequent sale and should not be permitted to take advantage of his fraud.

[4] It is not necessary to go into all the facts or discuss all the questions argued at the bar. The finding as to whether the sale was really benami or a genuine purchase by defendant 6 will be sufficient to dispose of this appeal. On behalf of the appellants it is pointed out that so far as the motive suggested by defendant 1 is concerned it is equivocal. The defendant alleges that Padma Matha was the mistress of his Guru, the late Madhab Das, and that as it was contrary to law that he himself should bid at the sale, defendant 6 was put up as the ostensible purchaser. According to the plaintiff the object of the Mahant Madhab Das was admittedly to deprive Chintamoni of his raiyati interest in the holding by bringing the properties to auction sale. To achieve this object it was not possible for the Mahant to bid at the auction himself, as that would be contrary to the provisions of S. 227, Orissa Tenancy Act. Mr. Rao's contention is that even admitting this premise to be correct, defendant 1 shall not be permitted to take advantage of the sale as Chintamoni had actually been defrauded of his property; and secondly the Mahant being the judgment-debtor in the suit was prohibited from bidding at the sale and he should not, therefore, be permitted to commit a fraud upon the states (statute?) by pleading that he was the real auction-purchaser and not defendant 6. It may also well be that the defendant's Guru, Madhab Das, was anxious to make some provision for the future maintenance of his alleged mistress and discovered this easy way of parting with some of the Math properties by bringing about the rent sale. This view gains support from the Mahant's previous act, namely, the execution of a will on 3rd September 1934, whereby he provided for certain properties of the Math to be in the exclusive enjoyment of defendant 6 for her lifetime. The motive suggested for the alleged benami transaction has not, therefore, been successfully made out and is at least equivocal.

[5] [After discussing further evidence his Lordships concluded as follows:] We still allowed Mr. Mohapatra to argue the case on merits and satisfy us that defendant 1 had discharged the onus of proving that defendant 6 was only a name-lender and that the sale was really for the benefit of the Math. We are satisfied after hearing him that defendant 1 has failed to discharge that onus and hold that the apparent owner must be taken to be the real owner. No single circumstance brought out in evidence is unequivocal or is definitely in favour of the defendant's case, while on the other hand, every circumstance and every consideration is equally in favour of the plaintiff's case that the purchase by defendant 6 was a genuine transaction and that she was the real owner of the properties. A finding on this point alone would be sufficient to dispose of this appeal but as the other points have been argued at length I shall very briefly notice them.

[6] The appellant's contention is that defendant 1's Guru, Madhab Das, was a party to a fraud, *viz.*, to oust Chintamoni from the holding by bringing about the rent sale. Defendant 1 specifically pleads that his Guru colluded with his landlord and induced him to file the rent suit and put the holding to sale. This action on the part of the defendant amounted not only to a fraud on the statute but also on Chintamoni. The fraud was completed when the sale was held and the holding passed to the auction-purchaser and when Chintamoni launched his suit challenging the sale. It is well established that no party shall be heard to urge his own fraud in order to succeed before a Court, *Allegans suam turpotudinum non est audiendus*. Reliance is placed on *Shiva Narain Ram* v. *Mt. Phuljharia*, 52 I. C. 402 : (A. I. R. (6) 1919 Pat. 539) and *Luckee Narain* v. *Taramoni Dossee*, 3 W. R. 92, for the position that after fraud has been perpetrated no party to the fraud can take advantage of his own act and that the real owner shall not be permitted to challenge the title of the ostensible owner if a benami conveyance was executed in order to perpetrate a fraud. This is a well recognized principle and has been applied in several Indian decisions.

[7] Reference may also be made to *Varadarajulu Naidu* v. *Srinivasulu Naidu*, 20 Mad. 333 ; *Sidlingappa* v. *Hirasa*, 31 Bom. 405 : (9 Bom. L. R. 542) ; *Parthasarathy* v. *Kandaswami*, 45 M. L. J. 161 : (A. I. R. (10) 1923 Mad. 711) and *Ramaswami* v. *Alamelu Ammal*, 46 M. L. J. 298 : (A. I. R. (11) 1924 Mad. 604).

[8] I am, therefore, satisfied that the contentions of Mr. Rao must be upheld. These are the only points raised in the appeal and, in my judgment, both the Courts erred in drawing inferences from the proved facts. The judgments under appeal must accordingly be reversed and this appeal allowed with costs throught.

Narasimham J.—I agree.

D.H. *Appeal allowed.*

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*A. I. R. (37) 1950 Orissa 125 [*C. N. 21.*]

FULL BENCH

RAY C. J., JAGANNADHADAS AND NARASIMHAM JJ.

Sri Ramachandra Mardaray Deo—Decree-holder — Petitioner v. *Bhalu Patnaik and others—Opposite Party.*

Civil Revn. Petn. Nos. 32 and 34 to 38 of 1945, D/- 18-1-1950, against orders of Dist. Munsif, Aska, D/- 25-10-1944.

✠(a) **Limitation Act (1908), Art. 182 (1) — Date of decree, meaning of — Civil P. C. (1908), O. 20, R. 7.**

Per *Narasimham and Jagannadhadas JJ., (Ray C. J. contra)* — The pharse 'date of decree' in Art. 182 (1) should be construed with reference to O. 20, R. 7, Civil P. C. as the date when the judgment is pronounced and not the date when the decree is actually drawn up and signed. Hence an application for execution filed more than three years from the date of judgment but within three years from the date of signing of the decree, will be barred by limitation. Where the decree gives the date of judgment as the date of decree there can be no question of the decree-holder being in any way misled by the fact that it also gave the date on which it was actually signed: A. I. R. (8) 1921 P. C. 31; A. I. R. (25) 1938 Pat. 149 and A. I. R. (20) 1933 Cal. 239, *Disting.*; *Case law discussed.* [Paras 7, 15, 16, 17 and 55]

Annotation : ('42-Com.) Limitation Act, Art. 182, N. 25, Pts. 1 and 2; ('44-Com.) Civil P. C., O. 20 R. 7, N. 2 and 3.

(b) **Interpretation of Statutes — Statutes in pari materia—Civil Procedure Code and Limitation Act —Similar words and expressions occurring in two statutes should be given same meaning unless there is something repugnant in the subject or context.** [Paras 6, 19]

Annotation: ('44-Com.) Civil P. C., Pre N. 7 ; ('42-Com.) Limitation Act, Pre. N. 7, Pt. 2

(c) **Interpretation of Statutes—Marginal note—It does not form part of section and cannot be used to give a different effect to clear words in section where there cannot be any doubt as to ordinary meaning of words — But it is of some assistance inasmuch as it shows drift of section — It may be said to be assented to impliedly by the Legislature and its significance cannot be wholly ignored.** [Para 6]

Annotation: ('44-Com.) Civil P. C., Pre N. 11.

(d) **Interpretation of Statutes—Consolidating Act.**

If a consolidation Act re-enacts, with a like context a word or phrase in one of the Acts consolidated which has received judicial interpretation, that interpretation will generally be applicable to the same word or phrase in the consolidation Act. [Para 8]

Annotation : ('44-Com.) Civil P. C., Pre N. 7 ; ('42-Com.) Limitation Act, N. 18 Pt 2.

(e) **Interpretation of Statutes — Statute of limitation—Equitable considerations are out of place— Limitation Act (1908), Preamble.** [Paras 14, 22]

Annotation: ('42-Com.) Limitation Act, Pre. N. 6a.

P. V. B. Rao — for Petitioner.

R. N. Sinha, B. K. Pal, S. K. Ray and B. M. Patnaik — for Opposite-Party.

Narasimham J.— These six revision petitions are against the order of the District Munsif of Aska rejecting six execution petitions Nos. 269, 271, 272, 273, 275 and 277 of 1944 on the ground that they were barred by limitation. The revision petitions were first heard by my Lord the Chief Justice sitting singly and he was pleased to refer to a larger Bench in view of the doubt entertained by him regarding the correctness of two Division Bench decisions of the Patna High Court reported in *Banwari Narain* v. *Ramhari Narain*, A. I. R. (29) 1942 Pat. 335: (197 I. C. 217) and *Mohammad Sadique Mian* v. *Mahabir Sao*, A. I. R. (29) 1942 Pat. 110 : (21 Pat. 366).

[2] The material facts which are not in dispute are as follows: Execution Petn. No. 269 of 44 arose out of a Small Cause Court suit which was disposed of on 1st August 1944 and the remaining five execution petitions arose out of Small Cause Court suits which were disposed of on 8th August 1941. In all those suits, the decrees were actually drawn up and signed by the Munsif on 21st August 1941, and the decrees not only bore the dates on which the suits were disposed of (1st or 8th August as the case may be) but also the date on which they were actually signed (21st August 1941). The decree-holder is the same in all the execution petitions which were filed on 21st August 1944. By virtue of Art. 182, Limitation Act, the execution petitions appear *prima facie* to be time-barred. But the decree-holder's main contention is that in all the six cases the decrees were formally drawn up and signed by the Court only on 21st August 1941 and that consequently limitation should run from that date and not from the date which the decrees bear. The whole question therefore turns on the construction of the expression 'date of decree' occurring in cl. (1) of Art. 182, Limitation Act. The lower Court relied on O. 20, R. 7, Civil P. C. and held that the expression 'date of decree' meant the date which the decrees bore and that inasmuch as under the aforesaid provision of the Civil Procedure Code the decree was required to bear the date of the judgment and not the date on which it was actually drawn up and signed, the former date alone should be taken to be the date of decree for the purpose of Art. 182, Limitation Act also.

[3] The expression 'date of decree' occurs in several provisions of the Civil Procedure Code such as Ss. 34, 48 (1) (a), Proviso (b) to S. 51, O. 21, R. 11 (2) (c), O. 21, R. 22 (1) (a) and O. 45, R. 7. Order 20, R. 7 runs as follows:

> "*Date of decree.* — The decree shall bear date the day on which the judgment was pronounced and, when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment he shall sign the decree."

Though the expression 'date of decree' has nowhere been defined in the ordinary way in the Civil Procedure Code, there seems to be a unanimity amongst all the High Courts of India as well as the Privy Council that by virtue of O. 20, R. 7 the date of decree means the date on which the judgment is pronounced and not the date on which the decree is formally drawn up and signed. In the Indian Limitation Act also, the expression 'date of decree' occurs in several Articles such as Arts. 152, 156, 161, 162, 164, 169, 170, 173, 175 and 182 etc. and there is no definition of that expression. But almost all the High Courts seem to be unanimous that even in the Limitation Act the expression 'date of decree' should be given the same meaning as indicated in O. 20, R. 7, Civil P. C. So far as Arts. 152, 156 and other Articles dealing with limitation for appeals, reviews, etc. were concerned, a direct decision of the question was not really necessary inasmuch as by relying on S. 12, Limitation Act the interval between the date of judgment and the date of decree could always excluded. But for the purpose of Art. 182, however, S. 12, Limitation Act will be of no avail and our attention has not been invited to any decision of any High Court in India or of the Privy Council in which it was held that for the purpose of Art. 182 the expression 'date of decree' should be construed as meaning the date on which the decree was actually signed. The petitioner's Advocate Mr. P. V. B. Rao was fully aware of his up-hill task in view of the unanimity of decisions against him. But he pressed for a full consideration of the entire question and relied mainly on some observations of the Privy Council in *Rameshwar Singh* v. *Homeswar Singh*, A. I. R. (8) 1921 P. C. 31 : (48 I. A. 17).

[4] Mr. P. V. B. Rao's arguments may be summed up thus: (i) Ordinarily the date of document is the date on which it is drawn up and signed by the parties and by parity of reasoning the date of decree must mean the date on which the decree is drawn up and signed. There is no special reason as to why this ordinary grammatical meaning should not be given to that expression in Art. 182. In any case, the delay between the date of pronouncing the judgment and the date of the drawing up and signing of the decree is due to the laches of the Court and the decree holder should not be penalised for the act of the Court. (ii) To give an extreme case, if the Court takes three years to draw up and sign a formal decree after pronouncing the judgment it will be grossly unfair to take the date of the judgment as the date of the decree and thus deprive the decree-holder of his right to execute the decree at all. (iii) When questioned as to what was the intention of the Legislature in making O. 20, R. 7, Civil P. C., he urged that the said rule may merely refer to the contents of a decree and may indicate that so far as substantive rights as between the decree-holder and the judgment-debtor are concerned the relevant date is the date of judgment but as regards limitation which is procedural law, the principle of O. 20, R. 7 should not be applied. (iv) He further urged that O. 20, R. 7 being in Sch. 1, Civil P. C., was liable to amendment by any High Court whereas the provisions of the Indian Limitation Act could be amended only by an Act of the appropriate Legislature. Consequently an artificial construction should not be put on an expression

occurring in the Limitation Act by making it dependent on the meaning given to an identical expression occurring in Sch. 1, Civil P. C., and thereby enable High Courts to amend the law of limitation thus indirectly permitting them to do what they have no authority to do directly.

[5] The whole question turns on the construction of the expression 'date of decree' occurring in cl. (1) of Art. 182, Limitation Act. It is true that the words in the Limitation Act should be given their natural grammatical meaning and equitable considerations are wholly out of place, *Nagendra Nath* v. *Suresh Chandra*, A.I.R. (19) 1932 P. C. 165: (60 Cal. 1 P. C.). But can it be said that the plain grammatical meaning of the expression 'date of decree' is the date on which it is actually drawn up and signed? On the other hand, the grammatical meaning of the expression 'date of a document' seems to be the date which the document actually bears. The only date which a decree is required to bear is the date of the judgment by virtue of O. 20, R. 7 read with App. D, Civil P. C. Doubtless in these decrees the dates on which the Munsif signed the decrees were also put but these were not statutorily required to be given either by the provisions of the Civil Procedure Code or by the Civil Rules of Practice and Circular Orders of the High Court of Madras which were in force at Aska at the time of the drawing up of the decrees. But why should the ordinary meaning of the 'date of a document' be departed from merely because the Court inserted in the document additional particulars which it was not statutorily required to do?

[6] It is conceded that the Civil Procedure Code and the Indian Limitation Act are statutes in *pari materia* and following the dictum of Lord Mansfield in *Rex* v. *Loxdale* the two statutes are to be "taken and construed together as one system as explanatory of each other." Similar words and expressions occurring in the two statutes should be given the same meaning unless there is something repugnant in the subject or context: *Tribeni Prasad* v. *Ramasray Prasad*, (A.I.R. (18) 1931 Pat. 241: (10 Pat. 670 F. B.) and *Durag Pal* v. *Pancham Singh*, A.I.R. (26) 1939 ALL. 403: (I. L. R. (1939) ALL. 647 F. B.), following the observations of the Privy Council in *Phoolbas Koonwar* v. *Lalla Jogeshur Sahoy*, 1 Cal. 226 : (3 I. A. 7 (P. C.)). In the Civil Procedure Code though the expression 'date of decree' has not been expressly defined, O. 20, R. 7 makes it absolutely clear that the only date which a decree shall bear is the date on which the judgment is pronounced and not the date on which the decree is drawn up and signed. If the provisions of the said O. 20 are carefully scrutinised it will be noticed that though while dealing with judgments R. 3 expressly says that the judgment shall be dated and signed at the time of pronouncing it, R. 7 while requiring the Judge to sign the decree does not say that he shall give the date also on that day. The marginal note or heading to R. 7 is 'date of decree.' It was argued on the basis of the Privy Council decision reported in *Thakurain Balraj Kunwar* v. *Jagatpal Singh*, 31 I. A. 132 : (26 ALL. 393 P. C.), that the marginal note cannot be referred to for the purpose of construing the Act. It is well established that the marginal note or heading cannot be used "to give a different effect to clear words in the section where there cannot be any doubt as to the ordinary meaning of the words" *R.* v. *Surrey (North Eastern Area Assessment Committee)*, 1947-2 ALL E. R. 276: (177 L. T. 441). But as pointed out by Collins M. R. in *Fletchet* v. *Birkenhead Corporation*, 1907-1 K.B. 205 at p. 213: (76 L. J. K. B. 218).

> "the headings of a statute can be usefully referred to to determine the sense of any doubtful expression in a section ranged under that heading."

Similarly in *Bushell* v. *Hammond*, (1904) 73 L. J. K. B. 1005: (1904-2 K. B. 563) it was observed":

> "the side-note although it forms no part of the section is of some assistance inasmuch as it shows the drift of the section."

This principle has been followed in India in several decisions. For instance, in *Emperor* v. *Esmail*, 57 Bom. 537: (A. I. R. (20) 1933 Bom. 417: 34 Cr. L. J. 1239 F.B.) the marginal note to S. 361, Penal Code was used in construing S. 363, Penal Code. Similarly, in *Secy. of State* v. *Bombay Municipality* (No. 1), 59 Bom. 681: (A. I. R. (22) 1935 Bom. 347) the marginal note to S. 84, Government of India Act, 1915, was looked into in order to see the general trend of that section. In *Ram Saran* v. *Bhagwat Prasad*, 51 ALL. 411: (A. I. R. (16) 1929 ALL. 53 F. B.) there is an exhaustive discussion about the importance to be attached to marginal notes inserted in a statute with the assent and the authority of the Legislature and with respect I would agree with the reasonings given there. In India though marginal notes do not form part of the statute they are inserted by the draftsman at the time of drafting the bill and are seen and sometimes commented upon by the Legilature during the passage of the Bill. As pointed out in the aforesaid Allahabad decision marginal notes in India may be said to be assented to impliedly by the Legislature and their significance cannot be wholly ignored. The expression 'date of decree' occurs in the marginal note to O. 20, R. 7, and the same expression occurs in several other provisions of the Civil P. C. already cited. It is obvious that the expression should be given the same meaning throughout the Code and consequently it will be idle to contend that the date of decree is understood in the Civil P. C., in any sense other than that expressly provided for the same in R. 7. Mr. Rao's argument that R. 7, should be taken as merely descriptive of the contents of a decree is not convincing because if the Legislature thought of merely specifying the contents of a decree that would have surely included the provisions of R. 7, in R. 6, itself which expressly deals with the contents of a decree. Where was the necessity for making a separate rule on the subject and giving the marginal heading 'date of decree?' Again if, as conceded by Mr. Rao, R. 7, fixes the date of the judgment as the relevant date from which the substantive rights between the decree-holder and the judgment-debtor are regulated there seems to be no reason why the right of the decree-holder to execute his decree should also be not determined by the same date. If the decree-holder's substantive rights accrue from the date of the judgment by virtue of O. 20, R. 7, disabilities arising out of the non-exercise of his rights must also count from that date.

[7] There are two observations of the Privy Council regarding the construction of the expression 'date of decree' which I think are conclusive as to what those words mean in the Civil P. C. In *The Owners of 'Brenhilda* v. *B. I. S. N. Co.*, 7 Cal. 547: (8 I. A. 159 P. C.) their Lordships pointed out

> "their Lordships therefore think that the date of the decree did not mean the date on which the decree was reduced to writing and signed by the Court but the date on which the High Court delivered their judgment and expressed what the decree was."

Mr. Rao tried to distinguish this case on the ground that it referred to the construction of R. 35 of the Rules and Regulations made during the time of King William IV and that at that time there was no provision for annexing a copy of the decree to the petition of appeal as required by the Civil P. C. But this distinguishing feature does not in any way detract from the force of the observations made by their Lordships as regards the date of the decree. In another Privy Council decision reported in *Mungniram* v. *Gursahai*, 16 I. A. 195 at p. 200 : (17 Cal. 347 P. C.) their Lordships observed :

> "When a man obtains an order for a certificate he does in substance comply with the terms of this Act in the same way as when a person has the judgment of the Court that he shall have a decree in his suit it may be said that he then obtains his decree. The decree when it is drawn up afterwards relates back to that time."

The Oweners of Brenhilda v. *B. I. S. N. Co.*, 7 Cal. 547: (8 I. A. 159 P. C.) has been subsequently followed in *Harendra Lal* v. *Sm. Hari Dasi*, 14 C. W. N. 420: (5 I. C. 844) in construing the expression 'date of decree' occurring in O. 45, R. 7, Civil P. C. In a Full Bench decision of the Patna High Court reported in *Lachmeswar Prasad* v. *Girdhari Lal*, A. I. R. (26) 1939 Pat. 667: (19 Pat. 123 F.B.) the same construction has been applied while interpreting that rule. Relying therefore on the marginal note to R. 7 of O. 20, the complete absence of any statutory provision requiring the Judge to put in the decree the date on which he signs the same and the decisions mentioned above I have no hesitation in holding that throughout the Civil P. C., the expression 'date of decree' means the date on which the judgment was pronounced.

[8] Is there any justification for putting a different construction on the said expression in the Limitation act which is in *pari materia* with the Civil P. C.? I see none. Both the statutes were repealed and re-enacted several times after making substantial amendments and the two statutes now in force were passed in the year 1908 within a few months of each other. The expression 'date of decree' remained the same from the time of the earliest Act till the present day. Prior to 1908, the said expression 'date of decree' had been given the special meaning indicated by O. 20, R. 7, by High Courts while construing the relevant provisions of the Limitation Act. See *Golam Gaffar* v. *Goljan Bibi*, 25 Cal. 109, *Bani Madhub* v. *Matungini Dassi*, 13 Cal. 104 F. B., and *Afzul Hossain* v. *Mt. Umda Bibi*, 1 C. W. N. 93. As pointed out in *Maxwell's Interpretation of Statutes*, (9th Edition at page 27), if a Consolidation Act re-enacts, with a like context a word or phrase in one of the Acts consolidated which has received judicial interpretation, that interpretation will generally be applicable to the same word or phrase in the Consolidation Act. The Limitation Act of 1908 is partly a consolidating statute, as indicated in its preamble and the Legislature may be presumed to be fully aware of this construction given by the High Courts and yet it did not think it necessary to make any change in the expression 'date of decree'. If the Legislature wanted to make it clear that in Art. 182 the relevant date was the date of the signing of the decree it would not have adopted the same expression as that used in the old Limitation Act of 1877 (XV [15] of 1877).

[9] It will be instructive to compare the provisions of the proviso to S. 23, Registration Act, 1908, which says that a decree shall not be accepted for registration unless it is presented within four months from the date *on which it was made*. Column 2 of Art. 182, prescribes a special period of limitation for the execution of decrees which are registered. The Indian Limi-

tation Act came into force on 7th August 1908 and the Indian Registration Act came into force on 18th December 1908. The Legislature took special care to refer to the date on which a decree was made in the proviso to S. 23, Registration Act whereas in the Limitation Act they merely used the expression 'date of decree' though that expression had been given a special meaning by several previous judicial decision. The reasonable inference is that the Legislature intended that the interpretation put by the previous judicial decision should continue in the Limitation Act, whereas in the Registration Act, the relevant date should be the date on which the decree was actually drawn up and signed. It is true that the Registration Act is not in *pari materia* with the Limitation Act and the provisions of former Act should not ordinarily be used in construing the Limitation Act. But the proviso to S. 23, Registration Act stands on a different footing inasmuch as it refers to the special period of limitation for registering decrees and it has direct connection with Art. 182, Limitation Act which provides a special period of limitation for execution of decrees which are registered. Considering the short interval between the passing of the two Acts, it is not likely that the Legislature would have used different expression in the two Acts without a definite purpose.

[10] It is also significant that though by virtue of S. 12, read with S. 5, Limitation Act any hardship that may be caused by the delay in the drawing up of a decree can, so far as appeals, reviews and certain class of applications are concerned be remedied, no special provision has been made for relaxing the stringent provisions of Art. 182, relating to execution of decrees. Perhaps the reason for this may be that the period of limitation for appeals and reviews etc., is very brief being a matter of few months only and any delay in the drawing up of a decree may cause genuine hardship in several instances. But, for execution of decrees, the period of limitation is three years and it will be fantastic to say that a Court would delay for such a length of time in drawing up a decree after writing out the judgment. A party must know on the date of the judgment itself that limitation for the execution of the decree would run from that date. If he notices any unconscionable delay on the part of the Court in drawing up the decree, he can always remind the Court to expedite its action.

[11] The principle that the decree-holder should not be penalised for the delay caused by the action of the Court on which Mr. Rao has relied does not help him very much. The maxim *actus curiae neminem gravabit* seems to be the principle underlying O. 20. R. 7, Civil P. C., itself. Once a judgment is pronounced the drawing up of the decree is a matter within the powers of the Court and the parties should not be prejudiced so far as their rights are concerned by any delay caused by the Court. Therefore, the Legislature made express provision directing that the decree shall bear the date of the judgment so that the rights of the parties may be regulated from that date. If the rights and liabilities of the decree-holder and judgment-debtor are thus to be regulated from the date of the judgment there is no reason as to why the judgment-debtor should lose a valuable right which accrues to him due to the non-executability of a decree caused by the lapse of time from the date of the judgment. In other words why should the delay of the Court in drawing up the decree favour the decree-holder by extending the law of limitation and prejudice the rights of the judgment-debtor? It will be illogical to say that though the decree-holder's substantive rights should commence from the date of the judgment because the delay on the part of the Court should not prejudice his rights, he should at the same time be relieved of any disability arising from his omission to exercise his rights from that date.

[12] The argument that O. 20, R. 7 Civil P. C. is liable to amendment by a High Court whereas the Limitation Act can be amended only by the Legislature and that consequently an expression which is subject to amendment by another authority should not be given the same interpretation in the Limitation Act does not appeal to me. The plain fact is that O. 20, R. 7, even now remains as it was when the Legislature enacted it as part of the Civil P. C., in 1908. Similarly Art. 182, Limitation Act also remains as before (except for some minor amendments) from 1908. The words of a statute should generally be understood in the sense which they bore when it was passed. (Maxwell's Interpretation of Statutes, Edn. 9, p. 62). Merely because another authority has been conferred power by the very Legislature to amend O. 20, R. 7 it cannot be said that the expressions occurring in Sch. I to the Civil Procedure Code should not be used for construing the same expressions occurring in the Limitation Act.

[13] Next I take up *Rameshwar Singh* v. *Homeshwar Singh*, A.I.R. (8) 1921 P. C. 31 : (48 I. A. 17) which seems to be the main strength of the petitioner's case. The material facts of that case are as follows: A decree was passed against one Ekradeshwar on 27th July 1906 for a certain sum but he was not made personally liable for the same. The decree further declared that the decretal amount was to be realised by the sale of the property belonging to one Janeswar and left in Ekradeshwar's possession. The decree

did not make any portion of the property of Janeshwar which was in the possession of any one else liable for the decree. But since April 1906, the property of Janeshwar was in the possession of his widow and Ekradeshwar obtained possession of that property only in December 1914 after separate litigation with the widow of Janeshwar. The Privy Council held that the decree of 27th July 1906 became executable only in December 1914 when Ekradeshwar obtained possession of Janeshwar's property and that limitation should run from that date and not from the date of the decree. Their Lordships observed :

> "They are of opinion that in order to make the provisions of the Limitation Act apply, the decree sought to be enforced must have been in such a form as to render it capable in the circumstances of being enforced."

From the aforesaid observation, it was argued that the date of decree for the purpose of Art. 182 should be the date on which the decree became capable of execution and that as no application for execution of a decree can be filed unless a copy of the decree is along with it (*see* Rr. 142 and 143 of the Madras Civil Rules of Practice and Circular Orders) the decree was incapable of execution till the date of the signing of the decree. The aforesaid Privy Council decision is clearly distinguishable. The contents of the decree of 1906 referred to therein indicate that the decree was in the nature of a conditional decree in the sense that it referred to properties which at the time of passing the decree were not in the possession of the judgment-debtor. The decree was made applicable only to those properties when they came into judgment-debtor's possession. Therefore, there was full justification for construing the expression 'date of decree" to be the date on which the decree became capable of execution. But no such consideration can arise in the present case nor can that decision be taken as authority for the wide proposition that the date of decree in Art. 182 must mean the date on which the decree was signed in all cases.

[14] Under R. 142 of the Civil Rules of Practice and Circular Orders of Madras High Court which were in force at Aska in 1941, every petition for execution was required to be accompanied by a copy of the decree and if there was no such copy the execution petition was liable to be rejected. On the basis of these rules it was urged that the date on which the decree-holder was in a position to comply with the rules should be the relevant date for the purpose of limitation and that so long as the Court had not drawn up the decree the decree-holder was not in a position to apply for execution and imitation should not therefore run against him. Equitable considerations are however out of place in construing the Indian Limitation Act and however hard the case may be, one cannot depart from the well established construction of the expression 'date of decree' as made by almost all the High Courts. Mr. Rao drew our attention to an old case reported in *Madan Mohan* v. *Nobin Kishore*, 3 C. L. J. 291, where while construing S. 90, old T. P. Act (corresponding to O. 34, R. 6, Civil P. C.), it was held that for the purpose of limitation the date on which the decree was formally drawn up under that section should count and not the date on which the order was passed for recovery of the decretal amount from the judgment-debtor. This case however is clearly distinguishable. Section 90 of the old T. P. Act does not refer to the pronouncing of judgment first and the drawing up of a decree later. It only refers to the passing of a decree under some circumstances. On the facts of that case, the learned Judges held that the first order would not amount to the passing of a decree as required by the said section. That dicision cannot therefore be given a wider significance than was warranted by the facts of that case.

[15] Lastly comes the question as to whether the petitioner can reasonably urge that he was misled by the fact in the decrees the Court gave the dates on which the decrees were actually signed (21-8-41). This point has been fully discussed by the learned Munsif and he has correctly distinguished this case from *Kali Prasad* v. *Mt. Bibi Aziz Fatma*, A.I.R. (25) 1938 Pat. 149 : (174 I. C. 397) and *Nalini Kanta* v. *Kamaraddi*, A. I. R. (20) 1933 Cal. 239 : (141 I. C. 114). I entirely agree with his reasonings. There can be no question of the decree-holder being in any way misled because the Court gave the date of the judgment in every case as the date of the decree and the mere fact that it gave some more information than was required by O. 20, R. 7, cannot be held to justify the inference that the petitioner was in any way misled.

[16] I would therefore agree with the lower Court and hold that the execution petitions are barred by limitation.

[17] **Jagannadhadas J.** — I agree with my learned brother J. Narasimham that the phrase 'date of decree' in Art. 182, Cl. (1), Limitation Act should be construed with reference to O. 20, R. 7 as the date when the judgment is pronounced and not the date when the decree following on the judgment is actually drawn up and signed and that accordingly these revisions should be dismissed with costs.

[18] The basis of the argument for the petitioner is the assumption that there is in fact no decree in existence until the decree is actually

drawn up and signed and that the date of the decree in its normal sense must mean the date when the decree is authenticated by the Judge putting his signature on it. The definition of the word "decree" as constrasted with the word "judgment" in S. 2, Civil P. C. as also the provisions of O. 20, Rr. 3, 4, 5, 6, and 7 are relied on in this connection. It is pointed out that a judgment is merely a statement of the grounds of the decree, while the decree is the "formal" expression of the adjudication and it is said that inasmuch as the form of the decree has to comply with the requirements of O. 20, Rr. 6 and 7, there is in fact no decree in existence until that form is complied with by the actual drafting of the decree and the signature of the Judge is put thereon. It is also pointed out that under Rr. 7, 8 and 9 of Chap. 5, Part I of the General Rules and Circular Orders of the Patna High Court, which continue to be in force in this Court, notice has to be given after the draft of the decree is prepared and it is after the Judge satisfies himself that the draft is correct and is in accordance with the judgment, that he has to sign it and that the Circular Orders specifically provide for his putting down the date when he signs. It is further argued that the legislature would not have contemplated the date of the judgment itself as the starting point of limitation for execution when the very decree that is to be the foundation of the execution had not come into existence and is not available to the decree-holder for his reference to ascertain his exact liability. It is also pointed out that the Madras Civil Rules of Practice which govern these particular execution applications now under consideration require a copy of the decree to be filed along with the execution application. It is also said, on the authority of *Rameshwar Singh* v. *Homeshwar Singh*, A. I. R. (8) 1921 P. C. 31 : (48 I. A. 17), that in order to make the provisions of the Indian Limitation Act applicable, the decree sought to be enforced, must have been in such a form as to render it capable in the circumstances, of being enforced.

[19] Having given my best consideration to the above arguments, it appears to me that the whole of the above line of reasoning is totally inadmissible. The decision of the question turns upon what is the exact sense of the phrase "date of decree" as used in Art. 182, Limitation Act. If the meaning is reasonably clear on a consideration of the Act itself and the allied provisions, it is not permissible to introduce other considerations on any theory of beneficient construction. There can be no doubt that at least so far as the Civil Procedure Code is concerned, the phrase "date of the decree" wherever it occurs in the Code must mean only the date of the judgment as provided in O. 20, R. 7. It would follow that the rights and liabilities of the decree-holder, in so far as they depend upon the express provisions of the Civil Procedure Code, spring up the very moment that the judgment is pronounced. Under S. 33, Civil P. C., after a case has been heard, the Court shall pronounce the judgment and on such judgment, the decree shall follow. There is no indication of the contemplation of any time-lag between the judgment and the decree. The pronouncement of the judgment and the passing of the decree are accordingly simultaneous. Under O. 20, R. 11, sub-r. (1), if the decree is one for payment of money, a Court may, on the oral application of the decree-holder, at the time of the passing of the decree, order immediate execution thereof by the arrest of the judgment-debtor, if he is within the precincts of the Court. It may be noticed that this may be done even prior to the preparation of the warrant, let alone the preparation of the decree, and the mention of the arrest, if the judgment-debtor is within the precincts of the Court, makes it reasonably clear that this has reference to the time when the judgment itself is pronounced when it may be normally expected that the judgment-debtor was likely to be present. Under S. 34 the interest payable on any money that will be payable under a decree has reference to the date of the decree. Under O. 20, R. 12, sub-r. (3) the decree-holder's right to obtain mesne profits in a decree for possession cannot enure beyond the expiration of three years from the date of the decree. It would be surprising if the right of the decree-holder to the interest under S. 34 is to be denied to him until the decree is actually drafted or his right to obtain mesne profits can be prolonged beyond three years after the judgment, if he can manage to get the drafting of the decree delayed for some months or years. There can, therefore, be no doubt that in so far as any rights and liabilities of the decree-holder or the judgment-debtor are specifically provided for in the Civil Procedure Code itself, the date of the decree is the date of the pronouncement of the judgment and this is what, in terms, is provided for by O. 20, R. 7. I am unable to understand the argument that the only effect of O. 20, R. 7 is to provide that in the matter of substantive rights and liabilities, the decree is to relate back to the date of the judgment, as for instance in O. 20, R. 12 and S. 34, but not as regards the right to apply for execution which is concerned with procedure.

[19 a] The Civil Procedure Code itself furnishes an answer to this contention. A reference to S. 48, Civil P. C., to my mind is definitely clinching. That section provides for an absolute prohibition against an execution being ordered

on the application for execution presented after the expiration of 12 years *from the date of the decree* sought to be executed. It cannot be disputed that the pharse "date of the decree" in this section must be construed with reference to O. 20, R. 7. This clearly shows that according to the scheme of the Civil Procedure Code, not merely the so-called substantive rights and liabilities of the decree-holder, but also his right to apply for execution itself is one that is dependent on the date of the decree as prescribed in the Code itself. It must, therefore, follow that this is so under the Limitation Act also. It is well established that the starting point of limitation under column 3 of any article of the Limitation Act is the point of time when the right to apply accrues. To construe the words "the date of the decree" in the Limitation Act as indicating something different from what the various provisions of the Civil Procedure Code clearly imply and indicate and in particular what S. 48, Civil P. C., specifies would be to introduce disharmony in the working of the provisions of the Civil Procedure Code and the provisions of the Limitation Act relating to execution. As pointed out by my learned brother Narasimham J., the Code of Civil Procedure and the Limitation Act are Acts, in pari materia and are, therefore, to be construed together. It appears to me also that the argument based upon the assumption that since a decree is by definition a "formal expression of adjudication," there is no decree at all until the decree is actually drafted, is not correct. Under Ss. 96 and 97, Civil P. C., an appeal lies from a decree passed by a Court. Can it possibly be contended that the right of the unsuccessful party to take up an appeal to the appellate Court arises not at the moment when the decree is passed, that is when the judgment is delivered, but only after the decree is formally drafted? This question has arisen in various cases and it has been held in *Kamini Debi* v. *Promotho Nath*, A. I. R. (2) 1915 Cal. 272: (27 I. C. 317) and *Manohar Lal* v. *Nanakchand*, A. I. R. (6) 1919 Lah. 53: (66 P. R. 1919) that the mere omission on the part of the Court to embody the effect of its decision in a decree in the prescribed form does not negative the right of the party affected to prefer an appeal. In *Bhup Indar* v. *Bijai Bahadur* 23 ALL. 152: (27 I. A. 209 P. C.), the Privy Council while noticing the definition of the word "decree" given in the Civil Procedure Code as a formal expression of adjudiction, held that a mere decision of the Court determining the extent of the period for which the judgment-debtor was liable to pay mesne profits to the decree-holder was a decree within the meaning of the Code. The Privy Council point out that "it (the order) is equally final in its effect and as such equally open to appeal." It is clear that the stress has been (laid ?) on the fact that the order was a decision which conclusively determined the rights of parties and not on its being embodied in a formal decree. In *Mungniram* v. *Gursahai*, 16 I. A. 195: (17 Cal. 347 P. C.) the Privy Council treated a mere order for the issue of a certificate under Act XL [40] of 1858 as in itself a certificate though no formal certificate had been issued and in so holding, applied the analogy of a person obtaining a judgment in Court being treated as one having obtained the decree itself though the decree itself is drawn up afterwards. The Privy Council case in *The Owener's of 'Brenhilda'* v. *B. I. S. N., Co.*, 7 Cal. 547 at p. 551: (8 I. A. 159 P. C.) is very instructive on this matter, and it says as follows:

> "Their Lordships, therefore, think that the date of the decree did not mean the date on which the decree was reduced to writing and signed by the Court, but the date on which the High Court delivered their judgment and expressed what the decree was."

This clearly indicates that in their Lordships' view, on the delivery or pronouncement of the judgment the decree itself is *expressed*. In fact, it is usually the practice that the Court after pronouncing its judgment in terms also states what the exact effect of that judgment is on the rights of the parties and gives specific directions as to the relief that it grants. In this sense the mandatory provision of S. 33, Civil P. C., that on the pronouncement of the judgment, a decree shall follow is as a matter of fact, carried out in everyday practice by immediate and simultaneous pronouncement of the relief granted. What usually is known as a "judgment" appears technically to be a combination of the judgment and the decree as understood in the definition of the words "judgment" and "decree" in S. 2. It appears to me, therefore, that the phrase "formal expression of adjudication" in the definition of the word "decree" in S. 2, Civil P. C., has no reference to the formalities as prescribed in O. 20, but is in contradistinction to a judgment which is a mere statement of grounds of the decision and that it has reference not necessarily to the formal drafting but to the formal pronouncement of the effect of adjudication by way of granting of relief. It appears to me, therefore, that argument that has been built up by emphasising that the decree is a formal expression is unwarranted. I think the argument is due to a confusion between a formal expression as opposed to a mere statement of the grounds of the decision and a document drafted in accordance with the precribed form. The Code does not define the decree as being the latter.

[20] As regards the support for the petitioner's argument sought to be derived from the dictum

of the Privy Council in *Rameshwarsingk* v. *Homeshwarsingh*, A. I. R. (8) 1921 P. C. 31 : (48 I. A. 17), I am satisfied that it cannot be invoked so as to import into the consideration of the words "date of the decree" something different from what a comprehensive consideration of the provisions of the Civil P. C., and the Limitation Act leads to. As pointed out by my learned brother Narasimham J., the decree in *Rameshwarsingh* v. *Homeshwarsingh*, A. I. R. (8) 1921 P. C. 31 : (48 I. A. 17), is in the nature of a conditional decree depending on the facts of that particular case. What their Lordships say is that in order to apply the provisions of the Limitation Act, the decree sought to be enforced must have been in such a form as to render it capable in the circumstances, of being *enforced*. Be it observed that they do not say that the decree must be reduced to a form so as to enable the decree-holder *to file an application* for execution. It appears to me reasonable to construe this dictum of the Privy Council as having reference to the form on which the enforcement of the rights of the decree-holder depends, that is, to its being capable of execution as a matter of substantive rights and not to its being embodied in a form which enables the decree-holder to apply for execution. If it is appreciated that the decree-holder has in a normal case the right to enforce the decree, the moment the judgment is delivered and the decree is passed, though he may not have the facility to file an execution application until a decree is drafted, the distinction above pointed out becomes obvious. I do not, therefore, think it right to construe the dictum of the Privy Council in *Rameshwar Singh* v. *Homeshwar Singh*, A. I. R. (8) 1921 P. C. 31 : (48 I. A. 17), as having a bearing on this discussion and as entitling the Court to import what may be called a liberal construction into the phrase "date of the decree" contrary to what O. 20 R. 7, provides.

[21] As has been pointed out by my learned brother Narasimham, J., there has been a unanimity of opinion in all the decided cases up-to-date on this question when the same has in specific form been presented to it for decision. It is unnecessary to notice all those cases or any of the cases relating to partition decrees, decrees for accounts and so forth in which somewhat apparently different views have been expressed and which depend on different considerations.

[22] In a matter of this kind, which is substantially one of procedure, I would not be prepared, if only on the ground of *stare decisis*, to countenance a different view being taken. I would, however, point out that the principle that, for all purposes, the date of the decree is to be taken as the date of the judgment, is one that is based on well-established general principles which have been constantly applied and acted upon in English Courts and which have been adopted in Indian decisions in consonance with the requirements of sound judicial administration. It is the principle which is expressed by the phrase "*nunc pro tunc*" (now for then). That principle means that a judgment is entered or a document is enrolled so as to have some legal force and effect as if it had been entered or enrolled at some earlier day on which it should properly have been done. Where a proceeding has been delayed by the action of the Court or on like grounds, the Court may allow it to be dated as if it had taken place or been delivered at an earlier date. This practice of the Courts in England was based on the maxim "*actus curiae neminem gravabit*" i. e., an act of the Court shall prejudice no man. In considering the question of prejudice, the principle is that neither party should suffer and not, only one of the parties. This principle of "*nunc pro tunc*" has been acted upon in English Courts from the very earliest times as will be found from the leading case of *Cumber* v. *Wane*, in 1 Sm. L. C. 376 at pp. 394-395 and has been followed by the Privy Council in *Surendro* v. *Durga Sundurag*, 19 Cal. 513 : (19 I. A. 108 P. C.). The principle and the application thereof have been noticed by the Calcutta High Court in *Hara Krishna* v. *Ram Gopal*, 14 Cal. W. N. 759 : (6 I. C. 170), which gives a reference to various other cases and which shows that this principle has been universally accepted in the British as well as in the Indian system of administration of justice. The principle has come up before English Courts for application normally in two sets of circumstances, namely, where a judgment has been delivered and there has been some delay in formally entering up the judgment as provided in O. 41 of English Rules of Practice and also in a case where a party to the litigation has died after the conclusion of the hearing of the case and before the judgment is delivered. In such cases the principle of "*nunc pro tunc*" has been applied in order to obviate, to the persons concerned, the hardship that may enure on account of the inevitable delay of the Court or its officers. But the actual application of this principle in the English Courts is dependent to some extent on the discretion of the Court. But in India, it has been statutorily adopted in the Civil Procedure Code in O. 20, R. 7 and O. 22, R. 6. It appears to me therefore that it is not permissible to introduce considerations of supposed equitable construction ignoring the more fundamental and important principle of "*nunc pro tunc*" that has been statutorily drafted into the Code by O. 20, R. 7. After all,

as the Privy Council has pointed out in *Nagendra Nath* v. *Suresh Chandra*, A. I. R. (19) 1932 P. C. 165 : (60 Cal 1), there is no scope for application of considerations of equity in the construction of the statutory provisions of the Limitation Act.

[23] I am also unable to appreciate the argument of hardship with reference to a matter of this kind where a substantially large period by way of three years has been provided under the Limitation Act. The possibility of the delay in drafting a decree for such a substantial period as to affect seriously the rights of the decree-holder is so remote, that the greater likelihood of mischief that might arise on a different construction must override. After all, it will be observed that difficulty in this case, if what is suggested in the course of the argument is true, namely, that the decree-holder was misled by the date put under the decree by the Judge, is one that has arisen under the Circular Rules and Orders which cannot override the statutory provisions of the Civil Procedure Code and the Limitation Act. If this provision in the Circular Orders is likely to lead to any difficulty the remedy lies in amending it. I may also note that there may be cases in which, after a judgment is delivered, some substantial questions which require further judicial consideration and determination before the decree can be formally drafted, may remain and in all such cases it would be desirable that the judgment itself should be treated as part-pronounced and adjourned to a further date for final pronouncement and it may be desirable to make some rules providing for such a practice. But where what remains to be done between the judgment and drafting of a decree is merely what may be called clerical work, which does not require any judicial consideration, but only a checking up of the correctness of the clerical work, there can be no question of any delay caused by any mistake of the Court. The delay is inherent in the situation and cannot therefore be counted and taken notice of.

[24] In the result I agree that the revisions should be dismissed with costs.

[25] I may add that I would not have felt called upon to deal with this matter at this length after the pronouncement of my learned brother with whom I agree, but for the respect which I owe to the opinion expressed by my Lord the Chief Justice in the course of the arguments in favour of the opposite view and on account of the doubt he has felt about the correctness of the pre-existing settled view.

[26] We must express our indebtedness on behalf of the Special Bench to M/S R. N. Sinha, B. K. Pal, S. K. Ray, and B. M. Patnaik who appeared as *amicus curiæ* and helped the case in discussion of somewhat a difficult subject.

[27] **Ray C. J.**—I have had the benefit of reading the concurrent views of my learned brothers Narasimham and Das JJ. They had my views on the subject fully expressed during the hearing, the referring order apart. I regret to have to say that I could not pursuade myself to accept their opinions. The question involved is one of deceptive simplicity. It is not free from doubt. The contentions of my learned brothers carry a great measure of conviction at the first instance, but on close examination, they do not appear to be sound. I have, therefore, to record my dissentient views. It may be that, in the ultimate end, I may be found to be wrong. I do not exclude that from the arena of possibilities, but I feel, in all earnestness, the view I take is the right one. At any rate, I think it worthwhile to raise a controversy. The matter, in the precise form and pointedness, has never arisen in any of the decisions of the Judicial Committee, referred to by my learned brothers nor has any such been cited at the bar. At any rate, I have not come across any decision of the Privy Council in which it has been said that, for the purpose of computing the period of limitation for execution of a decree, its assumed date which is an antedate and not its actual date would be the starting point.

[28] I am quite aware of, and alive to, the note of caution that has been struck from time in judicial pronouncements, that in the construction of a Statute of limitation, general words are to have a general operation, and the Statute is not to be subjected to judicial exceptions arising from a supposed equity in other words, the Courts cannot engraft on the Statute exceptions or qualifications not clearly expressed in the Statute itself or clearly established by judicial authority. On the other hand, it is a familiar principle that a Statute of limitation should not be applied to cases not clearly within its provisions; it should not be extended by construction. As a general rule, provision of a statute of limitations will not be given a retroactive effect, unless it clearly appears that the Legislature so intended. Both substantive and remedial rights come under the operation of the general presumption against retroactive action or construction of a Statute. To me it appears, to hold or find that the time prescribed by the Statute shall have to be computed as starting with the date of pronouncement of a judgment and before preparation and promulgation of the decree under execution would amount to giving it retroactive operation. Law of limitation should not act retroactively on a

cause of action as soon as it arises on which it is impossible to launch an action.

[29] It is fundamental, in application of law of limitations, that where two constructions are equally applicable, the one favouring the longer duration should govern the case.

[30] A wide distinction exists between pure Statutes of limitation and *special statutory limitations* qualifying a given right. In the latter instance, time is made an essence of the right, limitation being its inherent part so that there is no right of action whatever independent of the limitation. A lapse of statutory period extinguishes the right altogether. To such limitations, the rules of law governing pure Statutes of limitations, applicable to all clauses of actions, have no application. They are not subject to the disabilities or excuses through which the effect of ordinary Statute of limitation may be avoided. Whether a particular limitation of time is to be regarded as a qualification of a particular right must be determined from the language employed and from the connexion in which it is used.

[31] The time limit prescribed in S. 48, Civil P. C., and that prescribed for limitations of actions generally as in the Limitation Act belong to the two different categories indicated above—one goes to the root of the Court's jurisdictional executability of the decree and is a matter of essence of the right so much so that the time, if and when lapsed, extinguishes the right under the decree and the other has no reference to the earned rights and can be waived or avoided by various disabilities and excuses.

[32] Under Art. 182 (4), Limitation Act, an amendment, however unsubstantial, gives rise to a *fresh terminus a quo* to the time limit, *Magan Lal* v. *Sitaram*, 16 Pat. 290; (A. I. R. (24) 1937 Pat. 316); *Durga Prasad* v. *Kedar Nath*, A. I. R. (16) 1929 Cal. 650: (125 I. C. 292); *Manohar* v. *Sudhi Priya Roy*, 65 C. L. J. 455 while it is wholly ineffective in arresting the run of time provided for in S. 48, Civil P. C., *Fakirchand* v. *Kundan Singh*, 54 ALL. 622: (A. I. R. (19) 1932 ALL. 351), *Rameshwar* v. *Raghunandan*, 16 Pat. 453: (A. I. R. (25) 1938 Pat. 57) *Administrator General, Madras* v. *Radha Krishna*, A. I. R. (23) 1936 Mad. 434: (161 I. C. 969.)

[33] Article 182 (4) allows an application for exection to be made within three years from the date when the decree is amended even though the amendment is made more than three years after the so-called date of the decree.

[34] In interpreting a statute of Limitation, the basis structure, the nature and object of and the very policy behind such laws, in their relation to the affairs of organised societies or states, have to be kept in view. As distinguished from prescription, laws of limitation are not available as matters of substantive rights, nor as instrument for conferment of such rights or titles. They are available only as defences. The entire fabric of the law relating to limitation of actions is based on the negligence or laches of the suitor (plaintiff or decree-holder, as the case may be). The state adopts and enacts laws limiting time for actions as a matter of policy for repose of individuals and avoidance of occasions for fraudulent or stale claims springing up at great distances of time and surprising the parties or their representatives when all the evidences are lost or the facts have become obscure from the lapse of time or the defective memory or death or removal of witnesses. The benefit of repose of individuals are derived and derivable from the laches or negligence of a party who has to set the machinery of law in motion. The operation of a particular provision must correlate to a condition either favouring or disfavouring the basic factor of laches or negligence of a party concerned. The reasonableness of construction must be tested with close reference and in correlation to such basic factor and not in isolation from them.

[35] Based on this rule of construction, it was held in the case of *Webber* v. *Webber*, 146 Mich. (Michigan) 31, 34; 109 N. Y. (New York) 50, that the time of the making and delivery of an antedated note payable "on demand after date" determines the time of the accrual of a right of action thereon, and fixes the period from which limitations begin to run.

[36] The case of *Collins* v. *Driscoll*, 69 Cal. (California) 550; 11 P. (Pacific Reporter) 244, is in point holding that the date of delivery of an antedated note, payable one day after date, determines the time at which the time begins to run.

[37] Closely connected with the same basic factor is the rule that "until the party can resort to a remedy the statute of limitations does not begin to run". The decision of the Judicial Committee of the Privy Council in 49 Indian Appeal (48 Ind. App. 17 : A. I. R. (8) 1921 P. C. 31 ?) is based upon this rule but not upon any condition attached, in the decree, to its enforceability. The liability adjudicated therein was not conditional on the happening of a particular event. It was limited in extent. The ratio of this decision was that so long as no effective remedy was available to the suitor, the time does not begin to run. It is wrong to say that the decree was conditional. It is correct to say that the remedy was conditional in the sense that it was not available except on the eventuation of a certain contingency. The position in its application to the facts of the case, can be formulated

in a different way, to wit, where the right to resort to a particular remedy depends upon the prior ascertainment of facts and where such facts as those must be ascertained in a judicial proceeding, the running of the statute of limitation begins not until the ascertainment of such facts by such proceeding. Decisions bearing testimony to the correctness of the principles expounded above are myriads in Law Reports arising out of cases in which statute provides that the time begins to run from the date the right to sue or apply, as the case may be, accrues or arises. In the present case, *a specific date*, namely, date of decree, has been expressly prescribed as *terminus a quo* of the time. That makes no difference in application of the principle. The question that arises is which is the date to begin with. It bears a close analogy to the case of delivery of an antedated note already referred to above. In the decree, the facts or, in other words, the particular reliefs granted on which the cause of action for execution is based, are stated as ascertained. The remedy of execution can be resorted to only on such an ascertainment. In consideration thereof, if the words predicating the *terminus a quo* are capable of two interpretations, the one that conforms to the principles stated above has to be adopted.

[38] The knowledge of facts giving rise to a cause of action to sue or apply is fundamentally assumed, in the very scheme of the Act, as the fulfilment of the basic requirement that makes time run against a party. Section 18 of the Act provides for suspension of time as against one who has been kept out of such knowledge. Normally, knowledge of a thing has to be assumed against one who could know it by his own vigilance. Where the very source of knowledge is, *non est*, no lack of vigilance can be attributed to him (a party concerned). The reason of the rule of vigilance ceases when ascertainment of facts is not under his control but depends upon some act to be performed by another, and in such an event the time does not begin to run until the performance of the Act. A remedy cannot be said to be available to a party unless the remedy could be pursued successfully. It can be argued that a petition for execution, however defective, could be put in, at any time, after judgment and before decree. True, but would it be an application in accordance with law? Does such an obligation lie on the party? Is he expected to grope in the dark?

[39] Compelled by considerations above, I am sanguinely urged to hold that the date of the decree in this case would be the date when it was completely made and promulgated and not the date with which it was antedated. Such antedating is for the purpose of stating from what date the right to the reliefs granted should take effect. We are here concerned with remedy and not the right. I owe a duty to my learned brothers and to the learned counsel for the opposite party to say why I do not concur with them. This will involve me in dealing categorically with their reasons vis-a-vis that of mine.

[40] Brother Das thinks that, in law, decree has no separate existence from judgment. A written document incorporating the statements of respective cases of the parties, their claims and the adjudication thereof consummated in the recording of the specific reliefs granted embodied in a precise form is not essential. This is true to a very limited extent that decree has no independent existence in the sense that it must conform closely and strictly to the judgment. But despite that it has a separate entity. It has to be prepared in a prescribed form. After it is prepared and promulgated under the hand and seal of the Court, the judgment is pushed to the background. The law insists on its preparation. Appeal lies from it and against it. In an appeal, accompaniment of a judgment with the memorandum may be dispensed with but not the decree which is compulsory—vide O. 41, R. 1. If the ordering portion of a judgment takes the place of a decree, no party is entitled to an addition of the time occupied for a copy thereof in computation of the time available for filing an appeal. There would be no meaning in providing, in Art. 182 (4), Limitation Act, for a fresh *terminus a quo* on amendment of a decree. In accord with this view, any amendment, however substantial, should be merely formal, as all amendments must necessarily and ever be in order to bring it into conformity with the judgment; then the amended decree too is already there in the judgment as its integral part. Why then should the Legislature provide for a fresh *terminus a quo* to spring up along of an amendment? That a decree is a written document can hardly be disputed. In order that execution can be levied thereon, it is urged, preparation of a decree is not essential. Reliance is placed upon O. 21, R. 11 (1). The language of the sub-rule does not lend support to this contention. It does not say in so many words that the order of immediate execution by arrest of the judgment-debtor can be made as soon as the judgment is pronounced. The words used are "at the time of the passing of the decree". To answer the controversy by reference to this is begging the question. It dispenses with preparation of the warrant of arrest and not of decree. If the Legislature meant that it would say so clearly and expressly. It dispenses with written application of execution and preparation of warrant. I am

not sure if arrest order can be made before decree is prepared. Probably, in practice, they do it, but I reserve my opinion as to its legality. Even so, it does not mean that decree-holder is bound to take this remedy. It is like attachment before judgment. It has a very limited scope. It does not testify to a decree being unnecessary for launching an execution. An exception proves the rule and does not annihilate it. It accentuates the force of the rule by laying down that in one case and one case only the rule can be excepted from. I concede and have never doubted that whenever the question of accrual of right arises, the date is the judgment date, but in relation to availability of remedy it is repugnant to the subject as well as context to synchronise it with the signing of judgment and not the document called 'decree'. The highest at which the provision of O. 20, R. 7 be placed is that it defines the phrase "date of decree" for all purposes wheresoever it occurs. It is conventional of legislative penmanship to prefix the definition clauses with the words "in the absence of repugnancy to the subject or context". Such conventional expressions are not mere superfluities. They indicate that on appropriate occasions the rigor and the exactitude of the definition can be departed from. Definitions are devices to widen or limit the plain grammatical meaning of expressions and to assign an artificial meaning. The Legislature at the same time provides that where adherence to such meaning will lead to repugnancy it can be departed from. Date of a formal document shall not mean its antedate or post date. Whenever a document bears a date either or later than its completion, it is said to have been antedated or postdated. To say, on account of legal provision, that it shall be deemed to bear a particular date, independently of its actual date, is quite another thing. The date of a document is not the date it bears however erroneously. It is no where provided that the only date that a decree should bear is the date of judgment. Even in the absence of any command of law, the Court putting its hand and seal on a decree, should put date of his doing so; in usual course of business he shall have to do it and a party having had to rely on it is entitled to adduce evidence about it in case it is omitted from the decree.

[41] There are certain well established rules of construction of statutes which may be stated here. It is said to be the duty of the Judge to make such construction of a statute as shall suppress the mischief and advance the remedy. Even where the usual meaning of the language falls short of the whole object of the Legislature, a more extended meaning may be attributed to the words, if they are fairly susceptible of it. Before adopting any proposed construction of a passage susceptible of more than one meaning, it is important to consider the effects or consequences which would result from it, for they often point to the real meaning of the words. There are certain objects which the Legislature is presumed not to intend, and a construction which would lead to any of them is therefore to be avoided. It is not infrequently necessary, therefore, to limit the effect of the words contained in an enactment (especially general words), and sometimes to depart not only from their primary and literal meaning, but also from the rules of grammatical construction in cases where it seems highly improbable that the words in their wide primary or grammatical meaning actually express the real intention of the Legislature. It is regarded as more reasonable to hold that the Legislature expressed its intention in a slovenly manner, than that a meaning should be given to them which could not have been intended. It is in the last degree impossible that the Legislature would overthrow fundamental principles, infringe right or depart from the general system of law, without expressing its intention with irresistible clearness.

[42] It is said that the Code of Civil Procedure, Limitation Act and the Registration Act are Statutes in *pari materia.* This is an assumption without proof. The objects behind the Acts are not the same nor the subjects dealt with. Besides, the point that confronts us is whether we can apply the law that governs accrual of rights for the purpose of limiting the field of operation of law regulating remedies. Civil Procedure Code is not an unmixed law of procedure. Some parts thereof are devoted to definition of right. It is said that the rule that the decree should synchronise with judgment flows from the maxim *actus curiiae neminem gravabit.* This maxim is founded upon justice and good sense and affords a safe and certain guide for the administration of law. If the decree has been prepared and completed later than when the judgment was pronounced, it is due to Court's delay; it is an act of Court. An act of the Court shall prejudice no man. This result is best achieved by effectuating the rights from the date of judgment and availing the remedies for their enforcement from the date when the preparation of the decree is completed.

[43] I can conceive of no circumstance in which the judgment-debtor should in any way be prejudiced. In the case of *Miles* v. *Williams,* (1846) 9 Q. B. 47 : (16 L. J. Q. B. 56), the issues of fact were tried in August 1843, a verdict was found for the plaintiff, and a rule for a new trial was discharged in Trinity Term, 1844 ; in the same term the demurrers were set down in

the special paper, but did not come on for argument until May, 1845, when judgment was given upon them for the plaintiff. The plaintiff, having died in March 1845, the Court made absolute a rule to enter judgment as of Trinity Term, 1844. Can it be urged in such a case that the time for limitation will run from the date on which the judgment was entered? I find nothing in the application of this maxim that deters us from adopting rule of interpreting the words in their natural meaning which advances the remedy and prejudices, none. I have failed to understand how does the rule proposed by me prejudices the judgment-debtor. What does it matter to him if the time for limitation purpose starts to run earlier or later. It does not enhance his burden. The rule "that one party has acquired a valuable right" is taken into account only when the Court is called upon to exercise his discretionary power to condone or excuse delay in order to grant an extension of time to his adversary.

[44] Two decisions of the Privy Council have been relied on by the opposite party—one as a direct case and the other as laying down the principle applied on a question which is in *pari materia* with the present one. These two cases have gone far in influencing the opinions of my learned brothers. First one is that of *Owners of Brenhilda* v. *B. I. S. N. Co.*, 7 Cal. 547: (8 I. A. 159 P. C.). Sir Barnes Peacock who delivered the judgment of the Privy Council himself distinguished the case before him from the one that falls under the corresponding rule of the Civil Procedure Code. His observation will speak for itself:

> "It has been urged that the decree was not drawn up in writing and signed by the Court until some considerable time afterwards, and that the parties could not appeal without annexing a copy of their decree to their petition of appeal. But the rule of annexing a copy of the decree to the petition of appeal refer to appeals which are preferred under the Code of Civil Procedure, Act VIII [8] of 1859; it does not apply to appeals preferred or asserted under the 35th section of the rules of William the Fourth. The words "after the date of decree," according to their Lordships' view of the rule, do not mean after the date when the decree is drawn up in writing, but after the date on which the decree or sentence is pronounced by the Vice Admiralty or Admiralty Court, as the case may be. The words which are constantly used in Acts which refer to decrees in the Admiralty Court are 'the pronouncing of the sentence or decree." Their Lordships, therefore, think that the date of the decree did not mean the date on which the decree was reduced to writing and signed by the Court, but the date on which the High Court delivered their judgment and expressed what the decree was. If the parties intended to appeal, they ought, in accordance with the rule, to have asserted their appeal within fifteen days from the date of the decree, by declaring in the Court that they intended to appeal; and that they did not do. It is important in Admiralty proceedings that notice of appeal should be given within a short period. When a ship is sued, it is usually arrested, and unless it is released upon bail, it is detained by an officer of the Court. It is, therefore, important, if a party intends to appeal from the decision of the Admiralty Court, that notice should be given within a certain limited time, and that time with regard to Vice-Admiralty cases, is fifteen days from the date of pronouncing the decree."

The construction was favoured as one in accord with the subject and context of the Act in which the phrase "date of the decree" occurred. If this view is fitted into a case under the Civil Procedure Code, will it not disturb the settled view of law that until the decree is drawn up time for appeal does not begin to run?

[45] The observation of their Lordships which is most pertinent to the controversy before us reads, at p. 200 of 16 I. A. 195: (17 Cal. 347): *Mungniram Marwari* v. *Gursahai Hossein*:

> "When a man obtains an order for a certificate he does in substance comply with the terms of this Act, in the same way as when a person has the judgment of the Court that he shall have a decree in his suit it may be said that he then obtains his decree. The decree, when it is drawn up afterwards, relates back to that time; and so would the certificate in this case relate back; and the terms of the Act that he shall have obtained such certificate are complied with."

This decision does not at all conflict with my view. It deals with the question "when does the right to the relief granted accrue", or, in other words, "when does the right to execute accrue". We are concerned with the question "whether 'the remedy' that is going to be barred for lapse of time was available all the time during the prescribed period of three years". If it was not available to the party for no fault of his but due to delay of Court, why should he be barred thereby making it all the more warranted the interpretation that advances his remedy without prejudice to the opponent.

[46] It is said, the Legislature did not think it fit to provide, as in Ss. 12 and 5 in their application to appeals, reviews and certain classes of applications, for redeeming the hardship likely to arise from the delay in drawing up of decrees in execution cases. The supposed answer to that is said to be that as the time was to run from the date of judgment being the date of decree any intermediate delay on the part of the authorities did not count. I consider it falacious. This omission from the Act in which all available escapes from such hardships have been adjusted against, strengthens rather than detracts from the construction that I should like to adopt. As and if the time begins to run from the date of drawing up and signing of the decree, no case of hardship flowing from Court's delay falls to be provided against.

[47] It is further said that it is but just that if the benefits of adjudication of respective claims to the decree-holder accrue from the date of pronouncement of judgment, any disabilities due to his failure to act too should arise simultaneous-

ly. As an abstract proposition, it is true in cases where liabilities or disabilities are inherent in or correlate to the said rights. The right to execute the decree by an application which must conform to certain requirements ordained by the law of procedure is not such. If it were so, the right to execute shall never be lost so long as the right under the decree is extant.

[48] The view taken in *Rameshwar Singh* v. *Homeshwar Singh*, A. I. R. (8) 1921 P. C. 31 : (48 I. A. 17) is in full harmony with the view I take. The decree, under execution, in that case, contained nothing to make it a conditional one. Had that been so, the High Court would not take the view it did. Lack of its executable form, till something eventuated, did not arise from any condition incorporated or embodied in it but was due to non-availability of the remedy due to extraneous circumstances to which the decree-holder was neither a party nor a privy. The decision establishes the principle that when for any reason beyond his control the remedy by execution is not available to a decree-holder, the time limited should not run against him and that such a principle is deducible from the language and the scheme of the Act. According to their Lordships, the date of decree is not the date when decree is passed or drawn and signed, but when it is executable both in form and substance. I lay emphasis on the words, in their Lordships' judgment, "executable form".

[49] I am not keen to discuss if the decision of *Brajabala Debi* v. *Gurudas*, 3 C. L. J. 293 : (33 Cal. 487) is distinguishable. I did not form the opinion. I have done on its basis. It came in by the way during the hearing. In fact, Mr. Pal cited it. But I should say that they took a reasonable view. The word 'decree' appeared in S. 90, T. P. Act as it appeared in Art. 182. As in a proceeding under S. 90, T. P. Act so in a suit for recovery of money, a judgment or order precedes a decree which merely follows. The S. 90 proceeding is in continuation of a suit and as such does not differ from it.

[50] As for the decision reported in *Nagendra Nath* v. *Suresh Chandra*, A. I. R. (19) 1932 P. C. 165 : (60 Cal. 1), the mode of reasoning employed by their Lordships of the Judicial Committee in construing Art. 182, Limitation Act does lend a great support to that of mine. In construing what is an appeal, their Lordships assigned the strict grammatical meaning to it and not the technical meaning that it should bear under the Civil Procedure Code. In fact, as against that part of the judgment and decree of the lower Court and as against those parties, there was no appeal but there was a petition challenging a part of the decree asking the appellate Court to revise that part. He (the decree-holder) was free to execute the decree except against the respondents impleaded. As against the appellants before their Lordships, the decision so far as it affected them had become final not only because the decree-holder did not appeal but also those appellants too did not prefer any appeal. But grammatically speaking, there was an appeal.

[51] As to prejudice, if any, against judgment-debtor, their Lordships have emphatically said

> "Nor in such a case as this is, the judgment-debtor is prejudiced. He may indeed obtain the boon of delay."

Independently of this observation, I have already said that the rule of construction adopted by me does not prejudice the judgment-debtor. I am not led by any consideration of hardship to the decree-holder. I consider he would not be charged with omission when it is impossible for him to act.

[52] I think I owe a word of explanation for running away from the chain of precedents afforded by a long line of authorities on the particular point. It is always to be borne in mind, in administering the law, that laws are to be made for the society and not the society for the laws, and even some gifted minds are not free from this delusion. A distinguished English Judge whilst pitying the hard lot of a man who was ruined because his pleader had supposed his remedy to be trespass instead of case, is said to have added :

> "No doubt it is hard on him. The declaration ought to have been in case. If it had been done, he would have won, but if the distinction between trespass and case is removed, law, as a science, is gone—gone."

[53] In my opinion, a Judge should not be troubled with the little things regardless of the wider matters of law. He ought to be strong enough to brush away the technicalities but not to lose himself in legal cobwebs which no doubt sometimes get him hopelessly entangled. I could not understand the series of cases in which it has been held that the interval between pronouncement of a judgment and drawing up and signing of a decree is added to the period of limitation allowed for an appeal on the theory that it comes within the purview of S. 12, Limitation Act being a period occupied for the purpose of obtaining copies. This reasoning could apply to a case where an application for copy of a decree synchronises with the pronouncement of judgment. It does not apply to a case in which the application for copy is filed after the decree is drawn up, signed and promulgated. This argument seems to be more or less a fiction employed to meet a hard case.

[54] I have already said a few words regarding the principle involved in entry of judgments *nunc pro tunc* in the English Practice and Procedure. I know how heavily the adoption of that

principle has influenced the enactment of O. 20, R. 7 and how strongly it has influenced my learned brothers, but it is likely to mislead us unless we follow the procedure relating to it. I find from the annotations in 62nd annual issue of the Annual Practice, 1944, appended to O. 41, Rr. 3 and 3A the rules that deal with "entry of judgment" which correspond to preparation of decree under the Civil Procedure Code in India —that "the execution cannot issue till after actual entry of the judgment," and in the annotation to O. 52, Rr. 13 and 14, which deal with entry of orders in proceedings as drawing up orders

> "although it has been held that an order has no effect until it is drawn up and served (*Matcalf* v. *British Tea Association*, (1882) 46 L. T. 31), in subsequent cases in the C. D. it was decided that an order dismissing an action operated from the moment it was pronounced, and that the fact that it was not drawn up or served was immaterial (*Script Phonography* v. *Gregg* (1890) 59 L. J. Ch. 406, and *see Farden* v. *Richter*, (1889) 23 Q. B. D. 124 : (58 L. J. Q. B. 244).) Probably the doctrine of *Matcalf* v. *British Tea Association*, (1882-46 L. T. 31) would now be only applied to cases where service is expressly made a condition precedent to the doing of some act."

Our practice and rules require that before a decree is finally drawn up and signed and sealed under the hand and seal of the Court, parties should be noticed and their objection, if any, should be considered. I lay strong emphasis upon the consideration "that execution cannot issue till after actual entry of the judgment" of the English Practice and draw an analogy between it and our drawing up of the decree. In my opinion, no execution should ordinarily be levied until the decree is drawn up. The case on this side of the practice is much stronger than that in England, because there a judgment is ordered to be entered on an application of a party. The party has, therefore, to move the Court in order that the judgment may be entered. The party in India has no obligation to move. It is purely an act of Court. The party should not lose his valuable time, even if it is a day or two, for the delay of the Court.

[55] In consideration of what I have said above, I would hold that the execution cases are in time and would allow the civil revision cases.

[56] **Jagannadha Das J.** — I may add that the judgment prepared by my Lord the Chief Justice has by his kindness and courtesy been circulated to my learned brother and myself. I have anxiously reconsidered the whole matter in the light of the elucidation furnished thereby. I regret very much however that in spite of my great respect to my Lord's views, I do not feel persuaded that the view taken by me is wrong or that the contrary view propounded is right. My learned brother Narasimham J. has on reconsideration intimated that he adheres to the view already expressed.

[57] In the result, the Court's order in pursuance of the majority view is that the revisions are dismissed without costs.

K.S. *Revisions dismissed.*

A. I. R. (37) 1950 Orissa 140 [*C. N. 22.*]

PANIGRAHI AND NARASIMHAM JJ.

Mani Sahoo and after him Hadibandhu Sahoo — Plaintiff — Appellant v. *Lokanath Misra and others—Defendants-Respondents.*

F. A. No. 24 of 1945, D/- 5-1-1950, from a decision, Addl. Sub-Judge, Puri, D/- 28-2-1945.

(a) Hindu law—Joint family—Karta — Power of, to represent in certificate proceedings.

The karta of a Hindu joint family can effectively represent the family in the certificate proceedings even though not expressly named as such. [Para 8]

(b) Registration Act (1908), S. 17 (2) (vi)—Money suit — Petition of compromise creating charge on property attached before judgment—Registration.

Where certain property is attached before judgment in a money suit that property will not be the subject-matter of the suit or of a proceeding as contemplated by S. 17 (2) (vi) and a compromise petition filed in such suit creating a charge on such property would be compulsorily registrable for creating a valid charge especially when the charge has not been incorporated in the operative portion of the decree: A. I. R (28) 1941 Bom. 1, *Foll.*; A. I. R. (22) 1935 Mad. 232, *Not foll.* [Paras 9 and 10]

Annotation: ('49-Com.) Reg. Act, S. 17 N. 59 Pt. 11, 12; N. 60 pt. 11 and N. 61.

(c) Limitation Act (1908), Arts. 12 and 13—Applicability —Suit under S. 37, Bihar and Orissa Public Demands Recovery Act.

Though Art. 13 in terms applies only to a "decision or order of a civil Court in any proceeding other than a suit" it must be deemed to apply to decisions or orders of a Certificate Officer also by virtue of S. 65 (2), Bihar and Orissa Public Demands Recovery Act which says clearly that the provisions of the Indian Limitation Act shall apply to all proceedings under that Act as if a certificate were a decree of a civil Court.

Hence a suit under S. 37, Public Demands Recovery Act to set aside an order of the Certificate Officer under S. 35 of that Act would properly be governed by Art. 13 and not by Art. 12 and limitation would start from the date of dismissal of appeal from such order. [Para 12]

Annotation: ('42-Com.) Limitation Act, Art. 13 N. 2 and 3.

H. Sen and L. K. Dasgupta — for Appellant.

P. C. Chatterji, S. K. Ray, S. D. Das and P. Misra —for Respondents.

Narasimham J.—This is a plaintiff's appeal against the judgment of the Additional Subordinate Judge, Puri dismissing his suit for a declaration of his right in respect of twelve annas interest in a house standing on plot No. 1068 in the town of Puri and for other consequential reliefs.

[2] The said plot is within the town Khasmahal of Puri Collectorate and was settled by the Khas-

mahal with one Gadadhar Sahu who constructed a building thereon. One of the points agitated in the lower Court was that the house was the exclusive property of Gadadhar Sahu. But this was decided against the defendants (*vide* para. 7 of the lower Court's judgment) and this decision was not challenged in appeal. It may therefore be taken as well-established that the lease-hold property and the house standing on the said plot were the joint property of Gadadhar Sahu and his three brothers who admittedly were members of a Hindu joint family at all relevant times.

[3] The plaintiff is a businessman and money-lender of Cuttack town. He instituted a suit (M. S. No. 127 of 34) against Gadadhar Sahu and his three brothers for realisation of the price of the articles supplied on credit to them amounting to about Rs. 12,653-8-0. He also took out an order for attachment before judgment of some of the properties of the joint family including disputed house. But before the said order of attachment was actually served at the spot the parties came to a compromise in pursuance of which a compromise decree was passed on 30th July 1934. In the operative portion of the decree one of the terms which referred to a charge being created in favour of the plaintiff decree-holder in respect of the disputed house by way of security for payment of the compromise decretal amount was not embodied but it remained in the petition of compromise which was also attached to the decree. Subsequently, however, on 16th February 1939 the said petition appears to have been made part of the decree by an order of the Court and there is an endorsement at the end of Ex. 2 to that effect. But no evidence was led about the circumstances under which the Court passed the order on 16th February 1939 directing the compromise petition to be part of the decree and the order itself was not proved. The learned lower Court rightly refused to take the endorsement to be sufficient to show that the compromise petition also became part of the decree. The judgment-debtors failed to implement some of the terms of the compromise and thereupon the appellant decree-holder filed an execution (Execution Case No. 352 of 34 renumbered as 17 of 36). It is unnecessary to describe in detail the various stages in the execution petition and it is sufficient to note that in execution of the said compromise decree the appellant purchased the disputed house on 16th September 1937 and also obtained delivery of symbolical possession on 29th April 1938. His title to the house is based on the court sale dated 16th September 1937 in execution of the compromise decree obtained against Gadadhar Sahu and his three brothers.

[4] Respondent 1 is a prominent lawyer and money-lender of Puri town and he claims to have purchased the entire house in a certificate sale dated 13th February 1935 (Certificate case No. 277 of 1933-34). The certificate case arose in consequence of a certificate filed by the Income-tax authorities on 10th March 1934 against Gadadhar Sahu for realisation of income-tax dues with penalty. After the certificate sale dated 13th February 1935 and delivery of possession, the three brothers of Gadadhar Sahu filed an objection under S. 35, B. & O. Public Demands Recovery Act. But their objection was rejected on 15th November 1935. Respondent 2 is a subsequent purchaser of the disputed property from respondent 1.

[5] It will be noticed that the plaintiff's purchase at court auction in execution of his compromise decree was on 16th September 1937 whereas the purchase by defendant 1 in the certificate sale was more than two years before on 13th February 1935 in the certificate proceeding. The latter's purchase would obviously prevail. But with a view to get round this difficulty the plaintiff relied on the fact that a charge in respect of the disputed house was created at the time of the passing of the compromise decree in M. S. No. 127 of 34 on 30th July 1934. He further relied on the fact that in the certificate proceeding Gadadhar Sahu alone was shown as the certificate debtor. He further argued that the right, title and interest of Gadadhar Sahu in the property amounting to one-fourth share alone passed by the certificate sale and that in any case the rights of the other three brothers were unaffected by the sale and that those rights were transferred to the plaintiff by the civil court sale dated 16th September 1937.

[6] In dismissing the plaintiff's suit the learned lower Court found that: (i) Gadadhar Sahu represented the joint family consisting of himself and his three brothers in the certificate proceeding and that consequently the entire interest of the family in the disputed house passed by the sale (ii) the charge created by the compromise between the plaintiff and Gadadhar Sahu and his brothers in M. S. No. 127 of 34 was not a valid charge because it was not created by a registered instrument nor was it incorporated in the operative part of the compromise decree; and (iii) in any case the suit was barred by limitation by virtue of Art. 12, Limitation Act inasmuch as it was not brought within one year from the date on which the Collector on appeal maintained the order of the certificate officer rejecting the claim of Gadadhar's three brothers Satyabadi Sahu, Madan Sahu and Shyamsundar Sahu under S. 35, B. & O. Public Demands Recovery Act.

[7] All these three findings of the learned Subordinate Judge have been challenged before us and it is necessary to discuss each of them at some length.

[8] (After discussion of the evidence the judgment proceeds as follows:) Judging from the admissions and circumstances mentioned above I would accept the evidence of defendant 1 on this point and in agreement with the learned lower Court hold that Gadadhar Sahu effectively represented the joint family firm in the certificate proceeding. As rightly pointed out by the lower Court it is now well-settled that a Karta of a Hindu family can effectively represent the family in the certificate proceedings even though not expressly named as such (see *Lalchand* v. *Sheogobind*, A. I. R. (16) 1929 Pat. 741 : (8 Pat. 788); *Hari Prasad* v. *Lal Behari*, A. I. R. (27) 1940 Pat. 328 : (19 Pat. 618 F. B.) and *Kameshwar Singh* v. *Ishwari Prasad*, A. I. R. (27) 1940 Pat. 692:(189 I. C. 114). Therefore it follows that the entire interest of the joint family in the disputed house passed to defendant 1 by virtue of the certificate sale dated 13th February 1935.

[9] Next I take up the question as to whether a valid charge was created in favour of the plaintiff by virtue of the compromise between him and the Sahu brothers in M. S. No. 127 of 1934. The compromise decree (Ex. 2) dated 30th July 1934 does not say expressly that a charge was created in favour of the plaintiff-decree-holder in respect of the disputed house. Doubtless in the petition of compromise which was also attached to the decree there is a reference to such a charge in para. 3. But it has not been incorporated in the operative portion of the decree and such a charge cannot be created except by a registered instrument.

[10] To meet this difficutly, Mr. Dasgupta urged that the compromise was effected at a time when the proceeding of the plaintiff in respect of attachment before judgment of the disputed house was pending before the Court and that consequently the disputed house may be held to form the subject-matter of that proceeding. He relied on *Govindaswami* v. *Rasu*, A. I. R. (22) 1935 Mad. 232 : (58 Mad. 781), in support of the view that even though the main suit may be a money-suit, where the parties compromise in an interlocutory proceeding in that suit in respect of some property which was sought to be attached before judgment the provisions of cl. (vi) of sub-s. (2) of S. 17, Registration Act would be attracted and registration was not compulsory. The Madras decision referred to was that of a single Judge and it came up for consideration in a later decision of the Bombay High Court reported in *Chhotibai* v. *Mansukhlal*, A. I. R. (28) 1941 Bom. 1: (I. L. R. (1941) Bom. 34), where a Division Bench expressly dissented from the Madras view. With respect I would agree with the later Bombay view and hold that if certain property is attached before judgment in a money-suit that property will not be the subject-matter of the suit or of a proceeding as contemplated in cl. (vi) of sub-s. (2) of S. 17, Registration Act. Registration is therefore compulsory for creating such a charge even in a compromise petition and in the absence of such registration the plaintiff cannot claim any preferential right.

[11] Moreover, in any case, the plaintiff's preferential claim in respect of the disputed house must fail because under Section 8 (b), B & O Public Demands Recovery Act from the date the service of the notice under S. 7 of that Act a charge is created in respect of all the property of the certificate debtors and all other charges created subsequently are postponed to that charge. In the present case, the order-sheet of the certificate proceedings (Ex. 6) shows that the notice under S. 7 was served on 19th March 1934, nearly four months before the plaintiff's compromise in M. S. No. 352 of 34. Therefore even if it be held that by virtue of that compromise a charge was created in favour of the plaintiff that charge must be postponed to the prior charge of the Crown over the same property brought about by the operation of law, namely, by S. 8(b), B & O Public Demands Recovery Act. An attempt was made on behalf of the plaintiff, at the time of argument before the lower Court, to show that the notice under S. 7 was not properly served as required by law on the certificate debtors on 19th March 1934. The lower Court rightly refused to entertain that plea at such a belated stage. The order-sheet in the certificate proceeding (Ex. 6) especially the order dated 2nd May 1935 shows clearly that the Certificate Officer held that the notice was properly served. The plaintiff did not lead any evidence to show that there was no proper service nor did he raise any issue on this point.

[12] Next I take up the question of limitation. On 15th November 1935, the Certificate Officer rejected an application under S. 35 B & O Public Demands Recovery Act filed by the three brothers of Gadadhar Sahu (Satyabadi Sahu, Madan Sahu and Shyamsundar Sahu). Section 37 of that Act says that a person against whom such an order is made

> "may institute a suit in a Civil Court to establish the right which he claims to the present possession of the property; but subject to the result of such suit (if any) the order shall be *conclusive*."

The order of the Certificate Officer was passed on 15th November 1935 and an appeal against his order was dismissed by the Collector on 25th January 1936. But the present suit was filed on 21st June 1943. The plaintiff claims to be the successor-in-interest of Satyabadi, Madan and Shyamsunder who were unsuccessful applicants in the petition under S. 35, B & O Public Demands Recovery Act. The learned lower Court held that Art. 12, Limitation Act would apply and that the present suit was hopelessly barred by limitation. I think the appropriate Article is Art. 13 and not Art. 12. Though that article in terms applies only to a "decision or order of a civil Court in any proceeding other than a suit" it must be deemed to apply to decisions or orders of a Certificate Officer also by virtue of S. 65 (2), B. & O. Public Demands Recovery Act which says clearly that the provisions of the Indian Limitation Act shall apply to all proceedings under that Act as if a certificate were a decree of a civil Court. Limitation would therefore be one year from the date of the appellate order of the Collector (Ex. O) dated 25th January 1936 rejecting the appeal filed by the Sahu brothers against the order of the Certificate Officer dated 15th November 1935.

[13] Thus the plaintiff's suit must fail both on the ground of limitation and also because of the prior title acquired by defendant 1 by virtue of the certificate sale. I would therefore dismiss the appeal with costs.

Panigrahi J.— I agree.

K.S. *Appeal dismissed.*

A. I. R. (37) 1950 Orissa 143 [*C. N. 23.*]

PANIGRAHI AND NARASIMHAM JJ.

Sm. Amruti Dei—Defendant—Appellant v. *Sm. Saradamoni Dei and another — Respondents.*

Second Appeal No. 225 of 1947, D/- 4th January 1950, from decision of Dist. J., Cuttack D/- 3-4-1947.

(a) Advancement—Husband and wife—Purchase in wife's name—Presumption—Onus.

There is no presumption in law that property apparently purchased by a woman is not hers and that she should prove as against a stranger that it was with her money that she purchased those properties. On the other hand, it is upon him who seeks to challenge that the apparent owner is not the real owner to establish by cogent evidence that the purchase money came from the alleged real owner. Where in a suit by a reversioner to set aside an alienation made by the late widow, of property alleged to have been purchased by her and this belonging to her, the plaintiff alleges that the property apparently purchased by the widow in her own name was really purchased by her husband and that the money was supplied by the husband, the onus is heavy upon the plaintiff to show that that was the fact. Unless therefore it is strictly proved that the purchase money was paid by the husband the presumption that the apparent owner is also the real owner must be made; and no suspicion or conjecture shall be allowed as a substitute for evidence to the contrary. [Para 6]

(b) Hindu law — Widow—Alienation — Legal necessity—Alienee's duty to enquire.

If there is an actual existing necessity for advance of money, the circumstance that this necessity is brought about by previous mismanagement does not vitiate the loan unless the creditor had himself been a party to the misconduct which had produced the danger. This rule applies to alienations made by widow. It is enough for the alienee to show the existence of necessity at the time of such alienation. Even though there may not be legal necessity in fact, the alienee will be protected if he honestly did all that was possible and reasonable to satisfy himself that the required necessity existed. The illustration to S. 38, T. P. Act which now applies to Hindus leaves no doubt on the point. When actual enquiry by an alienee becomes impossible, the recital in the document coupled with other circumstances should be sufficient evidence of the necessity for such allegation: 6 M. I. A. 393 (P. C.), *Rel. on.* [Paras 8, 10]

(c) Benami — Property purchased apparently by Hindu woman in her own name — Sale by her of property—Enquiry by alienee as to real ownership of property or legal necessity impossible due to lapse of time — Recitation in deed of sale coupled with other circumstances held sufficient proof of necessity — Husband setting up title to property and alleging wife to be benamidar — He must establish notice to purchaser of real title — Purchaser is protected under S. 41, T. P. Act — Reversioner claiming under husband, the ostensible owner cannot claim higher rights — Hindu law—Widow — Alienation — Setting aside of : A. I. R. (8) 1921 Cal. 549 and A. I. R. (28) 1941 Cal. 318, *Rel. on.* [Para 10]

(d) Hindu law — Alienation — Widow — Suit by reversioner to set aside alienation — Court finding that property belonged to widow and that she had title to alienate it — Reversioner proving that she spent for improvements over property — She held could recover cost of improvement from absence, such costs being charge on it. [Para 11]

P. C. Chatterji — for Appellant.
M. S. Rao — for Respondents.

Panigrahi J. — This is an appeal by defendant 3 in a suit by a reversioner for a declaration that the alienation made by the mother of the plaintiff is invalid and for possession of the lands described in Sch. 'Ga' attached to the plaint.

[2] The plaintiff Saradamoni Dei is the daughter of one Bhola Nath Singh who died leaving a widow by name Ushamoni and two daughters, viz., the plaintiff and another who is now dead. The widow Ushamoni died in the year 1944 leaving the plaintiff as the sole surviving heir of Bhola Nath. Defendant 3, who is the appellant before us, purchased the properties described in Sch. 'Ga' from Ushamoni by a sale deed dated 18-8-37 (Ex. A) for Rs. 170. The alleged purpose of this sale was the payment of a debt contracted by Ushamoni from one Anangabhim for the marriage of her second daughter, and to pay off arrears of rent on those lands.

[3] Admittedly the properties stood in the name of Ushamoni and her name had been recorded in the Current Settlement Khatian

(Khatas Nos. 99 and 102) as proved by Exs. D and D-1. The properties in suit are covered by three sale deeds, viz., Ex. B dated 25-7-10 (a kebala executed by one Aprati Charan Singh in favour of Ushamoni); Ex. B-1 dated 7-7-1915 (a kebala executed by Mana Singh in favour of Ushamoni); and Ex. B-2 (a kebala executed by Pranasrushna and his brother Brundaban in favour of Ushamoni) dated 3-11-1915. All these documents had been obtained in Ushamoni's name when her husband was working in danger in the Central Provinces.

[4] The learned Munsif who tried the suit in the first instance held that Ushamoni was only a benamidar for her husband and that the real title to these properties rested with Bholanath. He, however, found that the alienation made by the widow under Ex. A, dated 18th August 1937 was justified by legal necessity and accordingly upheld the sale in favour of the appellant. He also found that a sum of Rs. 170 had actually been paid by the appellant to Ushamoni as consideration for Ex. A. He relied upon the evidence adduced by D. Ws.-2 and 4 to the effect that Ushamoni was pressed by necessity on account of the expenses incurred by her for the marriage of her second daughter. He also accepted the testimony of the witnesses that the income from Bholanath's estate gradually dwindled on account of failure of crops and non-payment of rent so that she could hardly make both ends meet. The learned Munsif observed:

> "There is nothing unnatural if she had no ready and enough funds to meet the expenses of her daughter's marriage and for that purpose she seems to have borrowed from Anangabhim and to repay that debt she made the alienation in favour of defendant 3."

He accordingly recorded his finding that

> "there is convincing evidence that to repay that debt she made the alienation under Ex. A and as such it was for legal necessity and the plaintiff mut be bound by it."

[5] Against this judgment the plaintiff preferred an appeal in Appeal No. 258 of 1945 in the Court of the District Judge. The learned District Judge reversed the finding of the trial Court and held that the alienation in favour of defendant 3 was not justified by legal necessity and gave a decree to the plaintiff as prayed for. In arriving at this conclusion however, he committed some errors of record as well as errors in law. The learned Judge was under the impression that Bholanath was in employment under the District Board at the time of the purchase of these properties by Ushamoni in the years 1910 and 1915 and that, therefore, he had to purchase them in her name. He was also in error in holding that it was for the alienee to prove that the widow made these purchases from out of her own money.

[6] There is no presumption in law that property apparently purchased by a woman is not hers and that she should prove as against a stranger that it was with her money that she purchased those properties. On the other hand, it is upon him who seeks to challenge that the apparent owner is not the real owner to establish by cogent evidence that the purchase money from the real owner. It is suggested in this case that the money was supplied by the husband of Ushamoni and that the property was purchased by him benami in her name. The onus was heavily upon the plaintiff to show that that was the fact. Unfortunately both the Courts below relied upon certain letters written by Bholanath in the years 1910 and 1915 to justify their inference that Bholanath did actually advance the moneys necessary for the purchase of the properties under Exs. B, B-1 and B-2 cited above. [His Lordship considered those letters and proceeded]. Unless, therefore, it is strictly proved that the purchase money was paid by Bholanath the presumption that the apparent owner is also the real owner must be made; and no suspicion or conjecture shall be allowed as a substitute for evidence to the contrary.

[7] The learned District Judge also erred in making a surmise when he made the following observation:

> "Perhaps he (Bholanath) was then in service and in order to avoid exciting suspicion of the authorities he made this purchase in the name of his wife."

I can find no evidence in the records to show that Bholanath was in service at that time and that he made these purchases in the name of his wife to avoid exciting suspicion.

[8] Yet another error committed by the lower appellate Court was in assuming that even if the appellant had paid the entire price for the purchase under Ex. A, dated 18th August 1937 the sale cannot be upheld. The learned Judge observed:

> "The alienee has further to establish that there were no funds in the hands of the widow to meet the demands which are said to have then arisen."

The evidence that the sale was effected at about the time when the marriage of the second daughter of Bholanath was performed was accepted. But in view of the principle of law propounded by him, the learned Judge held that the alienee had failed to prove the justification for the loan incurred by the widow, to discharge which the sale under Ex. A was effected. If there is an actual existing necessity for advance of money, the circumstance that this necessity is brought about by previous mismanagement does not vitiate the loan unless the creditor had himself been a party to the misconduct which had produced the danger. This rule was laid down in *Hanuman Prasad's case*, (6 M. I. A.

393 : 18 W. R. 81 P. C.) and has been applied since to cases arising out of alienations made by widow. It is enough for the alinee to show the existence of necessity at the time of such alienation. It is also equally settled law that even though there may not be legal necessity in fact, the alienee will be protected if he honestly did all that was possible and reasonable to satisfy himself that the required necessity existed. The illustration to S. 38, T. P. Act which now applies to Hindus leaves no doubt on the point. While the trial Court accepted the evidence of D. W. 4 the learned District Judge makes no reference to it at all. [His Lordship considered the evidence and continued].

[9] The learned District Judge also committed another error in assuming that there was no evidence to show that the widow was in arrears of rent at the time of executing Ex. A. On this point, there is not only the oral testimony of D. W. 1 who deposed that "arrears of rent for four years were paid and I got the pautis as well" but Ex. C, the rent receipt, also shows that the rent for four years was paid on 7th October 1937, *i. e.*, a few days after the execution of Ex. A. I am, therefore, convinced that there has not been a satisfactory discussion of the evidence on the record and the real fact in issue appears to have been obscured by the wrong application of well-established principles of law.

[10] As I have already stated above, a creditor is protected if he honestly did all that was necessary for him to do in the circumstances of the case to satisfy himself with regard to the existence of necessity. Apparently the title deeds relating to the lands stood in the name of Ushamoni. Exhibit 5 D which is an extract from the Record of Rights shows that the disputed lands were recorded in the name of Ushamoni and were described as 'Patita'. The lands, it would appear, were apparently also not yielding any income and the only plot where light paddy was raised was plot No. 81 with an area of 48 decimals, all the other lands in Khatas 99 and 102 (Exs. D and D-1) laying fallow. The plaintiff did not adduce any evidence to show that Bholanath ever claimed to possess these lands in his own right; and the management of these lands by Bholanath even if it be assumed is not inconsistent with Ushamoni's title thereto remaining unaffected. Exhibit A clearly recites that Ushamoni claimed these lands to be her property and that she remained in possession of the same. In the absence of any collusion between Ushamoni and the alienee it is difficult to see why the latter should not have accepted this representation as being true. In this case, all the apparent circumstances point to an honest alienee accepting the representation made by Ushamoni as true and there is a singular absence of any circumstance which would have put him on an enquiry. It should also be remembered that even if the alienee had launched upon an enquiry as to whether Ushamoni had enough funds or not to make the purchases under Ex. B. Series, it would have been an impossible task—owing to the long lapse of time between her earlier purchase and the alienee's purchase. In such circumstances—when actual enquiry by an alienee becomes impossible—the recital in the document coupled with other circumstances should be sufficient evidence of the necessity for such alienation. Even if Bholanath were alive and had challenged the alienation by Ushamoni he would not succeed unless he could prove that the purchaser had notice of the real title; and S. 41, T. P. Act would be complete answer to his claim. Whether, in these circumstances, the plaintiff—as the reversioner to the ostensible owner—can claim a better right has not been considered by the Courts below though, as I have pointed out, Para. 7 of the written statement, makes a specific allegation. The cases reported in *Ananda Mohan* v. *Nilphamari Loan Office Ltd.*, 26 C. W. N. 436 : (A. I. R. (8) 1921 Cal. 549) and in *Chaplabala* v. *Sarat Kumari*, A. I. R. (28) 1941 Cal. 318 : (199 I. C. 755) are instances where the provisions of S. 41, T. P. Act, were invoked in favour of a purchaser in good faith without knowledge of the real state of affairs.

[11] The appellant also claims to have effected some improvements in the lands subsequent to her purchase. If this is proved to be a fact she would certainly be entitled to recover the cost of such improvements from the plaintiff, such cost being made a charge upon the property. This is however a question of fact which must be decided by the Court below.

[12] In view of all these considerations, I am convinced that there has not been a satisfactory disposal of the appeal and all the contentions raised by the appellant have not been adequately dealt with, the judgment under appeal is therefore, set aside and the case is remitted to the Court of the District Judge for disposal according to law in the light of the observations made above. The parties shall be at liberty to adduce further evidence, if any, but only on the limited question of improvements alleged to have been effected by the appellant and their probable cost. Each party shall bear his or her own costs.

[13] **Narasimham J.** — The principal question for decision in this appeal is whether the sale-deed (Ex. A) dated 18th August 1937 executed by Srimati Ushamoni Dei in favour of defendant 3 conveying by sale 3.30 acres of schedule

'Ga' lands for Rs. 173 would be binding against the plaintiff who is the sole surviving daughter of the said Ushamoni Dei. It is not disputed that the lands in question were purchased in the name of Ushanomi Dei by three Kabalas (Exs. B, B 1 and B-2) of the years 1910 and 1915. At that time, Ushamoni Dei's husband Bholanath Singh was working as a doctor somewhere in the Central Provinces. The case as put forward by the plaintiff (which was believed by both the Courts) was that the purchase was made by Bholanath Singh benami in the name of his wife Ushamoni Dei and that consequently on the death of Bholanath Singh sometime in 1928 the property devolved on Ushamoni Dei as widow's estate with limited power of alienation for legal necessity. Both the Courts concurrently held that the consideration for the three sale-deeds (Exs. B, B-1 and B 2) was paid by Bholanath Singh himself. The lower appellate Court further rightly held that the doctrine of advancement has no application in India and that once it is proved that the purchase money was paid by the husband though the property was purchased in the name of his wife the property should be held to be the property of the husband in the absence of any other piece of evidence to show that the husband really intended that the property should be gifted to his wife so as to be her Stridhan. In this view, the lower appellate Court further examined the evidence on the question of legal necessity for the alienation (Ex. A) and held that there was really no legal necessity in fact and that further the purchaser (defendant 3) did not make any *bona fide* enquiry about any such legal necessity.

[14] Therefore there are two questions of fact on which the whole case rests:

(i) whether the disputed property was the Stridhan of Ushamoni Dei or else whether it was purchased by her husband Bholanath Singh benami in the name of his wife; and (ii) if it be held that the property really belonged to the husband having been purchased benami in the name of his wife, whether Ushamoni's sale of the property to defendant 3 was for legal necessity or else at any rate whether the purchaser (defendant 3) made proper and *bona fide* enquiry as to the existence of the necessity and did all that was reasonable to satisfy himself as to the existence of the necessity (Art. 182, Mulla's Hindu law, 10th Edn, pp. 188 and 189).

[15] In my opinion the lower appellate Court correctly understood the legal position involved in this appeal but its conclusions on questions of fact were not based on a full discussion of all the evidence adduced by the parties. It may be that the conclusions were justified. But the lower appellate Court as a final Court of facts should have fully discussed the oral and documentary evidence and given clear reasons in justification of its conclusions.

[16] I would therefore concur in the order of my learned brother remanding the appeal.

R.G.D. *Appeal remanded.*

A. I. R. (37) 1950 Orissa 146 [*C. N. 24.*]

FULL BENCH

RAY C. J. JAGANNADHA DAS AND NARASIMHAM JJ.

Brajakishor Pattanik and others — Petitioners v. *Indian Union—Opposite Party.*

Criminal Misc. Nos. 107, 113, 119, 120, 126, 127 and 128 of 1949, D/-14-9-1949, from orders of Government of Orissa.

(a) Criminal P. C. (1898), S. 491 — Petitioner absconding from jail.

Where the petitioner after making the application absconds from the jail the High Court cannot consider the petition on merits as it can only examine the legality of the order of detention as incidental to the jurisdiction vested in it under S. 491 to examine the legality of the custody. [Para 2]

Annotation : ('46-Com.) Criminal P. C., S. 491, N. 7.

(b) Criminal P. C. (1898), S. 491 — Successive application.

That subsequent to the dismissal of the prior petition the High Court has, in other cases, taken a different view in similar circumstances, is not a ground for reconsideration of the legality of the detention. [Para 4]

Annotation : ('46-Com.) Criminal P. C., S. 491, N. 11.

(c) Public Safety—Orissa Maintenance of Public Order Act (IV [4] of 1948), Ss. 2, 3 — Successive orders of detention.

The Government have the power to pass any number of successive orders against the same person as the occasion may require. But if it appears that the fresh order is nothing more in substance than an extension of the previous order that would amount to an evasion of the imperative provisions of S. 3. Hence an order of detention under S. 2 passed against a person who has been already in detention by virtue of a prior order and without any fresh material disclosed for passing of the fresh order is illegal. [Para 15]

B. Das, G. B. Mohanty, M. S. Rao and V. Pasayat — for Petitioners.

Advocate-General—for Opposite Party.

Jagannadha Das J. — *Cri. Misc. No. 107 of 1949*: The petitioner in this case has applied to this Court under S. 491, Criminal P. C., questioning the validity of an order of detention dated 20th April 1949, passed against him by the Government of Orissa, under S. 2, Orissa Maintenance of Public Order Act. The petition is dated 4th June 1949, and has been forwarded to this Court through the Superintendent of Cuttack Jail where he was under detention. It has been stated to us by the Advocate-General on behalf of the Government that this petitioner has since absconded and has gone underground.

When this petition came up for hearing before us on 17th and 18th of August, we intimated to the counsel appearing for the petitioner that we would not be prepared to consider the application unless the petitioner presented himself in Court and made himself available receiving the orders of the Court. The petition was adjourned for consideration to 22nd; but the petitioner has not turned up.

[2] The relief under S. 491, Criminal P. C., is one available to a person under alleged illegal custody. The Court on an application by such a person is called upon to examine the legality of his custody or detention and if satisfied that it is illegal, will direct him to be set at liberty. The Court cannot be called upon merely to examine the legality of an order of detention and set aside the order of detention on the ground of its illegality. This Court is not a Court of appeal or a Court of revision against the detaining authority and can only examine the legality of the order of detention as incidental to the jurisdiction vested in it under S. 491 to examine the legality of the custody. If the petitioner is not in custody and is not available, the Court cannot stultify itself by passing an order directing the petitioner to be set at liberty. This petition therefore cannot be considered on its merits and must be rejected.

[3] *Cri. Misc. No. 113/49* : It has been stated by the Advocate-General on behalf of the Government when this petition came up for hearing on 22nd instant, that the petitioner has since been released. The petition has accordingly become infructuous and is therefore dismissed.

[4] *Cri. Misc. Nos. 126 and 127 of 1949* : These two are petitions by Manmohan Misra and Nisamony Tripathy respectively complaining against the legality of the orders of detention passed against them by the Government of Orissa under S. 2, Orissa Maintenance of Public Order Act, 1948, in respect of the detention under the very same orders. The petitioner had previously filed two other petitions Cr. Misc. 52 and 53 of 1949. They were considered on their merits and disposed of by this Court by its order dated 28th April 1949 dismissing their applications. The present petitions are for reconsideration of the legality of the same detentions. We have gone through the petitions and we are satisfied that there are no fresh grounds on which the legality of the detention is challenged. All that the petitioners say is that subsequent to the disposal of the prior petitions, this Court has in other cases taken a different view in similar circumstances. This is certainly not a ground for reconsideration. The petitions are accordingly dismissed. We are not to be understood as deciding by implication that such a petition for review or reconsideration lies at all, in cases of this kind. The petitions are under S. 491, Criminal P. C. As pointed out by their Lordships of the Privy Council in *C. P. Matthen* v. *Dist. Magistrate Trivendrum*, A.I.R. (26) 1939. P. C. 213 : (I. L. R. (1939) Mad. 744), the power to issue a prerogative writ of *habeas corpus*, in matters covered by S. 491, Criminal P. C., has been taken away. It is therefore doubtful whether the common law rule that successive applications for a writ of *habeas corpus* can be maintained before different Judges of the High Court on the same grounds, applies to proceedings under S. 491, Criminal P. C.

[5] *Criminal Misc. Nos. 119/49, 120/49, and 128/49.* These three petitions raise the common question of whether an order of detention under S. 2, Orissa Maintenance of Public Order Act, passed against a person who has been already in detention by virtue of a prior order and without any fresh material disclosed for passing of the fresh order, is legal.

[6] In Cri. Misc. No. 119 of 1949, the first order was passed on 28th October 1948, and was due to expire on 28th April 1949. The fresh order of detention was passed on 28th April 1949, while the petitioner was still in jail by virtue of the previous order and appears actually to have been served on him after the expiry of the first order.

[7] In this case the grounds of the present detention furnished to the petitioner set out a number of details, which it is not disputed, are the very grounds for the prior order of detention and there is the further addition as follows:

> "There is every reason to believe that after your release you will go underground and resort to sabotage. With a view to preventing you from acting in the manner above mentioned and from indulging in subversive activities, it was considered necessary that you should be detained."

[8] In Cri. Misc. No. 120 of 1949, the petitioner appears to have been under detention by a prior order which expired on 17th March 1949, and thereafter, he was continued to be kept in detention and the High Court on an application in Cri. Misc. 26 of 1949, made by the petitioner in respect of such continuance of custody, directed his release on 14th April 1949, on the ground that the continued detention was not supported by the Government by production of any fresh order of detention after 17th March 1949. Thereupon the Government passed a fresh order of detention on 23rd April 1949, the legality of which is the subject-matter of this petition.

[9] In this application, the grounds of detention furnished to the petitioner are set out as follows:

> "You are under detention for your communistic activities for a period of six months. You are a desperate

character and there is every reason to believe that after your release you will go under-ground in order to resort to sabotage and other forms of lawlessness. You have not changed your creed which contemplates chaos and confusion in the country by violent means and by commission of wide-spread sabotage of vulnerable points and dislocatian of essential public services. That your being at large constitutes an imminent danger to peace and maintenance of public order. It was therefore considered necessary that with a view to preventing you from acting in the manner mentioned above which is prejudicial to public safety and maintenance of public order, you should be detained."

[10] In Cri. Misc. No. 128 of 1949, the petitioner was detained by a prior order of detention dated 2nd September 1948, which was to expire on 2nd March 1949. The present order of detention against the petitioner was passed on 25th February 1949, while he was still under detention, to take effect from 2nd March 1949.

[11] In this case, the grounds of detention furnished to the petitioner for the present detention are set out as follows:

> "That you are detained for your communistic activities for a period of six months and there is every reason to believe that after your release you will go underground and resort to sabotage and other forms of lawlessness. That you have not changed your political creed which contemplates the creation of chaos and confusion in the country by violent means and by commission of wide-spread disturbances, sabotage of vulnerable points and dislocation of essential public services. That your being at large constitutes an imminent danger to public peace and maintenance of public order. It was therefore considered necessary that with a view to preventing you acting in the manner mentioned above which is prejudicial to the public safety and maintenance of public order, you should be detained."

[12] It would appear therefore that in all these three cases, the fresh order of detention was *prima facie* for the same reasons as the previous order of detention and accordingly as stated at the commencement of this judgment, the question arises as to the legality of such orders.

[13] This question was considered by me at length in my judgment in Cri. Misc. Cases Nos. 61, 70, 71, 73, 74, 75, 82, 89, 98, 99 and 102 of '49 dated 8th June 1949. When the present applications came up for disposal originally in the vacation, it was represented by the learned Advocate-General on behalf of the Government that he desires the correctness of that judgment to be reconsidered. These applications have accordingly been directed to be posted before a Special Bench and have now been re-heard on the question of law involved.

[14] After hearing the matter fully re-argued, I can see no reason to change the view that I have previously expressed. The main argument that has been advonced by the Advocate-General on behalf of the Government is that my judgment proceeded on the view that the Act is to be interpreted against the Government and in favour of the liberty of the subject, unless the powers of the Government can be supported by express terms of the Act. He urges that the correct approach is to see whether there is anything in the Act which cuts down the powers of the Government and that a construction which advances the purpose of the Act as appears from the preamble thereof, namely, "to provide for the preventive detention in connection with the public safety and maintenance of public order" is to be adopted. He therefore argues that the provision in S. 3, that an order is to remain in force for a period not exceeding six months is to be treated as a subsidiary provision and should not be construed as cutting down the power under S. 2. He has cited Craies on Statute Law, pp. 454, 455 and 456 in support of the view that the supposed distinction between the strict and liberal construction of the penal Statute has been, in modern times, almost discarded. In my judgment, however, I have made it clear that the determination of the question of law involved, is to be based "as far as possible on the wording of the Statute and not on mere extraneous general considerations." Even in the view of the approach suggested by the learned Advocate-General, the question remains whether the Government have under the Statutes, powers to pass fresh orders of detention which in effect and in substance amount to mere extension of the period of the prior order of detention. If the Government have no power to extend the period of detention, it cannot be disputed that an order which is in form a fresh order, but in substance is an extension, would amount to abuse of powers vested in the Government and would on that ground be invalid. It is from this point of view that the question has been elaborately considered in my previous judgment and it is unnecessary that the same should be repeated here. I adopt for the purpose of this judgment generally what I have stated in my previous judgment. It has been pointed out in course of the argument that S. 14, Orissa General Clauses Act, 1937, supports the power to issue fresh orders of the kind now in question. That section says as follows:

> "Where an Orissa Act confers a power or imposes a duty, then the power may be exercised and the duty shall be performed from time to time as occasion requires."

It may be noticed that this section is in terms the same as S. 14, Central General Clauses Act, 1897, as it stood prior to its amendment in 1919. The only difference that the amendment makes is the addition of the phrase "unless a different intention appears."

[15] It is argued that the fresh orders of detention under question are a fresh exercise of the power vested in the Government under S. 2.

Orissa Maintenance of Public Order Act, which is authorised by S. 14, Orissa General Clauses Act. It is said therefore that they cannot be said to be a contravention of S. 3, Orissa Maintenance of Public Order Act which merely provides that any particular order cannot be in force for a period exceeding six months. There can be no doubt that the Government have the power to pass any number of successive orders against the same person as occasion may require, but it must be shown that each fresh order is required by the then occasion. If it is not shown that the occasion—which I suppose means the totality of the objective circumstances at the time —requires it and if it appears that the fresh order is nothing more in substance than an extension of the previous order, that would amount to an evasion of the imperative provision of S. 3 which in categorical terms says that an order should remain in force for a period "not exceeding six months."

[16] Section 14, Orissa General Clauses Act does not in any way support the exercise of a power which on the facts of a particular case, the Court is able to pronounce as being an abuse of power. It may be noticed that even when the S. 14, Central General Clauses Act, 1897, stood before its amendment in 1919, a large number of orders under S. 144 were pronounced to be invalid as amounting to abuse of power. I have referred to those cases in my previous judgment.

[17] The question therefore in each one of these cases is whether the fresh orders are in effect orders of extension and amount to abuse of powers. The learned Advocate-General claimed that the affidavits filed in these applications on behalf of the Government by the Additional Home Secretary show that the orders do not amount to abuse of powers. It was pointed out to him, however, that a perusal of those affidavits which are all in the same routine form, only discloses that the Hon'ble Minister in Charge

> "after due consideration of the reports and information placed before him was fully satisfied that the petitioner acted in a manner prejudicial to the public safety and maintenance of public order."

It was pointed out to the Advocate-General that this could obviously refer only to reports and information prior to the earlier detention in respect of those detenues who were actually in detention by the date of the fresh orders, because they refer to the petitioner *having acted* in a prejudicial manner and there is no indication and it is unlikely that they have acted so while in jail custody.

[18] So far as Misc. Appln. No. 130 of 1949 is concerned, the fresh order was one passed after the prior release and same consideration may not apply. But since the Additional Home Secretary's affidavit in this case also is in the same routine form, we were not satisfied that any fresh consideration was given to the matter and we could not take it as establishing anything different from what could be said to have been the case in the other two petitions. We were, however, prepared to consider in all the three cases that the Government would have been fully justified in passing fresh orders of detention, though on the same previous grounds if it appeared that there was fresh material giving rise to fresh occasion for passing the fresh order of detention. We accordingly adjourned the hearing of the applications from 18th to 22nd to enable the Advocate-General to file fresh affidavits to elucidate the exact position in respect of these applicants. On the 22nd fresh affidavits, sworn by the Additional Home Secretary, were filed which state as follows:

> "From the confidential reports and records in regard to the activities of the detenue which were placed by me before the Hon'ble Minister in Charge, he was fully satisfied that the petitioner will go underground after his release and will resort to sabotage and will engage himself in various other subversive and dangerous activities which will be prejudicial to the public safety and maintenance of public order."

[19] We have considered these affidavits fully and carefully, but they are still very vague and we are unable to accept the same as showing that there was any fresh material to give rise to a fresh occasion for passing the order even though on the same previous grounds. The allegations in these new affidavits are too vague to satisfy even that limited test which has been suggested above as the one we were prepared to accept. The learned Advocate-General again applied for further time to elucidate the matter by more detailed affidavits. The hearing of these matters having been specifically adjourned for filing of these fresh affidavits, we could not possibly accede to this dilatory request of the Advocate-General for fresh time. In the circumstances since in our view the fresh orders that are in issue in these three cases amount in law to abuse of the powers vested in them under the Act, though they may have been in fact perfectly honest and bona fide. We have no option, therefore, but to hold that the orders are illegal. The detention of these petitioners is accordingly invalid and they have been directed to be set at liberty forthwith, by our order dated 22nd August 1949 wherein we intimated that the reasons for the same will be pronounced later.

Narasimham J.—I agree.

Ray C. J.—I agree.

D.H. *Order accordingly.*

A. I. R. (37) 1950 Orissa 150 [*C. N. 25.*]

RAY C. J. AND JAGANNADHADAS J.

Mitru Thapa and others — Defendants Appellants v. *Mst. Gurubari Goudani and others, Plaintiffs and another, Defendant — Respondents.*

A. F. A. D. No. 21 of 1946, D/ 17-1-1950, from decision of Sub-J., Sambalpur, D/-9-11-1945.

(a) Transfer of Property Act (1882), S. 91—Hindu reversioner — Interest in property mortgaged — Right to redeem—*(Obiter)*—Per *Ray C. J.*—Hindu law—Reversioners.

Obiter.—Per *Ray C. J.*—The words "any interest in the property mortgaged or the right to redeem the same" would convey the widest possible connotation so as to include the particular kind of "interest', that a reversioner of Hindu law has in the last male owner's property during the subsistence of limited owner's tenures. A reversioner is neither a volunteer nor a stranger when he, in order to protect the estate from the ravages of a debt binding thereon, and *ex post facto* on him, or on those whom he may represent, or by whom he may be represented, within Hindu law principles governing and applying to the status of reversioners *qua* presumptive heirs to the estate discharges the security. [Paras 10 and 16]

Annotation—('45-Com.) T. P. Act S. 91, N. 16, Pt. 4.

(b) Transfer of Property Act (1882), S 91—Hindu reversioner—Right to redeem—what must be proved—*(Obiter)*—Per *Ray C. J.* — Hindu Law — Reversioners.

Obiter.—Per *Ray C. J.*—It is always desirable that when a reversioner wants to make out a case of an interest in the equity of redemption so as to be entitled to redeem, he must plead and prove that it was necessary for the preservation and protection of the property. [Para 18]

Annotation—('45-Com.) T. P. Act, S. 91 N. 16, Pt. 8.

(c) Transfer of Property Act (1882), Ss. 91 and 92—Hindu reversioner—Right to subrogate—Possessory lien—Hindu law—Reversioners.

At the request of her widowed mother who was unable to redeem a mortgage executed by her the plaintiff, her daughter, paid up the mortgage money in the presence of the mother and *Punchas* of the village and the mortgagee, on receiving the money in full discharge of the mortgage, recorded an endorsement to that effect and made over the deed to the plaintiff. The plaintiff was given possession of the property which had been mortgaged but was later dispossessed forcibly by the defendants who were the sons of the plaintiff's deceased sister. An unregistered deed of gift of this property was executed by the widow in favour of the defendants who, however, were never given possession under it. The plaintiff being dispossessed by the defendants brought a suit for recovery of possession on declaration that the defendants were mere trespassers :

Held that as a reversioner, pure and simple, the plaintiff could not claim having subrogated to the rights of the mortgagee; but that she was entitled to a possessory lien in respect of the property, both as a matter of law and as a matter of equity, on the strength of which she could recover back her lost possession from the defendants who were mere trespassers, claiming as they did under a void gift. [Paras 3, 20 and 27]

Annotation.—('45-Com.) T. P. Act, S. 91, N. 16.

B. N. Das and G. B. Mohanti—for Appellants.

P. C. Chatterji—for Respondents.

Ray C. J. — This is an appeal by defendants 1, 2 and 3 in a suit for recovery of possession on declaration that the said defendants are mere trespassers. The disputed lands amounting to 3.33 acres of arable lands described in sch. *kha* of the plaint belonged originally to one Bala Bagatia whose widow is defendant 4. He died sometime in 1931 leaving behind his widow (defendant 4), his three daughters (plaintiffs 1, 2 and 3) and his predeceased daughter's sons (defendants 1, 2 and 3). The disputed lands had been mortgaged with possession on 26th February 1924 by way of security for a loan of Rs. 190 to one Akula Sahu. In pursuance of the condition of mortgage, Akula was to enjoy the usufruct in lieu of the interest as they accrued. Akul continued to remain in possession as mortgagee till 2nd January 1943 when it was redeemed. Akul returned the mortgage bond with an endorsement of satisfaction of that debt. It has been the plaintiffs' case, which has been found to be true by the learned Court of Appeal below, that the loan was paid off by plaintiff 1 (Gurubari) at the request of defendant 4 (Tara Bagatiani) and possession was delivered to her. That she has been unlawfully dispossessed by defendants 1 to 3, who secured an invalid gift from defendant 4. Hence the suit for declaration that the gift was beyond the competence of defendant 4, void and inoperative as against the reversionary rights of the plaintiffs and, particularly, as against the right flowing to plaintiff 1 from her redeeming the mortgage at the request of defendant 4 and for recovery of possession from the said defendants. Besides, there is a claim for damages for such unlawful occupation resulting in deprivation of her crops raised by plaintiff 1 in the year 1943 and of possession in the years following, before the suit.

[2] The defendants' reply is that they (defendants 1 to 3) paid up the mortgagee and redeemed the mortgage by raising a loan. They did so as the defendant 4 promised to give them the lands by way of gift, they having been brought up from their infancy by her. That accordingly, defendant 4 gifted away the lands to them by an unregistered deed of gift and made over possession and that it was by trickery that the plaintiff 1 secured possession of the usufructuary mortgage deed and got certain endorsements forged on its reverse.

[3] For the purpose of Second Appeal, the following findings are incontrovertible and conclusive :

(i) That at the request of defendant 4, who was unable to redeem the mortgage, the plaintiff 1 paid up the mortgage money in the presence of defendant 4 and the *punchas* of the village and the mortgagee, on receiving the money in full discharge of the mortgage, recorded an endorsement to that effect and made over the deed to the plaintiff 1;

(ii) That the plaintiff 1 was given possession of the lands but was later dispossessed forcibly by defendants 1 to 3;

(iii) That the unregistered deed of gift executed by defendant 4 in favour of defendants 1 to 3 was void and inoperative, and the donees under the deed were never given possession under it which they secured by force.

[4] On these findings, the learned lower appellate Court, reversing the judgment of the learned Munsif, decreed that the plaintiffs should be restored to possession and should recover the sum of Rs. 90 being the value of the crops forcibly removed by defendants 1 to 3. Hence the Second Appeal.

[5] The only point that has been urged before us by the defendants-appellants is that the plaintiff cannot subrogate herself to the position of a mortgagee on payment of the mortgage money, as she is a mere volunteer, and stranger, having no present interest in the disputed properties.

[6] Reliance is placed on Ss. 91 and 92, T. P. Act. Section 91 enumerates "persons who may redeem or sue for redemption". The material portion of the section is quoted for facility of reference:

> "91. Besides the mortgagor, any of the following persons may redeem . . . . . the mortgage property, namely:
>
> (a) any person other than the mortgagee of the interest sought to be redeemed who has any interest in, ... the property mortgaged or in . . . . . right to redeem the same . . . . ."

Section 92 defines the right acquired by the redeemer. It reads:

> "92. Any of the persons referred to in S. 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.
>
> "The right conferred by this section is called the right of subrogation, and a person acquiring the same is said to be subrogated to rights of the mortgagee whose mortgage he redeems.
>
> "A person who advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated"
>
> "Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full."

Considering both the sections together, it is urged, that only two alternatives are open to plaintiff 1, namely, either she should possess an interest in the property mortgaged or the right to redeem the same; or she should be one who has advanced to a mortgagor money with which the mortgage has been redeemed and in whose favour the mortgagor has, by a registered document, agreed that he should be subrogated to the rights of the mortgagee, whose mortgage has been redeemed; and that as the plaintiff owns no interest (present and subsisting) in the property mortgaged or the right to redeem the same, and as an advancer of money no agreement conceding the right of subrogation to her has been registered, she cannot be subrogated to the rights of the mortgagee and thus cannot recover possession. It is said no third alternative is open to the plaintiff.

[7] The contention that she is entitled to the right of subrogation on the strength of advancement of money to the mortgagor cannot be considered with any amount of seriousness as there is no registered agreement by the mortgagor.

[8] It has to be examined, however in some detail, whether she owns any interest within the meaning of S. 91 (a). At one time, there was some conflict of opinion over the question involved. Long since, it has been the trend of authorities in almost all the High Courts that a reversioner has no interest, either in the mortgage property or the equity of redemption. The reversioner has a mere *spes successionis* in the estate left by last male owner, it being always uncertain if a particular reversioner would survive the limited owner on which contingency his chance of succession to the property solely depends.

[9] This bare chance is not capable of assignment or disposition by a reversioner. It cannot be reduced to possession during the subsistence of the limited tenure.

[10] I shall presently deal with the various decisions bearing on the point. Before doing so, I propose to give my own commentary on the interpretation of the section. Dissociated from the historical context, the words "any interest in the property mortgaged or the right to redeem the same" would convey the widest possible connotation so as to include the particular kind of "interest" (to use the word for the sake of convenience) that a reversioner of Hindu law has in the last male owner's property during the subsistence of limited owner's tenures. It is well-known that a Hindu reversioner, provided he is the next presumptive heir at the time, can maintain a suit for declaration of his status, for avoidance, with reference to its futurity, of any disposition of the corpus by the for-the-time-being limited owner affecting his prospective

right which, at that moment, is nothing but a mere chance (*spes successionis*). This has been permitted not only as a matter of policy founded upon likely disappearance of available evidence relating to the circumstances that would invalidate the transaction, but also on the theory of representation. The reversioner in such a suit, represents the entire line of reversioners, and his action is one which is aimed at protecting the remainder of the estate after exhaustion of the limited interest of the life tenure-holder. As it is representative in character, even a more remote reversioner can maintain the action, on proof that the then nearer reversioners had by their conduct disqualified themselves from suing. If there is any reason behind it, it is this that all the reversioners that intervene between the last male holder and the next full owner of the inheritance and the latter, all taken collectively, own the estate of a remainderman. The interest owned by this collective body is not subject to chances but constitute a certain and vested interest in the property. The full ownership of the property which always, and, without exception, includes right of disposition both *inter vivos* and testamentary and which is transmissible to the owner's natural heirs is certainly not in the life estate-holder, whether a widow or a daughter or the like. The residuum of interest which together with the life tenure would make up the complete ownership, constitutes an interest which subsists, side by side, with the life tenure at they two together constitute the estate. Conceding hypothetically that all the presumtive heirs living at any particular moment may not survive the limited owner, there must be some others who must have come into existence by then, or in the long run, the estate may escheat to the State. The State, therefore, in such a contingency, cannot be excluded from the category of the reversioners. In short, the status of the entire line of reversioners down up the State, taken collectively, is hardly different from that of a remainderman a term so familiar in English law. Apt illustration of remainderman's right to redeem is furnished by the decision of the Chancery Division of the High Court of England in the case of *Aynsly* v. *Reed*, (1754) 21 E. R. 264. The facts of that case are.

[11] One John Aynsly, the plaintff's father, was seised of estates at South Middleton, subject to a mortgage, in fee, to the defendant Francis for securing £200, died having devised by his will the said estate called Highlands to the defendant Reed, his heirs and assigns subject to the payment of debts, legacies to the uses following, to the plaintiff for life, remainder to trustees to preserve, but nevertheless, to permit the plaintiff to receive the rents and profits after his, the testator's debts and legacies were paid, and not sooner, remainder to the plaintiff's sons and daughters, by any other wife than the present in strict settlement, and in default of such issue, then to his two daughters, the defendants, Mary Davidson and Ann Tweddel, during their lives as tenants in common, remainder to the defendant Francis Tweddel for life, with remainder to his first and other sons, in tail male, remainder to his grandson, the defendant, George Tweddel, in like manner, with remainder to his first and other sons in tail male, with the ultimate remainder to the testator's own heirs. The plaintiff proved the will and the defendant Reed entered on the estates The bill was for an account of the testator's personal estate; for an account of what was due on the defendant Francis Deleval's mortgage; and for a direction to pay up the said mortgage etc. By the decree an account was directed of what was due on Deleval's mortgage and upon the plaintiff's or upon the defendant's, Mary Davidson, Ann-Tweddel, and George Tweddel, paying what should be found due, the mortgage was to convey, &c., and in default of the plaintiff's or the said defendants redeeming, the bill as to the defendants, the mortgagee, was to be dismissed, and the said defendants were to stand foreclosed; but in case, the plaintiff or the said defendants, or any of them, should redeem, *the equity of redemption was to be in the person so redeeming*.

[12] It cannot be said that there was not some amount of uncertainty in the bequest falling to the lot of the defendants above named; but yet it being a remainderman's estate was a subsisting interest in the equity of redemption. Such an interest would clothe the holder thereof with a status enabling him to exercise a right of redemption as against the mortgagee for the purpose of saving the estate from extinction. Such an extinction would defeat remainderman's prospective inheritance. On exercise of right of redemption, the redeemer would in equity become the owner of redemption.

[13] The decision in the case of *Mahadeo* v. *Babya*, A.I.R. (16) 1929 Nag. 27:(112 I.C. 248)) bears a close analogy to *Aynsly's case* ((1754) 21 E.R. 264) just quoted. The testator bequeathed his property to his widow for life, and on her death to A and his heirs. A survived the testator. It was held that A's interest is a vested interest and A's son or heir though not entitled to possession during the widow's life time, has an interest within the meaning of S. 91 of the Transfer of Property Act that entitled him to redeem. Though the decision is that of a Single Judge of the Chief Court of Nagpur, I find it is based upon very closely reasoned arguments derived from

authorities mentioned in Col. (ii) p. 28 of the report. The cases relied upon are *Bilaso* v. *Munni Lal*, 33 ALL. 558: (11 I. C. 516) and *Bhagabati* v. *Kali Charan*, 38 I. A. 54: (38 Cal. 468 P. C.). In the latter case, on the death of the testator's mother and wife, the property was to pass to his sister's sons. It was held that the sister's sons who were living at the testator's death had a vested interest though their possession and enjoyment of the property was postponed till the deaths of the testator's mother and widow. In *Mahadeo's case*, (A. I. R. (16) 1929 Nag. 27: 112 I. C. 248), the learned Judge has made a distinction between an individual reversioner's interest and that on one whose testamentary succession was certain till after deaths of certain intervening life tenants though not reducible to immediate possession. It is uncertainty implicit in an individual reversioner's chance of succession that makes it distinguishable from that of a remainderman's certainty to succession and that of his heirs.

[14] I should like to note that I am not oblivious of the fact that Hindu widow's estate is not identically the same as that of a life estate. The difference between the two consists in a Hindu widow having the absolute power of alienation in certain circumstances defined in Hindu law. This is because she represents the whole estate for the purpose of its preservation. That does not mean that the whole estate vests in her.

[15] The legislative intent ought to be clear from the language employed to indicate the condition of eligibility for the right to redeem. The Legislature did not feel satisfied by using the words "any interest in, or charge upon the property mortgaged", but went further to say "or in or upon the right to redeem the same." The reversioner, as a presumptive heir, may not have an interest *in praesenti* in the property mortgaged, but has, by all means, an interest in the equity of redemption, in the sense that, in case the eqity of redemption is foreclosed, he too, along with the life estate owner and the entire line of reversioners one or the other of whom must be surviving when the succession traceable to the last male owner reopens, should stand foreclosed. It may be noted that the 'interest' contemplated is not one which is immediately reducible to possession.

[16] Looked at from another angle or vision, in case of a mortgage binding on the estate, all persons interested in it, in a manner and to the extent so as to be debarred from right to redeem the mortgage property, in a suit, either for foreclosure or for sale, are to be deemed as joint debtors. In the suit, they may or may not be impleaded as parties defendants in their individual capacities. The decrees for foreclosure or sale of mortgage property obtained by a mortgagee of the last male (full) owner as against a limited owner are, in the absence of any fraud or collusion, binding on them as much as if the decrees were obtained against them *eo nomine*. The position of a joint debtor, in relation to his right of subrogation to the security of the common creditor, accruing from his liquidation of his debt is well-settled in English and American law, particularly in those States of America, in which the English Common Law Doctrine has not been abrogated. In these countries one of the joint tenants or tenants-in-common may, on redemption, enter upon possession of the mortgage property for the purpose of reimbursing himself subject to account with his co-tenant, being entitled to possession and receipt of the whole of the rents. In this country, however, he cannot do so, except in the case of an usufructuary mortgage, or, it may be, an English mortgage. In *Walker* v. *Eaton*, (50 Am. Decisions, 637), a joint debtor's right to be subrogated to the security of the common creditor has been affirmed by Shipley C. J. The learned Judge says:

> "If one who may be obliged to redeem the share of a co-tenant to relieve his own share from incumbrance, could have no right to retain the share of such co tenant as security and to obtain a reimbursement of the amount equitably chargeable to it, he might utterly fail to obtain compensation. And yet his co-tenant, without making any payment, might be entitled to the full possession and benefit of his share of the land, discharged from the incumbrance. The law cannot justly be charged with such results as produced by conformity to its provisions. The principle is well established and is of frequent application in the redemption of mortgages, that one having an interest in an estate under encumbrance, may redeem the whole estate when necessary to redeem his own share or to relieve his own title from incumbrance even against the pleasure of a co-tenant or other owner, and may be regarded as the assignee of the incumbrance upon the other shares or interest."

In my judgment, therefore, a reversioner is neither a volunteer nor a stranger when he, in order to protect the estate from the ravages of a debt binding thereon, and *ex post facto* on him, or on those whom he may represent, or by whom he may be represented, within Hindu law principles governing and applying to the status of reversioners, *qua* presumptive heirs, to the estate discharges the security.

[17] I am not disposed, however, to decide the instant case on this finding of mine in view of the weight of authorities against it, particularly, as the present case can be dealt with fairly and squarely as between the parties, treated from a standpoint to which I shall come presently.

[18] I shall now address myself to the decisions in which the view contrary to the one

already expressed by me has been taken. The first case, that I shall pick up, is the case of *Chhotey Singh* v. *Surat Singh*, 5 Luck. 691: (A. I. R. (17) 1930 Oudh. 294). In this case, relying on the dictum of the Privy Council in the case of *Amrit Narayan Singh* v. *Gaya Singh*, 45 I. A. 35: (A. I. R. (4) 1917 P. C. 95) it was held that in the face of very definite and clean pronouncement of their Lordships of the Judicial Committee, in *Amrit Narayan Singh* v. *Gaya Singh*, (45 I. A. 35: A. I. R. (4) 1917 P. C. 95) it can hardly be possible to say, now, that the position of a Hindu reversioner is in any way better than that of a mere possibility. They said so while considering the correctness of the decision of a Single Judge in the case of *Sheoratan Singh* v. *Hubba Singh*, (Select case No. 271) in which Mr. Spankie, A. J. C., formulated the question arising for determination in the case in the following terms:

> "The question I have to decide seems therefore to be whether the plaintiffs, as presumptively entitled to the possession of the lands on the death of the widow, if they survive her, have only a spes successionis or have an interest in the lands and in the right to redeem them."

And answered the same by holding that

> " the expectancy of succession which the person has who is presumptively entitled to possession on the death of a Hindu widow, if he survive her, seems to be a possibility coupled with an interest."

Their Lordships of the Judicial Committee, in *Amrit Narayan Singh's case* (45 I. A 35: A. I. R. (4) 1917 P. C. 95) made the following observations which have been quoted by the learned Judges who decided *Chhotey Singh's* case, (5 Luck. 691: A. I. R. (17) 1930 Oudh. 294.)

> "A Hindu reversioner has no right or interest in praesenti in the property which the female holder holds in her life until it vests in him on her death, should he survive her, he has nothing to assign or relinquish, or even to transmit to his heirs. His right becomes concrete only on her demise; until then it is a mere spes successionis."

This observation, however, understood in its fullest logical extent, did not enable the learned Judges to rule out the view that I have set down above. They said:

> "It is not necessary for us in the present case to decide whether a reversioner should or should not be allowed to redeem the property, where he succeeds in making out a case on the ground of the *redemption being necessary for the preservation or protection of the property.*"

It is always desirable that when a reversioner wants to make out a case of an interest in the equity of redemption so as to be entitled to redeem, he must plead and prove that it was necessary for the preservation and protection of the property. In the present case, unless if it can be gleaned from the circumstances established, such case has not been pleaded. The learned counsel for the plaintiffs has not specifically urged any arguments before us on this ground.

[19] In the case of *Rama Chander* v. *Kallu*, 30 ALL. 497: (5 A. L. J. 631), it has been pronounced that a reversioner is not a person interested in the property in possession of Hindu widow. His interest is contingent upon his surviving mortgagor's widow. As a general rule it is said, 'interest' means 'present interest' and not a mere contingent right. This was a case in which the reversioner wanted not only to redeem but also to recover possession. I should leave some notes with regard to this decision. The question as to whether the reversionery heirs of a deceased husband of a Hindu widow had an interest in the right to redeem the mortgage property was not at all taken into consideration. Besides, the question was considered in the background of the special features present in the frame of the suit, as will appear quite obviously from the passage:

> "It seems to us that possibly this suit was instituted by the plaintiffs with a view to obtain an equitable charge of lien upon the property which would enable them in future proceedings to sell the property or in some way deprive the widow of her life estate."

In such a case, if I can say so with great respect, the conclusion reached by their Lordships was perfectly correct. The decision of the Madras High Court. in the case of *Govinda* v. *Lokanath*, 40 M. L. J. 114: (A.I.R. (8) 1921 Mad. 51), too established the proposition laid down therin that the equitable principle of subrogation could not be extended to a case of payment made under a belief in the future acquisition of an interest in property. In the case of *Narayana* v. *Pechiammal*, 36 Mad. 426: (15 I. C. 206), Sundra Ayyar J., who delivered the leading judgment, held:

> "I am on the whole inclined to hold that a reversioner cannot voluntarily claim to redeem a mortgage made by the last male holder or institute a suit for that purpose."

[20] But at the same time, the learned Judge observed:

> "But does it necessarily follow that when a suit is instituted by a mortgagee for sale, the reversioner has not got a sufficient interest in the property to entitle him to discharge the mortgage to prevent the loss of the property to which he would be entitled to succeed on the death of the widow? I do not think I am bound to hold that his rights stand on the same footing when he claims of his own accord to redeem and when he tries to save the property for "the estate" upon the mortgagee attempting to sell it. The right of a person interested in the payment of money while another is bound by law to pay and who therefore pays it, to be reimbursed by the other is recognised in S. 69, Contract Act. There is no reason for holding that only those who have an interest in a mortgaged property within the meaning of Ss. 85 and 91, T. P. Act can be held *to be interested in the payment of money* due on a mortgage created by the last male owner."

With the latter observations, I find myself to be in jub (*sic*) accord. The learned Judge has made a distinction between a reversioner volunteering to pay in order to redeem and one who proceeds to do so whether on request or not to save the property for 'the estate.' No doubt, the learned Judge is emphatic to say :

> "The principle contended for by the appellant that the mere payment of a mortgage debt by a stranger would entitle him to the mortgagee's rights by subrogation has always been negatived in India. See *Rama Tuhul Singh* v. *Biseswar Lall*, 2 I. A. 131 : (15 Beng. L. R. 208 P. C.). It is impossible to argue that it is open to any meddler to claim a lien by discharging a mortgage with which he has no concern. I must therefore overrule the contention that the plaintiff can claim to be subrogated to the rights either of the daughters or of Muthu Goundan by the mere fact that he discharged the mortgage of the latter."

There are various other cases cited at the bar and found in the text books in which a reversioner's claim of a right to redeem has been negatived. I do not think it necessary to consider each of these cases individually. It is sufficient to say that the fact of the question that I presented above and that has been noticed in some of the cases already specifically dealt with, and particularly in the case of *Narayanna* v. *Pechhiammal*, (36 Mad. 426 : 15 I. C. 206), has not been approached in any one of them. Not desiring to be in disagreement with my learned brother, I would hold that as a reversioner, pure and simple, plaintiff 1 cannot claim having subrogated to the rights of the mortgagee. My personal view of the matter, however, is as I have set out above.

[21] Despite the conclusion expressed above, the plaintiffs cannot be non-suited. Their suit for declaration that the gift made by defendant 4 in favour of defendants 1 to 3 is void must succeed. Defendant 4 is not competent to make a gift of the property except to enure during her life time. Besides, the unregistered deed of gift propounded by the defendants in this case cannot convey to them any title. The plaintiffs therefore will have a declaration that defendants 1 to 3 are trespassers and their act of dispossession of plaintiff 1, from the disputed property is unlawful.

[22] The question that next arises is, what reliefs plaintiff 1 would be entitled in return for her having discharged the mortgage debt ? The endorsement on the back of the mortgage bond makes it clear that she was invited by the widow (defendant 4) to make the payment, and to hold the property in possession in lieu thereof till she was paid up the sum of Rs. 190 paid by her. This endorsement, however, cannot be held to amount to vesting her with the right of subrogation within the meaning of S. 92, T. P. Act. The third paragraph of the section requires that a person who, independently of having any interest, or charge in, or upon the mortgage property of the right to redeem the same, advances money to redeem the mortgage shall be subrogated to to the rights of the mortgagee if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated. The endorsement, referred to not having been registered, it cannot serve the purpose of effecting subrogation. But, in my view, a third alternative is open to the plaintiff 1. She is entitled to an equitable charge on the property and in that capacity to retain possession till she is paid up by defendant 4. As against this, a Bench decision of the Madras High Court in the case of *Muthuswami Chettiar* v. *Ramaswami Samiyar*, A. I. R. (29) 1942 Mad. 751 : (204 I. C. 441) has been cited to us. In that case, it was held :

> "A transferee of immovable property is not entitled to a charge on it in respect of the amount disbursed by him in paying off a mortgage on the property when he is not entitled to be subrogated to the rights of the mortgagee by reason of the fact that there does not exist a registered agreement of the nature contemplated in the third paragraph of S. 92."

Leach C. J. observed as follows :

> "Other cases have been quoted to the Court, in the course of the arguments and it would appear that the expression 'Charge' and 'subrogation' have been used much in the same sense. We are, however, prepared to accept the proposition that a person who is entitled to be subrogated to the rights of a mortgagee is in law in a somewhat different position to a person who is merely entitled to a charge under an order of the Court. But this does not mean that the appellant is entitled to ask the Court to give him a charge. Since the amendment of the Act in 1929 the Court cannot hold a transferee who has discharged an encumbrance on the property to be subrogated to the rights of the mortgagee unless an agreement in writing has been entered into between him and the transferee and the document has been registered. That being the position, is the Court to defeat the very object of the amendment by giving equitable relief in the form of a charge ? Equity follows the law and in my opinion that maxim applies in full force here. To accept the argument which has been presented to the Court would mean setting the section at naught, and this cannot be done. This is sufficient to dispose of the appeal, but there is a further factor. Equity will not grant relief to a person who comes into Court with unclean hands. You are aware that in some cases—the Court has granted equitable relief to a person whose hands have not been altogether clean, but this does not mean that the Court is going to grant relief to a person who has been a prime mover in the committal of fraud on another's creditors. The appellant in this case is the maternal uncle of respondent 3 and took a prominent part in bringing this transaction about."

This case, however, is distinguishable on its own facts. The transfer under which the transferee was claiming was held by all the Courts to constitute a fraud on the creditors. In the facts of the present case, however, the plaintiffs are entitled to an equitable charge on the property. The position of a stranger acquiring a lien on the principles of estoppel has been summarised at page 125 of Ashburner on Mortgages.

> "Expenditure by a stranger may give him a lien on the principle of estoppel.
>
> In order that this principle may apply, the stranger must make the expenditure in the erroneous belief that he has a title to the property on which it is made, and, secondly, the person against whom the esstoppel is raised must know, (a) that the stranger acts in the belief that he has a title, and (b) that the title on the faith of which he is acting is a bad one."

In the facts of the present case, the circumstances favouring the application of the principle of estoppel are stronger. That plaintiff 1 had a belief that she had title to the property would appear from the fact that Bala Bagatia and his mortgagee, while entering into transaction, thought it necessary that his daughters should be made parties—executants to the deed of mortgage. Accordingly, plaintiff 1 appears to be a signatory thereto. This must have led her to believe that she had an interest in the property mortgaged and for the matter of that in the equity of redemption. At the time she incurred expenditure to discharge the mortgage, she was prevailed upon by her mother to do so that she should retain possession of the property recovered from the hands of the mortgagee till she would be reimbursed. To an endorsement to that effect, her other sisters also attested. Oldfield and Hughes JJ. in the case of *Govinda* v. *Lokanath*, 40 M. L. J. 114 : (A. I. R. (8) 1921 Mad. 51), have explained the equitable principle that would govern cases like the present one. They premised :

> "This failing, appellants' claim has next to be considered as based on what they alleged to be the equitable principle, that, as they made their payment in good faith on the understanding that they were to obtain an interest in the property, which would have justified them, they are to be regarded as having been entitled to make them and to be subrogaged accordingly."

In dealing with this question, they expressed their approval to the proposition laid down in the cases of *Neesom* v. *Clarksom*, (1845) 4 Hare 97 : 62 R. R. 51 ; *Butler* v. *Rice*, (1910) 2 Ch. 277: (79 L. J. Ch. 652) and *Tangya Fala* v. *Trimbak Daga*, 40 Bom. 646 : (A. I. R. (3) 1916 Bom. 302). They said :

> "Thus in *Neesom* v. *Clarksom*, (1845) 4 Hare 97 : 62 R. R. 51, the payments were made by a transferee of property under a mistake as to the ownership of his transferor; but the fact that the former had obtained possession would go far towards supporting his *bona fide* belief in his title. In *Butler* v. *Rice*, (1910-2 Ch. 277 : 79 L. J. Ch. 652), the plaintiff was under the impression that the property, in respect of which he paid, actually belonged to Rice, not to his wife; and he had satisfied himself as to the possession of the title-deeds and obtained a guarantee from Rice's solicitor, before making his payment. In *Tangya Fala* v. *Trimback Daga*, (40 Bom. 646 : A. I. R. (3) 1916 Bom. 302), another case of this class, the mistake was regarding the actual ownership and possession had passed."

[23] In this connection, I have already quoted from the judgment of Sundra Ayyar J. in *Narayana* v. *Pechiammal*, 36 Mad. 426 : (15 I. C. 206) which fully supports the view that in the circumstances in which plaintiff 1, admittedly one of the next reversioners, has liquidated the dues under the previous mortgage executed by the last male owner would entitle her to an equitable charge or lien on the property. At any rate, the position is clear enough that defendants 1, 2 and 3, mere trespassers, should not be held justified in dispossessing the plaintiffs.

[24] My order, therefore, is that plaintiff 1 shall be allowed to recover possession and the amounts of damages ascertained by the Court of Appeal below in a fixed sum from defendants 1, 2 and 3. Her possession, however, should be subject to defeasance by defendant 4, on her being reimbursed the money that she paid to the mortgagee. During the time that she has been out of possession, she shall be entitled to recover mesne profits from defendants 1, 2 and 3 in an appropriate proceeding, failing which she shall be entitled to interest from defendant 4.

[25] Subject to this modification, the appeal fails and is dismissed with costs.

[26] **Jagannadha Das J.**—I agree with my Lord the Chief Justice that the plaintiffs are entitled to a declaration that defendants 1 to 3 are trespassers who have dispossessed plaintiff 1 unlawfully from the disputed property and that accordingly plaintiff 1 should have a decree for recovery of possession in the terms and with the qualifications mentioned in the concluding paragraph of His Lordship's judgment.

[27] As pointed out by my Lord, the facts of the case and the endorsement on the back of the mortgage-bond clearly make out that plaintiff 1 made the payment for redemption of the suit usufructuary mortgage, not as a mere volunteer but at the request of her mother, defendant 4, who owned the property at the time as succeeding to her husband, and who felt herself unable to redeem the mortgage. It would also appear from the said endorsement that it was understood between plaintiff 1 and defendant 4 that she should keep possession of the property in view of the payment made, until she was repaid the money paid by her. On these facts, I have absolutely no difficulty in holding that though plaintiff 1 had no right of subrogation, she is entitled to a possessory lien in respect of the property both as a matter of law and as a matter of equity, on the strength of which she can recover back her lost possession from defendants 1 to 3, who are mere trespassers, claiming as they do, under a void gift. Defendant 4 herself, if she threatened to disturb the possession of the plaintiff without repaying the money and in violation

of her specific understanding might have been restrained from doing so. Defendants 1 to 3 who claim by a gift under her cannot claim a higher position.

[28] As regards the larger question raised, namely, whether a reversioner is a person having interest within the terms of S. 91, sub-s. (a), Transfer of Property Act, I am unable, with respect, to consider his position or the position of the entire body of reversioners taken as a whole, to be analogous to that of a remainder-man or a joint debtor and to support the existence of the interest contemplated in S. 91 (a), Transfer of Property Act on that footing. It appears to me, that consistently with the well-established principle that what is vested in a Hindu widow is not a mere life estate, but the entirety of the estate of the last male-holder, subject only to the limitation as to her capacity to deal with it, it is not legally permissible to hold that either a single reversioner or the entire body of reversioners have any interest. I would not, therefore, be inclined to say anything which may appear to throw any doubt on the well-settled line of decisions which have held that a reversioner is not a person having the kind of interest contemplated in S. 91 (a). Slightly different considerations may, however, arise as pointed out by my Lord in a case where a reversioner redeems a mortgage at the request of the widow and in the circumstances which call for his intervention for the protection of the property; but whether he would on such facts be entitled to either a right by way of subrogation or by way of a charge is not free from doubt. All that he is entitled to may be the personal right to re-imbursement under S. 69, Contract Act: (vide also *Narayana* v. *Pechiammal*, 36 Mad. 426 : (15 I.C. 206).) It is, however, unnecessary to express any final opinion on this rather difficult question since the case now under consideration has not been presented on that footing.

V.R.B. *Appeal dismissed.*

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* A. I. R. (37) 1950 Orissa 157 *[C. N. 26.]*

FULL BENCH

RAY C. J., JAGANNADHA DAS, PANIGRAHI AND NARASIMHAM JJ.

Prahalad Jena and others — Petitioners v. *State.*

Cr. M. Nos. 192 to 194 and 182 of 1949, D/-3-3-1950.

✠(a) **Public Safety—Orissa Maintenance of Public Order Act (IV [4] of 1948)—Validity — Preventive Detention (Extension of Duration) Order (1950) — Interval between midnight of 25th-26th January and signing of Order by President — Whether material for validity — Constitution of India, Art. 373—General Clauses Act (1897), Ss. 5 (3) and 3 (12).**

The Preventive Detention (Extension of Duration) Order, 1950, being an Order made by the President under Art. 373 of the Constitution, is to be deemed an Act of Parliament and as such a Central Act. The Order came into force about 10-50 A. M. on 26th January 1950. But by virtue of S. 5 (3) read with S. 3 (12), General Clauses Act, it should be deemed to have come into force for legal purposes from the midnight of 25th-26th January 1950, even though it might have been actually signed by the President only after 10-50 A. M. on 26th.

Hence, in considering the validity of the Orissa Maintenance of Public Order Act, 1948, the short interval of time between the mid-night of 25th-26th January and the exact time of the signing of the Order by the President, becomes immaterial. [Para 2]

✠(b) **Public Safety—Orissa Maintenance of Public Order Act (IV (4) of 1948 as amended in 1949), Ss. 2, 3 and 4—Validity—Public Safety—Preventive Detention (Extension of Duration) Order (1950)—Constitution of India, Arts. 13 and 22.**

The provisions of the Orissa Act dealing with preventive detention are void under Art. 13 (1) of the Constitution on account of their inconsistency with Art. 22 of the Constitution. [Para 10]

Sections 3 and 4 of the Orissa Act are void being inconsistent with the Constitution. Section 2 by itself is unworkable because no law merely authorizing the detention of a person under some circumstances, without any provision for fixing the duration, can be said to be workable. The entire law contained in Ss. 2, 3 and 4 must be held to be invalid on the application of the doctrine of severability. [Para 5]

Nor can the Preventive Detention (Extension of Duration) Order, 1950, be of any avail to the State in justification of the continuance of detention after the Constitution came into force. [Para 31]

(c) **Constitution of India, Art. 13 (1)—Object of.**

Per *Narasimham J.*—The object of Art. 13 (1) is to invalidate those existing laws which continue in force by virtue of Art. 372 (1) which are inconsistent with any of the provisions of Part III dealing with the fundamental rights even though those provisions may expressly refer to the rights of persons and not to the laws of the State. [Para 4]

(d) **Constitution of India — Nature and Scope — Constitutional law — Legislatures.**

Per *Ray C. J.*—The Constitution is the fundamental of basic law to which all other laws must conform. It is superior to the will of the Legislature, the validity of whose Acts is to be determined by its provisions and it is the sole charter by which the rights of the Union as well as State-Governments are to be determined. It antedated all other laws and all of them must, whether by adaptation or modification, be brought into line with and be placed on a footing as if the laws made under the Constitution. [Para 15]

(e) **Interpretation of Statutes — Constitution — Law made under Constitution — Interpretation — Technical rules.**

Per *Ray C. J.*—It is true that astute interpretation or strict adherence to technical rules are foreign to interpretation of a Constitution, but the same doctrine cannot be invoked in favour of law purporting to have been made in obedience to the Constitution. [Para 20]

Annotation : ('44-Com.) Civil P. C., Pre N. 7.

(f) **Interpretation of Statutes — Constitution — Construction.**

Per *Ray C. J.*—Local hardships and inconveniences do not count in interpreting a Constitution which is based upon the national will as against that of a Legislature. [Para 20]

Annotation :—('44-Com) Civil P. C., Pre N. 7.

(g) Interpretation of Statutes — Doctrine of severability.

It is elementary that the same statute of law may be in part constitutional and in part unconstitutional and, if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected.

But where the different parts of a statute are so mutually connected with and dependent on each other as to warrant a belief that the Legislature intended them as a whole, then if some parts are unconstitutional and void all the provisions must fall with them. [Para **21**]

Annotation :—('44-Com) Civil P. C., Pre N. 7.

(h) Constitutional law—Legislatures—Powers of —Written constitution.

Per *Ray C. J.*—No legislative authority that is subject to a written Constitution which it is bound to obey possesses sovereign powers to the fullest extent. No legislative authority can make laws that are not according to, and consistent with, the fundamental laws that have been prescribed for its Government by the people, who are superior to both the law-making and the Constitution themselves. [Para 22]

(i) Adaptation of Laws Order (1950), R. 28 — Adaptation of President's Order — Making new laws — If contemplated.

Rule 28 does not contemplate adaptation of the President's Order made under S. 373 of the Constitution. Again, adaptations within the meaning of the Rule do not contemplate making new laws in place of the old nor enforcement of laws that are unconstitutional. [Para 23]

(j) Interpretation of Statutes — Act affecting liberty of citizen.

It is the duty of a Court to construe a statute so as to render it constitutional. [Para 27]

Where the liberty of the citizen and the enactment of a Legislature are in conflict owing to the effect of the Legislation being left in doubt, the benefit of the doubt should be given in favour of the liberty of the citizen. [Para 27]

Annotation :—('44-Com) Civil P. C., Pre N. 7.

H. Mahapatra, V. Pasayat and M. Mahanty — for Petitioners.

Advocate General and Govt. Advocate—for State.

Narasimham J. — These applications are under S. 491, Criminal P. C., against the orders of detention passed by the Provincial Government in exercise of their powers under S. 2 (1) (a) read with S. 4, Orissa Maintenance of Public Order Act, 1948 (hereinafter referred to as the Orissa Act) as amended by the amending Act (Orissa Act VI [6] of 1949). The applications were filed before the commencement of the Constitution and the legality of the detentions was therefore challenged on various other grounds which have now become academic in view of the coming into force of the Constitution on 26th January 1950. The legality of the detention of the applicants was challenged by Mr. M. Mahanty and Mr. Mahapatra on behalf of the applicants on the ground that the provisions of the Orissa Act dealing with preventive detention were void under Art. 13 (1) on account of their inconsistency with Art. 22 (4), (5), (6) and (7) of the Constitution. The learned advocates further relied on the reasonings adopted by Meredith C. J. and Sarjoo Prasad J. of the Patna High Court in a recent case, *Brahmeshwar Prasad* v. *State of Bihar*, Cr. Misc. 977 of 1949 : (A. I. R. (37) 1950 Pat 265) involving the construction of similar provisions of the Bihar Maintenance of Public Order Act (Act III [3] of 1950).

[2] On 26th January 1950 an Order known as "the Preventive Detention (Extension of Duration) Order, 1950" (herein after referred to as the order) was published in the Gazette of India under the signature of C. Rajagopalchari, Governor-General. Subsequently, however, an erratum was issued substituting the words "Dr. Rajendra Prasad, President" for C. Rajagopalchari, Governor-General." An affidavit was also filed before us by the Under-Secretary to the Government of Orissa communicating a copy of the telegram received from the Ministry of Home Affairs, Government of India to the effect that the order was in fact signed by the President Dr. Rajendra Prasad on 26th January, and that an authenticated copy of the same was sent for publication in the gazette. But that due to a clerical mistake the said order was published as an order of the Governor-General. In view of this affidavit, we are satisfied that the order was in fact made by the President on 26th January 1950. That order was made by him in exercise of his powers under Art. 373 of the Constitution. It was argued that inasmuch as Dr. Rajendra Prasad assumed office as President of the Union of India only at about 10-50 A. M. on 26th the said order came into force sometime after Dr. Rajendra Prasad assumed office and that it cannot validate any law which might have become invalid prior to that hour. This argument appears to have carried much weight with the Division Bench of the Patna High Court in the recent case mentioned above. But in my opinion this argument is incorrect. An order made by the President under Art. 373 of the Constitution is, in substance, a law of the Parliament during the transitional period as contemplated by Cl. 7 of Art. 22 of the Constitution. This is made absolutely clear by the language used in Art. 373 wherein it is expressly stated that during the transitional period for reference to any law made by Parliament in Cl. (4) and (7) of Art. 22 there shall be substituted a reference to an order made by the President. Various other Articles of the Constitution confer on the President powers to make orders in respect of various matters such as Arts. 372, 391 and 392, etc. But an order under Art. 373 stands on a different footing in as much as it is expressly stated to be a substitution for 'the law of Parliament,' Consequently the general rules for the construction of any law of Parlia-

ment would apply while construing an order of the President made under other Articles of the Constitution. The General Clauses Act, 1897 was adapted by the President in exercise of his powers under Art. 372 (2) and published in the Gazette of India on 26th January 1950. After that adaptation, the expression 'Central Act' has been defined in S. 3 (7), General Clauses Act, as meaning an Act of Parliament. I do not think there is any material difference between an Act of Parliament and the 'law made by the Parliament' because the only method provided in the Constitution for Parliament to make laws is by introducing and passing Bills as provided in Arts. 107 to 111. Therefore, an order of the President under Art. 373 for the purpose of construction with reference to the General Clauses Act should be deemed to be an 'Act' of Parliament and as such a 'Central Act.' Section 5 (3), General Clauses Act, makes it clear that:

> "Unless the contrary is expressed, a Central Act or Regulation shall be construed as coming into operation immediately on the expiration of the day preceding its commencement."

The expression 'Commencement' has also been defined in S. 3 (12) of that Act as follows:

> "Commencement" used with reference to an Act or regulation shall mean the day on which the Act or Regulation comes into force."

Therefore, if a Central Act came into force, say at 11 A. M. on 26th January then by virtue of S. 5 (3) read with S. 3 (12), General Clauses Act, that Act should be *deemed to have come into force from the midnight of the* 25th-26th January. The order of the President under Art. 373 should, therefore, be deemed to have come into force from the midnight of 25th-26th January, even though it might have been actually signed by the President only after 10-50 A. M. on 26th. The Constitution also came into force from the midnight of 25th-26th January because the provisions of the General Clauses Act, S. 5 (3) were made applicable to the interpretation of the Constitution by Art. 367 (1). The result, therefore, is that both the Constitution and the order came into force for legal purposes from the midnight of 25th 26th January and in considering the validity or otherwise of the relevant provisions of the Orissa Act, the short interval of time between the mid-night of 25th-26th January and the exact time of the signing of the order by the President becomes immaterial.

[3] The main difficulty still remains, namely whether the provisions of the Orissa Act are inconsistent with Art. 22 of the Constitution. The law providing for preventive detention in Orissa is contained in Ss. 2, 3 and 4, Orissa Act. Section 2 (1) (A) of that Act authorises the Provincial Government, if satisfied with respect to a particular person that with a view to preventing him from acting in any manner prejudicial to the public safety and the maintenance of public order it is necessary so to do, to make an order directing that he be detained. Sections 3 and 4 are as follows:

> 3. *(1) Grounds of detention to be disclosed on application of the person affected by the order.* As soon as may be after a person is detained in pursuance of an order made under clause (a) of sub-s. (1) of S. 2, the authority making the order may, on application of the person affected by the order, communicate to him, so far as such communication can be made without disclosing facts, which the said authority considers to be against the public interest to disclose the grounds on which the order has been made and such other particulars as are in its opinion sufficient to enable him to make a representation to the Provincial Government against the order; and such person may, within such time as may be specified by the Provincial Government make a representation in writing to them against the order and it shall be the duty of the Provincial Government to inform him of his right to make such representation and to afford him opportunity of doing so; provided neither the said order of detention nor the detention of the said person thereunder shall be deemed to be invalid or unlawful or improper on the ground of any defect, vagueness or insufficiency of the communication made to such person under this section.
>
> *(2)* After the receipt of the representation referred to in sub-s. (1), or in case no representation is received, after the expiry of the time fixed therefore, the Provincial Government shall place before the Advisory Council constituted under sub-s. (3), the grounds on which the order has been made by an authority or officer subordinate to them, the report made by him under sub-s. (3) of S. 2 and the representation, if any made by the person concerned.
>
> *(3)* The Provincial Government shall constitute an Advisory Council whenever necessary and it shall consist of not less than three members one of whom shall be its Chairman. The Chairman and the members of the Council shall be appointed by the Provincial Government.
>
> *(4)* The Advisory Council shall, after considering the materials placed before it and, if necessary, after calling for such further information from the Provincial Government or from the person concerned as it may deem necessary, submit its report to the Provincial Government.
>
> *(5)* After considering the report of the Advisory Council the Provincial Government may confirm, modify or cancel the order made under sub-s. (1) of S. 2.
>
> 4. *(1) Duration of orders made under S. 2.* An order made under sub-s. (1) of S. 2 shall be in force for a period not exceeding six months from the date on which it is made unless earlier revoked by the authority making the order.
>
> *(2)* If in the opinion of the Provincial Government it is necessary or expedient so to do, it may at any time before the expiry of the period of six months aforesaid and after giving an opportunity to the person concerned to make any representation in writing which he may desire to make and after referring the matter to the Advisory Council constituted under sub-s. (3) of S. 3 and considering it a report direct that the order shall continue in force and the order as so extended shall continue for a further period of six months from the date on which but for such direction it would have ceased to be in force and thereafter if and so often as it

> is again extended by a further similar direction made in the same manner.
>
> (3) The revocation of any order made under sub-s. (1) of S. 2 shall not prevent the making under the sub-section of a fresh order to the same effect as the order revoked."

Clauses (4), (5) and (7) of Art. 22 of the Constitution are provisions relating to fundamental rights in respect of preventive detention of a person. Article 13 (1) says:

> "All laws in force in the territory of India immediately before the commencement of this Constitution in so far as they are inconsistent with the provisions of this part, shall to the extent of such inconsistency, be void."

One, has therefore, to carefully scrutinise the provisions of Ss. 2, 3 and 4, Orissa Act with special reference to the fundamental rights guaranteed in Art. 22 with a view to ascertain which portions of the Orissa Act are inconsistent with any of the provisions of the Article. Section 3, however has been attacked on the ground that it is wholly inconsistent with cls. (4) and (5) of Art. 22. The Advisory Council as contemplated by S. 3 is not the same as the Advisory Board required under cl. (4) of Art. 22 inasmuch as the Orissa Act does not prescribe the necessary qualifications for members of the Advisory Council. Moreover, the Orissa Act does not say that consultation with the Council should be made and its opinion should be obtained prior to the expiry of three months from the date of detention of a person. Nor does it make it mandatory for the Government to accept the opinion of the Advisory Council. Again, so far as the communication of grounds of detention is concerned, the Orissa Act does not make it mandatory on the Government to supply such grounds but it leaves it to the discretion of the Government if an application is made by the detenu. Moreover, the Provincial Government is made the sole judge as to what particulars in the grounds are sufficient to enable a detenu to make a representation against the order of detention. I therefore think that all the sub-sections of S. 3, Orissa Act are inconsistent with cls. 4 and (5) of Art. 22 and as such are invalid.

[4] It has been suggested that the fundamental rights under Art. 22 are conferred on a person whatever may be the law on the subject and that so long as those rights are not in any way abridged in respect of a person, the law under which he is detained cannot be challenged as invalid even though there may be some inconsistency between the provisions of the law on the one hand and Art. 22 on the other. In support of this argument, the language of Cls. (1), (2), (3), (5) and (6) which all refer to rights conferred on a person was emphasised. Clause (4) seems to refer to the law and not to a person in as much as it opens with the following words:

> "No law providing for preventive detention shall authorise the detention of a person for a longer period than three months . . . . .".

This language is quite defferent from

> "No person shall be detained for a longer period than three months under any law providing for prevetive detention."

What the constitution obviously hits is the law providing for preventive detention which does not fulfil certain conditions required by Cl. (4) of Art. 22 notwithstanding the fact that an order under that law detaining a person fixes the period of his detention to be only three months. The argument that Art. 22 affects the rights of a person and not the law under which such detention is made will render Art. 13 (1) practically nugatory inasmuch as all the other fundamental rights. Guaranteed in Part III of the Constitution deal with the rights conferred on a person (see Arts. 14, 15, 16, 19, 20, 23 and 24 etc.) It cannot be seriously contended that if there is any state law which is inconsistent with any of the provisions of the articles that law will not be invalid so long as there is no abridgement of the rights of an individual while adminstering those laws. The object of Art. 13 (1) seems to be to invalidate those existing laws which continue in force by virtue of Art. 372 (1) which are inconsistent with any of the provisions of Part III dealing with the fundamental rights even though those provisions may expressly refer to the rights of persons and not to the laws of the state.

[5] I may now take up the scrutiny of all the three sub sections of S. 4, Orissa Act. Sub-section (2) is clearly invalid because it authorises the continuation of detention beyond the first period of six months on the recommendation of an Advisory Council as constituted under S. 3 (3) which Council has been shown to be a different body from that contemplated by Art 22 (4). Sub-section (3) of S. 4, Orissa Act being a purely consequent provision need not be considered in this discussion. Sub section (1) of S. 4 says clearly that an order of detention under S. 2 (1) shall be in force for a period of six months from the date on which it is made unless earlier revoked by the authority making the order. An order of detention under S. 2 (1) (a) need not specify the period for which it is to be in force but by virtue of S. 4 (1) it will automatically be in force for a period of six months until earlier revoked by the competent authority. Therefore the combined effect of Ss. 2 (1) (a) and 4 (1), Orissa Act is that the law providing for preventive detention authorises the detention of person for a period of six months. But under Art. 22 (4) no

such law can authorise the detention of a person for a period longer than three months unless (1) an Advisory Board consisting of person qualified for appointment as Judges of a High Court has reported in favour of such detention; or (2) such person is detained in accordance with the provisions of an order made by the President under sub-cls. (a) and (b) of Cl. (7). The order may now be quoted in full.

"In exercise of the powers conferred by sub-cls. (a) and (b) of cl. (7) of Art. 22 of the Constitution of India read with Art. 373 thereof and of all other powers enabling him in that behalf, the President is pleased to make the following order namely:

1. (1) This order may be called the Preventive Detention (Extension of Duration) Order, 1950.

(2) It shall come into force at once.

2. Where in any class of cases or under any circumstances specified in any law providing for preventive detention in force at the commencement of the Constitution of India (hereinafter referred to as 'the Constitution') any person was, immediately before such commencement, or is at any time thereafter, in detention in pursuance of an order made under such law, such person may be detained for a period longer than three months under such law without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-cl. (a) of Cl. (4) of Art. 22 of the Constitution.

3. The maximum period for which any such person, as it referred to in para. 2, may be detained, shall, in the case of a person in detention immediately before the commencement of the Constitution be three months from such commencement, and in the case of a person detained in pursuance of an order made after such commencement, be three months from the date of such order."

Paragraph 2 of the Order needs no comment. It only dispenses with consultation with the Advisory Board under Art. 22 (4) (a). Paragraph 3 of the Order however says that the maximum period for which any person who was under detention under any law providing for preventive detention in force at the commencement of the Constitution shall be only three months from such commencement. That is to say, it fixes the maximum period of detention of any person under any law providing for preventive detention to be only three months from 26th January in respect of those persons who were under detention immediatety before. But the Orissa Act permits of detention for six months for all classes of persons detained under that Act and, consequently, sub-s. (1) of S. 4 also must be held to be invalid as being repugnant to the said Order of the President. The result therefore is that of the three sections of the Orissa Act dealing with the law in respect of preventive detention, Ss. 3 and 4 are rendered null and void as being inconsistent with the constitution and S. 2 alone remains. But S. 2 by itself is unworkable because unless there is any provision fixing the duration of detention of a person, no law which merely authorises the detention of a person under some circumstances can be said to be workable.

[6] It was however argued that so far as duration was concerned, the President's order supplied the gap and that para. 3 of that Order would indicate that all persons who might have been under detention immediately before 26th January could be validly detained for three months from that date. This argument however overlooks the significance of the word 'maximum' occurring in para. 3 of the Order and in sub-cl. (b) of cl. (7) of Art. 22. The Constitution authorises the Parliament (or the President during the transitional period) to prescribe by law the maximum period for which any person can be detained under any law providing for prevetive detention. In other words, the constitution while conferring on the Parliament the power to fix the maximum period for such detention leaves it to the law providing for preventive detention to fix any period within that maximum. Such law may be either an existing law continued in force by Art. 373 (1) or a new law made either by Parliament or by a State under cl. (2) of Art. 246 read with item 3 of List 3 to Sch. 7 of the Constitution. The law of Parliament under Art. 22 (7) will lay down only the circumscribing limits but within those limits it is for the law providing for preventive detention to make adequate provision specifying the period during which order of detention should remain in force. Article 22 (7) does not, in terms, confer either on the Parliament (or on the President) the power to fix the actual period of preventive detention in individual cases.

[7] This point will be clear if the precise scope of the power of the Parliament under Art. 22 (7) is carefully examined. Preventive detention is a subject included in item 3 of the concurrent list and consequently the State as well as the Parliament have concurrent powers to make any law providing for preventive detention by virtue of cl. (2) of Art. 246. But this power is, however, subject to the other provisions of the Constitution; that is to say, it is subject to the provisions of Art. 22 and any law made under that Article by Parliament itself. Thus the Parliament's power of Legislation in respect of preventive detention appears to be of two kinds. Firstly, its power to make a self-contained law providing for preventive detention on the lines of the Orissa Act is derived from Art. 246 (2) read with item 3 of List 3. Secondly, it has also got the over-riding power under cl. (7) of Art. 22 to prescribe the circumstances under which and the class of cases in which a person may be detained for a period longer than three months without consulting the Advisory Board under sub-cl. (a) of cl. (4)

of that Article and also to prescribe the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention. These two powers of the Parliament are not identical. The latter is a general regulating power which does not include the power to actually fix the period of detention in individual cases. This power can be conferred only by the law providing for preventive detention made by the appropriate authority under Art. 246 (2). It is the general regulating power of the Parliament under Art. 22 (7) that can be exercised by the President during the transitional period by virtue of Art. 373. But he has not got the power to make a law providing for preventive detention conferred on the Parliament under Art. 246 (2). That power during the transitional period can be exercised only by the Constituent Assembly under Art. 379 (1). If this distinction between the two kinds of legislative powers of the Parliament be clearly borne in mind there can be no difficulty in appreciating the precise scope and limitations of an order made by the President under **Art. 22 (7).**

[8] The same conclusion will emerge if the language of Art. 22 (7) is carefully examined. In sub-cls. (a) and (b) of cl. (7) of that Article the words "any law providing for preventive detention" occur. Though Art. 373 says that for any reference to any law made by Parliament in cl. (7) of Art. 22 an order of the President may be substituted. Article 373 does not go so far as to say that wherever the expression "law" occurs in cl. (7) of Art. 22 an order of the President may be substituted. The result is that the expression "law providing for preventive detention" in cl. (7) of Art. 22 remains unaffected by Art. 373. Therefore, on a matter of mere construction also, an order of the President under Art. 373 cannot take the place of any law providing for preventive detention as contemplated in cl. (7) of Art. 22 For that law one must look into the provisions of an existing law on the subject continued in force under Art. 372 (1) subject to the removal of those portions of that law which have become null and void by the application of Art. 13 (1) or else to any new law that may be made either by the State or by Parliament which law is also subject to the regulation made by Parliament under Art. 22 (7). This seems to be the true significance of the expression 'maximum' occurring in sub-cl. (b) of cl. 7 of Art. 22 and in para. 3 of the Order the President also only prescribes the maximum period of such detention without in any way fixing the actual period of detention in respect of every detenu. Therefore, in ascertaining what is the exact period of detention of a person para. 3 of the Order will be of no avail and one must look into the provisions of the law providing for preventive detention (Orissa Act in the present case) after excising from it those provisions which are null and void under **Art. 13 (1).** I have already shown that if this examination is made only S. 2 of the Orissa Act will survive and that it does not make any provision fixing the duration of an order of detention and as such is clearly unworkable.

[9] It was then argued that if S. 2 of the Orissa Act is retained and to that is added cls. (5) and (6) of Art. 22 and also the Order of the President it may be possible to make out a self-contained law dealing with preventive detention. This argument was fully met by Meredith C. J. in the Patna case. He rightly, if I may say so with respect, pointed out that such a procedure would be practically making out a new piece of legislation which it is obviously not the function of the Court. The Orissa Legislature which passed the Orissa Act in 1948 did not contemplate legislation of that type. Moreover, such a procedure would, in substance, amount to adaptation of the Orissa Act for the purpose of bringing it into accord with the provisions of the Constitution as provided for in cl. (2) of Art. 372. That power is conferred only on the President and no Court can arrogate to itself that power.

[10] The result, therefore, seems to be as follows: The Order of the President while prescribing the limits within which every law providing for preventive detention must lie, does not purport to be itself a self-contained law fixing the duration of preventive detention of a person. The President has, in fact, no authority to make such a law nor has he purported to do so. His order assumes the existence of a valid law providing for preventive detention in which the duration of any such order of detention would be within the maximum period fixed by the President in his order. If that duration is within the maximum period fixed in the order, no question of inconsistency will arise, if, however, the duration is in excess of the maximum so fixed that duration clause in the law providing for preventive detention would become invalid and it is left to the appropriate Legislature to amend the law so as to bring the duration clause in conformity with the President's order. In the present case, therefore, S. 4 (1) of the Orissa Act which fixes six months as the duration of any order under S. 2 (1) is invalid and the Legislature has not passed any amendment reducing the period of duration to three months or less so as to avoid any inconsistency between that provision of the Orissa Act and the President's order. The net result is that the only valid portion of the Orissa Act relating to preventive

detention is S. 2 and in considering whether that section by itself can be said to be valid law on the subject one has to apply the well-established doctrine of severability which was the subject of several decisions in the Privy Council the latest of which is *A.G. of Alberta* v. *A.G. of Canada*, A. I. R. (35) 1948 P. C. 194 : (52 C. W. N. 236). I have already shown that the Orissa Legislature would never have passed a bald law containing only S. 2 of the Orissa Act. In fact Ss. 3 and 4 and S. 2 of that Act form part of one scheme and without the safeguard provided in S. 3 and the limit on duration of an order of detention under S. 4 the Orissa Legislature would never have passed such a law providing for prevention detention.

[10a] Moreover, as already pointed out, S. 2 of the Orissa Act by itself is quite unworkable. Therefore, though S 2 of the Orissa Act may not be inconsistent with any of the provisions of the Constitution the entire law providing for preventive detention in the Orissa Act contained in Ss. 2, 3 and 4 must be held to be invalid on the application of the doctrine of severability.

[11] The result is that there is no valid law under which the detention of the applicants can be justified. They should, therefore, be set at liberty forthwith.

[12] Before we delivered the judgment our attention was invited to a recent Act of the Parliament making a self-contained law providing for preventive detention. But as the applicants have not been detained under that new law it is unnecessary to enter into a discussion regarding the provisions of that law. Our attention has not been invited to any provision in the new law continuing in force or validating orders of detention made prior to the coming into force of that law and, consequently, it cannot be of any help in the disposal of the present applications which are all under the old law.

[13] **Ray C. J.** — I have read the judgment written by my learned brother Narasimham J. I agree with the conclusion reached therein. I add the following that presents a slightly different approach to the problem.

[14] All the aforesaid applications have been heard together side by side and shall be governed by this order. The circumstances under which the petitioners were detained are not in dispute. The petitions had been filed under S. 491, Criminal P. C., which is still good law. They have also been treated to have been filed as it were under Art. 226 of the Union Constitution, which has come into operation since the midnight of 26th January. The constitutionality of the law, under which the petitioners have been detained or should continue to be detained, has been seriously challenged by the petitioners. The long and short of their contention is that the said laws do not conform to the basic requirements of preventive detention of a citizen under the Constitution. The different aspects of the contentions of the petitioners are noticed in the judgment as it proceeds.

[15] *The nature and scope of the Constitution.* — The Constitution is the fundamental of basic law to which all other laws must conform. It is superior to the will of the Legislature, the validity of whose Acts are to be determined by its provisions and it is the sole charter by which the rights of the Union as well as State-Governments are to be determined. It antedates all other laws and all of them must, whether by adaptation or modification, be brought into line with and be placed on a footing as if the laws made under the Constitution :

> *Article 13 (1) reads :* — "All laws in force in the territory of India immediately before the commencement of this Constitution, *in so far as they are inconsistent with the provisions of the part, shall, to the* extent of such inconsistency be void."

Clause (2) of the article is not material for the purpose of this case as it defines constitutional limitations on the legislative powers of the appropriate Legislatures in future. Article 372 provides that all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority, *but subject to the other provisions of this constitution.* The President has been empowered by cl. (2) of the article to adapt and modify such laws either by way of repeal or amendment as may be necessary or expedient by an order made in that behalf for the purpose of bringing the provisions of any such law into accord with the provisions of the Constitution. Such adaptation or modification is immune from being questioned in any Court of law. Reading the articles conjointly, it becomes plain that the pre-existing laws of either Provincial or Central Legislatures become shorn of such provisions of Part III of the Constitution. During the transitional period, however which, according to cl. (3) of the article, is to expire after two years from the commencement of the Constitution, the President is empowered to modify and adapt them in order to secure the workable minimum for the Constitution to be set up. In the absence of such adaptation and modification as is within the purview of the article, the pre-existing laws must remain in force, if at all subject to the provisions of the Constitution, that is to say, they should stand denuded of such provisions as are inconsistent with the provisions of Part III of the Constitution and as such are void. If what remains is sensible and complete in itself well and good, or else the entire Act or Regulation, as the case may be, must disappear from the arena of law. In order to render any such law invalid, it is not necessary that it should contravene some provisions of the Constitution. Inhibition by general scope and purpose of the instrument is enough to invalidate. Even implied limitations and restraints found in a Constitution cannot be overlooked in this connexion.

[16] The detentions of the petitioners are sought to be sustained under the President's order entitled "The Preventive Detention (Extension of Duration) Order, 1950" made on 26th January 1950 read with Orissa Maintenance of Public Order Act, 1948, as amended by the Amending Act (Orissa Act VI [6] of 1949). The Orissa Act is impugned as wholly void being repugnant to, and inconsistent with the provisions of Art. 22, cls. (4), (5), (6) and (7) read with Art. 13 (1) of the Constitution. The general spirit and purpose of all the said provisions is : (i) No authorisation of detention of person for a period longer than three months under any law of preventive detention shall be valid, (ii) except when an Advisory Board, consisting of persons who have been or are qualified to be appointed to be Judges of a High Court, has reported, before the expiration of the said period of three months, that there is in its opinion sufficient cause for such detention; (iii) provided that no such detention should exceed the maximum period prescribed by any law made by Parliament under sub-cl. (b) of cl. (7), or in the alternative by any order made by the President under sub-cl. (b) of cl. (7); (iv) any person, however, can be detained for more than three months in accordance with the provisions of any law made by Parliament under sub-cl. (a) of cl. (7), but not beyond the maximum period prescribed by the Parliament by any law; (v) it is obligatory on the authority making the order under any law of preventive detention to communicate as soon as may be to be detenu the grounds on which the order has been made; (vi) afford him the earliest opportunity of making representation against the order; (vii) but there is no obligation on such authority to disclose facts which it considers to be against the public interest to disclose.

[17] Tested in the light of the spirit and purpose of the provisions of the Constitution relating to preventive detention as summarised above, the Orissa Act is wholly inconsistent therewith. The Act authorises a detention of a person for a longer period than three months without the report or recommendation of an Advisory Board; according to it, there is no obligation on the authority making the order of detention to supply grounds for such order to the detenu so as to enable him to make a representation to the authority concerned; the opinion of the Advisory Council provided for in the said Act is not binding on the concerned authority; the Act empowers the State-Government to extend the period of detention under circumstances stated therein beyond six months, and, lastly, the validity of the detention on account of vagueness and inadequacy of the grounds supplied is beyond question. In short, the Executive Government is the sole arbiter in the matter. In order to give effect to Art. 13 of the Constitution, the State (Orissa) Act must be denuded of all such provisions as are inconsistent with cls. (4) and (5) of Art. 22 of the Constitution. The only consistency between the Constitution and the Impugned Act consists in the latter being avowedly a law providing for preventive detention, a subject within the competence of State Legislature enumerated as Item 3 of the Concurrent List of the Constitution. In view of the inconsistency, the authorisation under the Orissa Act for detention for a longer period than three months became invalid as soon as the Constitution came into operation.

[18] The question that then arises is whether the detention can be justified as one in pursuance of the Preventive Detention (Extention Duration) Order, 1950. I shall assume, that the Order came into operation along with the constitution. The constitutionality of such Order depends upon its conformity to the provisions of the Constitution relating thereto. The President derives his power to make the order under cl. (7) of Art. 22 read with Art. 373 of the Constitution. Adapted by Art. 373, cls. (4) and (7) of Art. 22 would read (after deleting the words and phrases not material for the purpose) :

"*4.* No law providing for preventive detention shall authorise detention of a person for a longer period than three months unless such person is detained in accordance with the Order made by President under sub-cls. (a) and (b) of clause (7);

7. President may by order prescribe, (a) the circumstances under which the class or classes of cases in which a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-cl. (a) of clause (4) and

(b) the maximum period for which any person may in class or classes of case be detained under any law providing for preventive detention."

[19] The legal position is that the basic requirements for detention for a longer period than three months, namely, report of an Ad-

visory Board constituted under sub-cl. (a) of cl. (4) of Art. 22 can be dispensed with in classes of cases and circumstances prescribed by Parliament and before prescription by Parliament by the President under cl. (7) of Art. 22. We are here concerned with an Order by the President. The President having no power under the Constitution to make any law, he has to prescribe the circumstances under which and the classes of cases in which a person may be detained for a period longer than three months *under any law providing for preventive* detention. The President's Order in question does not purport to make any law of preventive detention. It has to be noted that he has no such power under the Constitution. His power is that of adaptation and modification in the manner and for the purpose provided in Art. 372. While making an order under cl. (7) of Art. 22, he could exercise such power. That the very purpose of such power is to bring the provisions of any law in force in the territory of India into accord with the provisions of the Constitution indicates the constitutional limitations of such power. His power under cl. (7) of Art. 22 cannot be exercised free of the constitutional restraints and limitations. Even if it be assumed that the President can make any law in order to fulfil the requirements of Art. 22 (7), that law too must confirm to the constitutional limitations prescribed in the provisions of the Constitution of which cl. (5) of Art. 22 is one. What the President does under the Preventive Detention (Extention of Duration) Order amounts to authorising or validating the detention of the persons in detention immediately before the commencement of the Constitution under *self-same law* under which the primary order of detention had been made by the State authority. Put broadly, the President says that the Orissa Maintenance of Public Order Act shall remain in full force despite the constitutional inconsistencies and repugnancies therein for the maximum period of three months. This in my opinion, amounts to overriding the mandatory provisions of Art. 13 (1) and Art. 22 (5) of the Constitution. The President's order may be free from any constitutional lacuna so far as he prescribes the circumstances and the classes of cases for the purpose of cl. (7) of Art. 22 to be the same as in the Orissa Act and so, far as he dispenses with the mandatory necessity of obtaining the opinion of an Advisory Board in accordance with the provisons of sub-cl. (a) of cl. (4) of Art. 22 of the Constitution, and to that extent modifies the Orissa Act, but by prescribing that such persons may be detained for a period longer than three months under such law, he charters the validity of all other provisions of the Orissa Act which are radically contraventious of supreme law of the land, namely, the Constitution.

[20] It has been strenuously contended by the learned advocate-general that a very fair and liberal interpretation shall be given to the president's order, intended as it is, to fill up the void that is created, on the introduction of the Constitution, between the pre-constitution laws of preventive detention and the law or order passed or made under it. The order is a special device to remove the difficulties of transition from the old constitution to the new. I am fully aware that astute interpretation or strict adherence to technical rules are foreign to interpretation of a Constitution, but the same doctrine cannot be invoked in favour of law purporting to have been made in obedience to the Constitution. To give effect to this contention would amount to abrogate the procedure established by law. Article 21 of the Constitution may be prayed in aid. The article reads :

> "No person shall be deprived of his life or personal liberty except according to procedure established by law."

Preventive detention of a person amounts to deprivation of his personal liberty. This must be effected according to procedure established by law. Preventive detention, no doubt stands on a different footing from imprisonment inflicted as a punishment for commission of an offence, inasmuch as an open trial is unsuitable to the one while it is inevitable in the case of the other. The Constitution, however, enacts a substitute for an open trial. The substitute is provided by the combined operation of sub-cl. (a) of cl. (4) and cl. (5) of Art 22. By way of an exception in special class of cases and under particular circumstances specified in that behalf by the parliamentary law or presidential order, examination of detenus' case by an Advisory Board is dispensed with, but the minimum substitute giving a detenu the only opportunity of defending himself against the order of detention as contained in cl. (5) of the article is a permanent feature constitutionally ordained as an integral part of any law of preventive detention enacted either by a State or by the Union through appropriate legislative authorities. Any law that dispenses with this minimum would be derogatory to or even complete abdication of the procedure established by law so inevitably linked with deprivation of personal liberty. If the President, by his order intended to ensure this procedure to the detenu, he should have adopted the Orissa Act accordingly. While dispensing with the necessity of the opinion of the Advisory Board and reducing the maximum period to three months since the commencement of the Constitution or the date of the order, he expressly upholds the rest of the State law flying face in the place of the constitution. This deprives the detenu of his fundamental right of being supplied with the grounds on which the detention order has been made and of the opportunity of making a representation against the order. Mr. Advocate-General would ask us to take the President's order and the Orissa Act as constituting a Code complete in itself after excising such provisions therefrom as are either expressly or impliedly inconsistent with the Constitution, and act upon it. Then the question arises whether such a course is permissible. There is no doubt in my mind that it would amount to ourselves indulging in a piece of speculative legislation with the effect of depriving a citizen of his personal liberty without making available to him the procedure established by law. Local hardships and inconveniences do not count in interpreting a Constitution which is based upon the national will as against that of a Legislature. Part III is the Bill of Rights of the citizens of the Indian Union and it contains constitutional restraints and limitations upon the legislative functions of the appropriate legislative authorities as the case may be. It appears quite plainly from the text of the President's order that he did never mean that any part of the State laws in force immediately before the commencement of the Constitution should suffer chiselling of such provisions thereof as were then considered by the State legislature to be fundamental in exercise of State authorities' power of detention.

[21] The course advocated by the learned Advocate-General would lead to acceptance of one part and rejection of the other of the law enacted by the President's order. It is no doubt elementary that the same statute of law may be in part constitutional and in part unconstitutional, and, if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected. As to the case, in hand, I think the rule laid down by Shaw C. J., in *Warren* v. *Charlestown*, 2 Gray 84 is applicable,;

> *"That is the different parts are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other as to warrant a belief that the legislature intended them as a whole, and that if all could not be carried into effect the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them."*

The point is put thus by Mathews J. in *Poindexter* v. *Greenhow*, 114 U. S. 270 at p. 304;

> "It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional but these are cases where the parts are so distinctly separable that each can stand alone, and where the Court is able to see, and to declare, that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the legislature one they may never have been willing by itself to enact".

And again as stated by the said eminent Judge in *Spraigue* v. *Thompson*, 118 U. S. 90 at p. 95, where it was argued that certain illegal exceptions in a section of a statute might be disregarded, but that the rest could stand ;

> "The insuperable difficulty with the application of that principle of construction to the instance is that by rejecting the exception intended by the legislature of Georgia the statute is made to enact what confessedly the legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what may any one can say it would have enacted, in view of the illegality of the exceptions."

[22] Coming to the present case, it can never be predicated as to the intent behind the President's order that it should be partly enforced and partly rejected. No presumption of limitations or exceptions will be made merely for the purpose of sustaining the constitutionality of the order. The presumption of constitutionality of a statute does not apply where it shows, on its face, a violation of constitutional provisions. It may appear paradoxical that the Court should ever attempt to declare void the order of the President which, as the present one, is at par with an Act of Parliament. In fact, no English Court has ever attempted to do so, the accepted theory of the English constitution being that Parliament possesses supreme and unlimited legislative power. But a different consideration arises where there is written Constitution. The supreme authority resides in the people, who, for practical purposes, are those exercising the suffrage. This feature distinguishes a republican form of Government. No legislative authority that is subject to a written Constitution which it is bound to obey possesses sovereign powers to the fullest extent. No legislative authority can make laws that are not according to, and consistent with, the fundamental laws that have been prescribed for its Government by the people, who are superior to both the law-making and the Constitution themselves. All written Constitutions therefore are limitations on legislative powers or the sovereignty which in all organised Governments must reside somewhere. The authorities either Federal or State, however sovereign in its own sphere, both are subject to such constitutional limitations and restrictions as the people, acting in their national capacity, have seen fit to prescribe. In this view of the matter, authorisation of detention of the petitioners in pursuance of the President's order is unconstitutional, and, therefore, void.

[23] I feel inclined to say a word as to the Court's duty to construe the law in force before the 26th of January that all such adaptations as are necessary for the purpose. The point has not been argued at the Bar. In this connexion, reference may be made to R. 28, Adaptation of Laws Order, 1950, made by the President on 26th January 1950. So much of the Rule as bears upon the question reads:

> "Any Court, Tribunal or authority required or empowered to enforce any law in force in the territory of India immediately before the appointed day (the 26th of January, 1950) shall, notwithstanding that this order makes no provision or insufficient provision for the adaptation of the law for the purpose of bringing it into accord with the provisions of the Constitution, construe the law with all such adaptations as are necessary for the purpose."

The short answer to the point is that this does not contemplate adaptation of the President's order, the validity of which is under consideration. Again, adaptations within the meaning of the Rule do not contemplate making new laws in place of the old nor enforcement of laws, that are unconstitutional.

[24] In relation to all other contentions raised at the Bar, I am in agreement with what has been said by my learned brother Narasimham J., with whose conclusion I entirely agree. I would, therefore, direct that the petitioners in cases (Cr. Misc. 182, 192, 193 and 194) be released forthwith.

[25] **Das. J.** — I agree in general with the conclusion of my learned brother Narasimham J., in his judgment.

[26] The whole question under discussion has now become academic in view of the repeal of of the President's order by Central Act, IV [4] of 1950, which has come into operation before we pronounced our orders in these cases. It has not been disputed that without the President's order, the continuance of detentions in these cases under the existing Orissa Act would be illegal.

[27] **Panigrahi J.**—After anxious consideration of the points arising in these petitions, I have come to the conclusion that the order proposed by my learned brother Narasimham J., is the right one. My mind has swayed alternately between two different principles of constructions; firstly, that it is the duty of a Court to construe a statute so as to render it constitutional. Our respect for the integrity and patriotism of the Legislature is such that every effort should be made to reconcile a piece of Legislation with the Constitution where it appears to be in apparent conflict with it. Secondly, it is equally true that where the liberty of the citizen and the enactment of a Legislature are in conflict owing to the effect of the Legislation being left in doubt, the benefit of the doubt should be given in favour of the liberty of the citizen. In spite of my earnest attempts to reconcile the Orissa Maintenance of Public Order Act, 1949 (Orissa Act VI [6] of 1949) with the provisions of the Constitution of India as laid down in Arts. 12 and 22, I have been unable to uphold the validity of the existing provisions of that Act.

[28] I do not propose to examine the provisions of Ss. 3 and 4, Orissa Act, and I am in entire agreement with the judgment just now pronounced by my learned brother, that these sections should be declared void in law of the affirmative declaration made in Art. 13 of the Constitution. I am equally convinced that it is not open to the Court to substitute "three" for "six" months in S. 4 (1) of the Act so as to harmonize it with the Order of the President. That would be to re-write the law which is beyond the function of this Court. That is a field which other hands should plough. A law which cannot endure the test of the Constitution without judicial amendment must perish. I have, therefore, no hesitation in holding that both Ss. 3 and 4, Orissa Act have been rendered void by Art. 13.

[29] What remains, therefore, is S. 2 (1) (a) which empowers the Provincial Government to detain a person. The scope of a law providing for preventive detention is, however, delimited by Art. 22 (4) of the Constitution which says that "no law providing for preventive detention shall authorise the detentien of a person for a longer period than three months" unless an Advisory Board recommends the extension of the duration of detention or unless the detention is in accordance with the provisions of any law made by Parliament. Section 2 (1), Orissa Act breaks under this test as it does not provide for the Constitution of an Advisory Board as contemplated in Art. 4 (a), nor does it purport to be made in accordance with a law made by Parliament under cl. (7) of Art. 22. The power vested by S. (2) (1), Orissa Act, is, therefore, open to the objection that it is inconsistent with Art 22, cl. (4).

[30] What has given me considerable difficulty is the language of Art. 372 (1) which reads as follows:

> "372 (1) Notwithstanding the repeal by this Constitution of the enactments referred to in Art. 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority."

The expression "subject to the other provisions of this Constitution" is capable of being understood in two different ways. On the one hand it may mean that all the laws in force will be subject to the other provisions of this Constitution and thus continue in force until altered or repealed. On the other hand, it may mean that all the laws in force shall continue until altered or repealed by a competent Legislature or other competent authority, subject to the other provisions of this Constitution. In the latter view the alteration, repeal or amendment will be subject to the provisions of the Constitution while the laws in force are declared to continue. Unfortunately, this aspect of the matter was not canvassed at the Bar and I have, therefore, to blaze my own track, after such study as I could make of similar provisions occurring in other Dominion Acts. Section 292, Government of India Act, 1935 reads as follows:

> "Notwithstanding the repeal by this Act of the Government of India Act (that is to say, the Government of India Act, 1919) but subject to the other provisions of this Act, all the law in force in British India immediately before the commencement of Part III of this Act shall continue in force in British India until altered or repealed or amended by a competent Legislature or other competent authority."

Section 108, Commonwealth of Australia Constitution Act, 1900, reads as follows:

> 'Every law in force in a colony which has become or becomes a State, and relating to any matter within the powers of Parliament of the Commonwealth, shall subject to this Constitution, continue in force in that State; and until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration or repeal in respect of any such law as the Parliament of the Colony became a State."

Section 135, Union of South Africa Act, 1900, reads:

> "Subject to the provisions of this Act, all laws enforced in the several Colonies at the establishment of the Union shall continue in force in the respective provinces until repealed or amended by Parliament or by the Provincial Councils in matters in respect of which the power to make ordinance is reserved or delegated to them. All legal commissions in the several Colonies at the establishment of the Union shall continue as if the Union had not been established."

Section 129, British North America Act, 1867, reads:

> "All laws in force in Canada, Nova Scotia or New Brunswick at the Union . . . . shall continue in Onterio, Quebec, Nova Scotia, or New Brunswick, as if the Union had not been made; subject nevertheless to be repealed, abolished or altered . . . ."

It will be found that the language employed in these different Acts is slightly different from that employed in the Constitution Act which corresponds more or less to S. 135, Union of South-Africa Act. This provision aims at removing a void created by the new Constitution coming into force and enacts the continuance of the existing laws. But the Constitution of India expressly provides in Art. 13 (1) that all laws inconsistent with the provisions of Part III shall, to the extent of such inconsistency be void. On a simple reading of the two Articles, together, I am of opinion that Art. 372 (1) should be read subject to Art. 13 (1) and that all existing laws which are inconsistent with Art. 13 (1) shall stand, impliedly repealed. The meaning of the expression 'subject' to the other provisions of this 'Constitution' is to be found not so much in a strict etymological propriety of language as in the intention of the Constitution makers to declare all laws inconsistent with the Fundamental Rights as void from the date of commencement of the Constitution. The true nature and character of Art. 13 (1) can find expression only in giving supremacy over all other existing laws if they are in conflict with the express provisions of this Article, if the other view were to prevail then all laws providing for preventive detention shall continue in force until the Legislature chooses to alter or repeal them and until such time Art. 13 (1) shall remain a dead letter. The obvious result of this interpretation will be that the fundamental rights so solemnly declared in Part III of the Constitution shall cease to be operative as being inconsistent with the existing laws and shall be reduced to silence until a competent Legislature or other competent authority alters the existing laws. That is a result which I shudder to think of, it could never have been the intention of the Constiution makers to make the fundamental rights so illusory provisions and intangible.

[31] The other provision which has given me no less trouble is the language employed in Art. 22 (7) of the Constitution. I am satisfied that for the transitional period the Order made by the President under that Article shall have the effect of a law made by Parliament by virtue of Art. 373. The order of the President came into force simultaneously with the Constitution as the Order was promulgated on 26th January 1950. There was no void or gap between the old provisions lapsing and the new provisions coming into force. (If therefore, the order of the President is valid and can help the State it will operate from the commencement of the constitution. But here, again, I have satisfied myself that the order of the President has no effect upon the detention of the petitioners. Article 22 (7) says:

> "Parliament may by law prescribe (a) the circumstances under which and the class or classes of cases in which a person may be detained for a period longer than three months under any law providing for preventive detention, without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-cl. (a) of cl. (4) and (b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention."

To "prescribe" in its etymological sense means "to lay down, for direction." Why did not the Constitution say that the Parliament may by law provide or enact or make as it has done in the other Articles of the Constitution? Article 139 says "Parliament may by law confer", Art. 140 says "Parliament may by law make provisions etc." Article 145 says 'subject to the provisions any law made by Parliament,' Art. 240 says "Parliament may by law create or continue," Arts. 240 and 246 enable Parliament to 'make" laws, Art. 247 and Art. 371 use the expression 'Parliament may by law provide." Similarly, the President may by order "specify" under Art. 370 (1) (b) (11). Under the proviso to Art. 371 the President may by Order "direct." The difference in the language employed in the different articles, leads me to think that the use of the word "prescribe" in Art. 22 (7) is not unintentional and that the word should be understood only in its etymological sense. So understood, Art. 22 (7) read with Art. 373 enables the President to prescribe by an order the circumstances and the class or classes of cases in which a person may be detained for a period longer than three months under any law providing for preventive detention. He can also prescribe the maximum period for which any person may be detained under any law providing for preventive detention. Subject to this prescription any law providing for preventive detention may indicate that a person be detained. The President cannot, under this clause, purport to enact a law providing for detention itself. His power is restricted to prescribing the limits within which a piece of legislation can be enacted. The Order of the President can therefore be of no avail to the State in justification of the continuance of detention after the Constitution came into force. It was open to the State Legislature to undertake legislation within the limits prescribed by the President by his order dated 26th January 1950, just as it was open to the President to adapt the existing laws in exercise of his powers, conferred by Art. 372 (2). Nothing has been done in this regard by either authority and the only plea put forward by the learned Advocate-General is that they had not enough time to bring the existing laws in line with the provisions of the Constitution. But the liberty of the citizen and the conveniences of the Legislature of the Executive cannot be weighed in the same scales. As I have indicated at the beginning, the liberty of the citizen must prevail over other considerations, whether they be that the Legislature had no time or whether they may be due to the fact that the legislation leaves the position in doubt.

[32] **By the Court.**—The above are reasons given for the order already passed on 1st March 1950 directing the release of all the petitioners.

[33] We further certify under Art. 132 (1) of the Constitution that this case involves a substantial question of law as to the interpretation of the Constitution.

V.B.B. *Petitions allowed.*

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* A. I. R. (37) 1950 Orissa 169 [*C. N. 27.*]

RAY C. J. AND DAS J.

Indramoni Mohapatra — Petitioner v. *Nilamoni Moharana—Opposite Party.*

Civil Revn. No. 137 of 1949, D/- 7-12-1949, from order of D. J., Cuttack, D/- 9-4-1949.

*(a) Arbitration Act (1940), S. 47, Proviso—"Award otherwise obtained"—Award obtained on agreement for reference to arbitration pending suit—Award if adjustment of suit—Civil P. C. (1908), O. 23, R. 3—Contract Act (1872), S. 23.

A reference to arbitration of the subject.matter of a pending action without an order of Court is within the contemplation of the proviso to S. 47 of the Act. Such a reference involves ouster or, at any rate, suspension for the time being of the Court's jurisdiction to proceed with the trial of the suit and is opposed to public policy and as a contract it is unenforceable even under the general law of contract. Further, an award otherwise obtained within the meaning of the proviso to S. 47, cannot *ipso facto* work as an accord and satisfaction of the suit. It must be acquiesced in or agreed to be treated as such after it is made. Consequently, an award obtained on an agreement for reference to arbitration between the parties during the pendency of a suit and without any order from the Court cannot be treated as an adjustment of the suit under O. 23, R. 3, Civil P. C. *ipso facto* and without a fresh consent between the parties given after the award : A.I.R. (32) 1945 Mad. 294, *Dissent.* [Paras 9, 12, 17, 38 & 46]

Annotation : ('46-Man) Arbitration Act S. 47 N. 1; Contract Act S. 23 N. 23.

('44-Com) C. P. C. O. 23, R. 3 N. 9.

(b) Specific Relief Act (1877), S. 21, Exception—Applicability.

Per *Ray C. J.*—The latter part of the Exception is not capable of application to a case of arbitration agreement during the pendency of a suit. The bar applies to a subsequently instituted suit, not to one pre-existing. [Para 10]

Annotation : ('46-Man) Sp. Rel. Act S. 21 N. 8.

D. Mohanty—for Petitioner.
A. S. Khan—for Opposite Party.

Ray C. J.—The petition is directed against an order of remand passed by Sri B. C. Das, District Judge of Cuttack-Dhenkanal, in Miscellaneous Appeal No. 87 of 1948, reversing an order dated, 4th October 1948 of Sri B. S. Patnaik, Additional Subordinate Judge of Cuttack, in Money Suit No. 8/342 of 1948/47. The suit was for recovery of Rs. 2493-12-0 being the sum borrowed with interest accrued thereon, under two handnotes executed by the opposite party in favour of the petitioner. The defendant resisted the suit, while accepting that the hand-notes were genuine and for consideration, with a plea of payment. The material date on which and since when the events giving rise to this application occurred is 3rd July 1948. On that date, the plaintiff was ready to go on with the hearing of the suit, and filed a list of witnesses. The defendant interposed a plea, as a barrier to the suit, by a petition purporting to be one under O. 23, R. 3, Civil P. C. for recording as a compromise an award given in an arbitration out of and without the intervention of the Court, on a reference made during the pendency of the suit. The plaintiff, took exception to the plea on 27th September 1948. On the date, next following, that is, on 29th September 1948, the learned Additional Subordinate Judge heard the parties and was of opinion that the plea of accord and satisfaction taken by the defendant on the basis of the award obtained pending suit on an arbitration without the intervention of the Court was not available to the defendant and set down the case for hearing on merits.

[2] The defendant took up an appeal against the order. The District Judge reversed it with an order of remand for reconsideration of the defendant's application on merits, in the light of his observations set out therein. The substance of his observation was embodied in the following passage quoted from his order :

> "The agreement executed by the parties while referring the matter to arbitration has therefore to be examined to ascertain if it was an agreement to accept a future award, which be treated as a compromise in the suit, but that agreement is not before the Court as the learned Subordinate Judge did not enter into any evidence, although the defendant-appellant, as the record shows, was ready with it. In the circumstances, there is no alternative but to set aside the order of the learned Subordinate Judge and send back the application to him for fresh disposal according to law in the light of the above observations after taking such evidence as the parties choose to place before him."

[3] It may be noted that there is no indication in the order that the Court should hold any such enquiry as would be pertinent to a decision if the award, as such, is otherwise valid and binding between the parties. Such considerations, as a Court has to address itself to, in order that an award can be enforced, as a judgment of Court, for example, misconduct of the arbitrators, if any, excess of jurisdiction on their part, error apparent on the face of the award and the like have not been specified by the learned District Judge as within the scope of the rehearing.

[4] The learned Judge, for holding that the award shall be treated as a conclusive adjustment of the suit to found a decree thereon, relied solely upon a decision of the Madras High Court reported in *Arumuga Mudaliar* v. *Balasubramania Mudaliar*, A.I.R. (32) 1945 Mad. 294: (I.L R. (1946) Mad. 39). The statutory provision dealing with the subject is contained in the proviso to S. 47, Arbitration Act (Act X (10) of 1940). The proviso, it has been held in the aforesaid decision, by his Lordship, Leach C. J. has not altered, rather reaffirmed the law relating to an award, when obtained on a reference to arbitration of the subject-matter of an action during its pendency without an order of Court, being treated as an adjustment of the suit even without the consent of all parties concerned being expressly and specifically given in that behalf. In order to appreciate the meaning and intendment of the proviso, the context in which it has been set, the basic value of an arbitration agreement and binding character of an award obtained therein and the history of the legislation on the subject have to be kept in view. History of Statute law of Arbitration in India has followed the footsteps of that in England and has been moulded on the model of the same basic structure. It will show how from a revocable agreement it has gradually developed into an enforceable contract within certain specified limits.

[5] In the pre-British period the law of arbitration was not unknown in India but it bears no analogy to the form in which it applies now. We had in India territorial arbitration boards such as 'Village Panchayats' and sectarian tribunals like Panchayats of different castes and creeds. In the lower strata of the society tribunals like caste-Panchayate are still to be found. The binding authority of the decisions of these Panchayats is very great and their jurisdication is not confined to questions referred to them for decision but would cover cases of violation of unwirtten, social, caste or *quasi*-legal rules of conduct. The aggrieved party could always summon a Panchayat and place his case before it. Such Panchayat tribunals consider it as one of their normal functions to decide and dispose of such disputes. The sanction behind the decisions of the territorial Panchayats or caste or sectional Panchayats is ostracism from society and common privileges. With the commencement of the British Administration, there was some statutory recognition however inchoate of arbitration as a mode of settlement of disputes cognizable in Courts of law. It did not extend however to disputes affecting immovable properties till 1813. The first regulation which laid down rules for referring suits to arbitration with the consent of the parties appeared in the Civil Procedure Code in in the year 1787. There was now detailed provision to regulate the arbitration proceedings. Regulation XVI [16] of 1793 made a sufficient inroad into the law of arbitration as understood in England, it being provided that disputes of certain description, such as disputed accounts, partnerships debts, doubtful or contested, bar-

gains non-performance of contracts would be only disputes that could be referred to arbitration. There were provisions prescribing the procedure in cases of such references, the awards and empowering the Courts to set them aside. In 1813 provision was made extending the provisions of regulation XVI [16] of 1793 to suits with respect to rights in land. There were some regulations in Bengal such as regulation VII [7] of 1822 and IX [9] of 1883 which empowered Revenue and Settlement Officers to refer disputes as to rent and revenue to arbitrators and to exercise control over them in relation to their proceedings. In the Code of Civil Procedure, 1859 (Act VIII [8] of 1859) provisions were made permitting references to arbitrations in pending suits and authorising arbitration without the intervention of the Court. These provisions continued till the Code of Civil Procedure of 1882 (Act XIV [14] of 1882) replaced them by its Ss. 506 to 526 dealing with references to arbitration with or without the intervention of the Court. In none of the statutes or regulations referred to above, there was any provisions for reference to arbitration of future disputes. All of them confine their provisions to references to arbitration of disputes after they had arisen. This was considered to be a great draw-back particularly in the law regulating commercial transaction S. 21, Specific Relief Act 1 [1] of 1877 first provided that save as provided by the Code of Civil Procedure, no contract to refer to arbitration shall be specifically enforced; but if any person who has made such a contract, and has refused to perform it, sues in respect of any subject which he has contracted to refer the existence of such contract shall bar the suit. On account of the unenforcibility of a contract to refer to arbitration notwithstanding a half-hearted relief granted by the bar of a suit provided for in S. 21, this branch of law was in an unsatisfactory state. To remove this anomaly, Act IX [9] of 1899 was enacted on the lines of the English Arbitration Act of 1889. It made provision for reference of disputes present as well as future to arbitration without the intervention of the Court. Though this Act was in force throughout India, its actual application as has been stated below was limited to Presidency towns besides a few more commercial towns. The law of Civil Procedure as devised in 1908 effected an improvement above what it was in the Code of 1882 except that it was placed in the form of a Schedule with the hope that at no distant date they may be transferred into a comprehensive Arbitration Act. The Civil Justice Committee presided over by the Hon'ble Rankin J. in recommending to the legislature that it was high time that a separate arbitration Act should be enacted made a reference to the passage in which the Richard's Committee that revised the Code of Civil Procedure expressed the hope of separate legislation of the law of arbitration. It is with this history that the present arbitration Act has been put on the statute book. It is a consolidating and amending law, all other laws on the subject having been repealed. This Act except in respect of a few points brings the law of arbitration in India, (rather, places the law of arbitration) at par with that in England. Before I close the history, I should draw attention to the fact that the last 37 words of S. 21, Specific Relief Act, which effectuated a contract to refer into a bar to a subsequently instituted suit in respect of the same subject were repealed by the Arbitration Act, IX [9] of 1899 and R. 22 of Sch. 2, Civil P. C. 1908. The effect of this repeal was that in so far as these acts provided for direct or indirect mode of enforcement of an agreement to refer to arbitration or an award obtained therein, the contract so far as it covered the same subject of dispute could not operate as a bar to a suit relating thereto. The result, that emerged out of this, was that an arbitration agreement would be a bad plea in a suit unless the remedy available under the statutory law of arbitration was taken recourse to. It follows as a corollary that a contract to refer to arbitration became unenforceable and therefore, revocable at the will of a party except as provided in either the Civil Procedure Code or Act IX [9] of 1899. With the enactment of the Indian Arbitration Act, 1940, S. 21 so for as is material to arbitration contracts has been fully recast and in its present form it reads :

> "And, save as provided by the Arbitration Act, 1940, no contract to refer present or future differences to arbitration shall be specifically enforced; but if any person who has made such a contract other than an arbitration agreement to which the provisions of the said Act apply and has refused to perform it, sues in respect of any subject, which he has contracted to refer the existence of such contract shall bar the suit."

The effect of this amendment of the section on the revocability or otherwise of a contract to refer and the availability of an arbitration agreement as a plea to a suit shall be dealt with presently. A conspectus of the law of arbitration in England in the background of its historical retrospect will, I hope, be of great use in dispelling the doubts and difficulties that occasionally arise in application of the law of arbitration in India which owes its origin (and shall be) to that in England. Arbitration was not unknown to the common law (English). It was however, in a rather unsatisfactory state. Greatest good faith between the parties was requisite to its success. The agreement to refer was revokable and there was no known procedure for enforcing an award like a judgment. Wronged party would begin with right of action, say, trespass, and end in a right of action say in covenant upon the *award*. He would thus be little nearer to his goal at the end than at the beginning if his opponent did not desire to perform what the arbitrator has awarded. Until an award was actually made, agreement to refer was regarded as a revokable authority given to a third person, namely, the arbitrator, in the nature of an authority given to an agent. The effect of this was that notwithstanding an arbitration agreement an action might be brought in the Courts in defiance of that agreement particularly so as "an express exclusion of the jurisdiction of the Courts was void as contrary to public policy" *Doleman* v. *Ossett Corporation*: (1912-3 K. B. 257-81 L J. K. B. 1092). Besides, a party who feared that the decision might be against him might revoke the arbitrator's authority and the whole proceeding would be abortive. Other difficulties arose where an appointed arbitrator died or refused to act or where a party to an arbitration agreement refused to complete the submission by the appointment of an arbitrator. As against these disadvantages, the first palliative that legal ingenuity discovered was to make the submission a rule of Court, the effect of which was to make revocation of the consent given to a reference or to ignore the decision of the arbitrator as constituting contempt of Court and the person in contempt becoming liable to attachment. The first great revision of the Law of Arbitration was contained in the Common Law Procedure Act, 1854, which provided that all written submission might be made rules of Court and the right of attachment was thereby applied unless the contrary intention appeared therein. The effect of the statute read with the provisions of the earlier statute on the subject was that if made a rule of Court such submissions were, except by leave, irrevocable; besides this statute also provided that a party to a submission could ask for a stay of proceedings of a suit brought by his opponent in breach of agreement to refer. Accordingly, the Court was given the jurisdiction either to refuse or grant a stay of proceedings on such an application within his discretion. This power remains until now both in India as well as in England as one of the fundamental features of the present law of arbitration. This Act also, conferred powers on the Court on application of the parties or otherwise to remit an award to the consideration of the arbitrator, to appoint an arbitrator or umpire, to substitute a new arbitrator for one whose appointment has been proved abortive. Lastly, the entire law of arbitration was codified by several statutes beginning with Arbitration Act, 1889, and ending with the Act of 1934. All the Acts together form a Code, references by order of the High Court and Court of Appeal now being governed by the Supreme Court of Judicature Consolidation Act, 1925. From the commencement of the Act in 1935 the Acts dealing with the law of arbitration are to be cited together as the Arbitration Acts, 1889-1934. According to these Acts, by making submission a rule of Court or by seeking to enforce the award like a judgment and by adopting various other methods provided for in the Acts an agreement of reference to arbitration has become irrevocable.

[6] The proviso cannot be dissociated from the history as well as from Ss. 46 and 47 of the Act. The sections read:

> "The provisions of this Act, except sub-s. (1) of S. 6 and Ss. 7, 12 and 37, shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so for as this Act is inconsistent with that other enactment or with any rules made thereunder."
>
> "Subject to the provisions of S. 46, and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder:
>
> Provided that an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending."

[7] They are enacted to replace a somewhat corresponding provision contained in S. 89, Civil P. C. and remove certain doubts that the construction of the latter section gave rise to. The said S. 89 and the Sch. II of Civil P. C. used till repealed by S. 49 (1) read with Sch. III, Arbitration Act, 1940 (hereinafter referred to as 'The Act'), to govern all references to arbitration whether by an order of a Court or otherwise and all proceedings thereunder, save in so far as was otherwise provided, by the Indian Arbitration Act 1899 or by any other law for the time being in force. According to S. 2, Arbitration Act, 1899, (since repealed) (which in its application was confined to agreements without order of Court) two conditions were required to be fulfilled before its provisions could be attracted, viz, (i) that there should not be a suit pending in respect thereof, and (ii) that the case must be one in respect of which, if either party wanted to bring a suit, the suit could be instituted in a Presidency Town. Schedule II, Civil P. C. since repealed dealt with three kinds of references. The Schedule was divided into three parts, each part embracing a fasciocule of rules under a distinct head. The three heads are (i) arbitration in suits (Rr. 1 to 16 inclusive), (ii) order of reference on agree-

ment to refer (Rr. 17 to 19 inclusive) and (iii) arbitration without the intervention of a Court (Rr. 20 and 21). The Indian Arbitration Act, 1899 and the Civil P. C., as between themselves governed the entire field of arbitration proceedings in British India. Besides, there was a large number of statutes which provided for arbitration in specified matters of dispute. Such statutory arbitrations, too, whether based on agreement of parties or not, were to be governed, except so for as the special statutory provisions indicated or prescribed otherwise, by the Act of 1899 or the Civil P. C., according as the disputes could be litigated upon in Presidency towns or outside. This will appear from S. 89, Civil P. C. In the Act there is an express provision in S. 46 extending its operation to every arbitration under any other enactment for the time being in force as if that other enactment were an arbitration agreement. The Act forms a complete Code of the law of arbitrations and awards being a consolidating and amending Act.

[8] It will appear that in the Act the same classification of reference has been maintained with a slight change in the phraseology to be noticed presently. Chapter IV deals with the features special to "*arbitration in suits*" except that the general provisions in Chap. V also apply to such arbitrations in so far as their applicability is called for by the particular circumstances arising. "*Arbitration without intervention of a Court*" is dealt with in Chap. II. Chapter III deals with '*arbitration with intervention of a Court where there is no suit pending*'. This corresponds mainly to the second head of Sch. II of the Code, "an order of reference on agreement to refer:" It may be noted that R. 18 of Sch. II, which provided for stay of suits filed during the pendency of a reference to arbitration has been replaced by S. 34 of the Act which finds place in Ch. V under the head 'general'. The reason for it is quite obvious. Neither R. 18 nor S. 34 makes any provision that the Court should, upon a motion for stay make an order of reference to arbitration. The Court's interference, in such cases, seems to be rather indirect. It serves the purpose by compelling the parties to perform their agreement as the sole means of settling their differences. The Court could however refuse to stay the suit for good reasons thus allowing a party to revoke the agreement and to abandon the domestic tribunal of his own choice. In the English Arbitration Act of 1889 there is a provision to the effect that no agreement to refer is revocable except by leave of Court. The same result is achieved if the Court refuses to stay the suit and thus relieves the plaintiff of the liability under the agreement. This amounts to revocation by leave of Court. The arbitration in the instant case is neither "an arbitration in a suit "nor" an arbitration with the intervention of the Court where there is no suit pending." Like the one it is not a reference by order of Court nor like the other the agreement is made a rule of Court. The question then arises whether it will fall into the category of an *arbitration without intervention of a Court within the meaning of the Act.*" At the first instance, it may appear to be so, as it is an arbitration which has proceeded through its normal course without any Court's interference until an award has been given; and the Chapter 'head' contains no words of limitation so as to confine it to cases where there is no suit pending. But for reasons to be stated presently, what appears on the surface is not real. Let us first examine what it meant in the Civil Procedure Code.

[9] On reading R. 20, Sch. 2, Civil P. C. it would be quite plain that "arbitration without the intervention of a Court" was not contemplated in the Code to cover such an arbitration during the pendency of a suit. The rule provides:

> "Where any matter has been referred to arbitration without the intervention of a Court and an award has been made thereon, any person interested in the award may apply to any Court having jurisdiction over the subject-matter of the award that the award be filed in Court."

Sub-rule (2) provides:

> "The application shall be in writing and shall be numbered and "*registered as a suit between the applicant as plaintiff and the other party as defendant.*""

Such a rule would be quite inapt and inappropriate to a case where the parties to the arbitration have already been arraigned as plaintiffs and defendants in a pending suit already numbered and registered. According to R. 21, if satisfied after due enquiries the Court may order the award to be filed and shall then proceed to pronounce a judgment according to its terms and upon a judgment so pronounced a decree shall follow. This provision too is inappropriate to an arbitration pending a suit without intervention of the Court. If it was so intended, the rule should have provided that the suit, thereupon (the award being obtained) be disposed of in terms of the award by adopting the same as the Court's judgment. There is no reference to what, if any, would happen to the pending suit. The Legislature having adopted the same phraseology as in the Code for the purpose of the Act, must be taken to have intended to describe the same kind of arbitration by the identical phraseology. Besides, internal evidence afforded by the various sections of the Act dealing with powers of the Court with reference to the said type of arbitration agreement and awards militates against the idea that the self-same sections would apply to arbitration agreements in relation to subject-matter of a suit. Here too, Court is empowered to pass a judgment upon award on which to found a decree or to supersede the reference and to order that the arbitration agreement shall cease to have effect with respect to the differences referred; unlike as in S. 25 of Chap. IV dealing with arbitrations in suits there is no corresponding provision that the Court then "shall proceed with the suit". On the premises aforesaid the conclusion, that to my mind seems inevitable, is that a reference to arbitration of the subject-matter of a pending action without an order of Court is not included within "Arbitration without the intervention of the Court" under the Act. In short, the sections dealing with the power of the Court to modify or remit or set aside an award in an arbitration without the intervention of the Court do not apply to "the award" under consideration, nor do the sections which will enable the Court to appoint or remove arbitrators or revoke their authorities. The arbitrators or umpires in such arbitrations cannot, likewise, as they would otherwise do under S. 13 of the Act, exercise power to administer oath to the parties or witnesses, correct, in an award, any clerical mistake or error arising from any accidental slip or omission or to administer to any party of the arbitration such interrogatories as may in the opinion of the arbitrators or umpires be necessary the powers that are inescapably necessary and legitimate for exercise of their judical functions.

[10] The questions that then fall to be considered are: Firstly whether such an agreement as the one in issue, is revocable at the will of a party and, if revoked, what is the consequence that should automatically follow. It is revocable if it is not specifically enforceable. Secondly, how far it supersedes the pending suit. According to an exception to S. 21, Specific Relief Act, it is not enforceable. The Exception reads:

> "And save as provided by the Arbitration Act 1940, no contract to refer present or future differences to arbitration shall be specifically enforced; but if any person who has made such a contract other than arbitration agreement to which the provisions of the said Act apply and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit".

The latter part of the exception is not capable of application to a case of arbitration agreement during the pendency of a suit. The bar applies to a subsequently instituted suit not to one pre-existing. To hold that this bar applies in the present case would amount to saying that an arbitration agreement without intervention of a Court relating to the subject-matter of a pending suit supersedes it resulting in an automatic lapse of the Court's jurisdiction of the cause. Such a consequence is hardly conceivable except in so far as its abeyance or suspension temporarily can be achieved indirectly through the provisions of the Act, say, by exercise of the Court's power to stay legal proceedings pending disposal of reference. This latter remedy, however, is not available to a post-suit-agreement as the plaintiff was then under no obligation limiting his right to sue in a tribunal of law (*vide* S. 34 of the Act). Besides, the bar referred to above does not apply to a case where an agreement of reference has been acted upon and terminated in an award as a suit for cancellation is not against the tenor of S. 21, Specific Relief Act, and that section has no application except where a person having made a contract to refer a controversy to arbitration has refused to perform it and institutes a suit in respect of the subject-matter in defiance of the contract: *Dwarka* v. *Ram Jatan*, 53 ALL. 16 : (A. I. R. (17) 1930 ALL. 877).

[11] Besides, it is apparent from the language of the S. (21, Specific Relief Act) that the bar contemplated is not available in the case of an arbitration to which provisions of the Act apply. As the proviso to S. 47 of the Act deals with awards obtained otherwise than under (the preceding provisions of) the Act, it can hardly be contended that the arbitration is *one* to which the Act does not at all *apply*. Sarcar in his Tagore Law Lectures on the law of Arbitration in British India p. 86 thus summarises his comment on S. 21 of Specific Relief Act of 1877:

> "Put concisely, the Specific Relief Act of 1877 was a bar to a suit for specific performance of an arbitration agreement, but it still permitted the defendant to plead the existence of such an agreement as a bar to the suit. The result of deletion of the last thirty-seven words from S. 21, Specific Relief Act, was that the defendant could not plead the existence of the arbitration agreement as a bar to the suit. The result achieved was that there could neither be specific performance nor would the arbitration agreement be a bar to the suit. The defendant's sole remedy lay in moving for the stay of the suit. On the suit being stayed, the defendant could take appropriate proceedings under the provision of the Indian Arbitration Act of 1899. If the suit is not stayed, the Court alone could adjudicate, arbitrators having become *functus officio*. This is also the position today."

[12] The position deducible can be comprehensively formulated as below:

1. No contract to refer present or future differences to arbitration save as provided by the Arbitration Act, 1940, is specifically enforceable.

2. All arbitrations both statutory and contractual, except if otherwise provided for in any

other law for the time being in force, are to be governed by the Act (*vide* Ss. 46 and 47).

[3] Chapters 2, 3 and 4 supplemented by other provisions of the Act read as a whole contemplate enquiry into and enforcement of only three kinds of references to arbitration and the awards therein obtained, viz., (i) arbitration in suits, (ii) arbitration in agreements made into a rule of Court and (iii) awards in arbitration without Court's intervention.

[4] Neither submission to arbitration of the subject-matter of a pending suit without Court's order nor the award obtained thereby is one of the three enumerated above, as I have already shown.

[5] The award in such an arbitration forms into a category by itself and is within the contemplation of the proviso to S. 47 of the Act. (Parties to such a submission may at any time choose to abandon the suit by lawfully available means such as withdrawal or non-appearance or otherwise and then file the award for the purpose of its enforcement. The Court shall then have the duty to enquire into its validity and may in doing so exercise the power of modifying, remitting, setting aside or enforcing as the case may be under various section of the Act, for example, Ss. 15, 16, 17, 19, 30 etc. or even superseding the arbitration altogether leaving the parties to remedies by suit).

[13] Under the Act, when called upon to enforce it, the Court has to determine judicially the binding character of an award on being satisfied that it stands the test of a valid award based upon a valid agreement for arbitration. Excess of jurisdiction, corruption, misconduct of the arbitrators and their proceedings form relevant matters for consideration.

[14] The defendant's contention, however, in the present case is that supported by the anticipatory consent given at the time of submission the pleaded award concludes the suit effectuating as it does a final adjustment and compromise of the subject-matter and must a decree in terms thereof follow. In other words, the unwilling plaintiff shall not be heard to countermand his consent—there being open no other point for its consideration "as an *award*".

[15] To explain the contention, in its true bearing, I shall quote from the decision of the learned C. J. of the Madras High Court at p. 295 (A. I. R. (32) 1945 Mad. 294):

> "Order 23 Rule 3 says .... There is here clear indication that agreement to accept a future award can be treated as a compromise in the suit and, in our judgment, the Arbitration Act of 1940, in no way alters it."

This view, if I may say so with great respect, suffers from a lacuna that it does not leave any scope for requisite inquiry that may result in either remitting or modifying or setting aside the award in the ultimate end or supersession of the agreement for arbitration. Like any other compromise it may only be subjected to the scrutiny in relation to its being a lawful compromise within the purview of O. 23, R. 3. The scope of this scrutiny is however limited. The law in this respect is thus summarised by Sir D. F. Mulla in his Commentary on Civil P. C. at p. 822 of 9th Edition :

> "Where both parties to a suit apply to the Court under this rule to pass a decree in accordance with the compromise arrived at between them, the Court has no power to refuse to pass the decree, on the ground that it considers the compromise as too favourable to one of the parties. An agreement may be lawful although it is voidable for fraud or undue influence. The rule does not refer to such agreements but if the agreement or compromise is unlawful, as where it is opposed to public policy, the Court should refuse to pass a decree in accordance with the compromise even if the parties consent."

To accede to the contention of the opposite parties would result in depriving the non-consenting party of the remedies available under the Act or any other rule or law to avoid an invalid award vitiated by excess of jurisdiction, errors apparent on the face of it, corruption or misconduct of the arbitrators or the preceding fraud or deception vitiating the agreement to refer and the like. This is as if the agreement to refer to arbitration of the subject-matter of a suit without intervention of the Court amounts to waiver by the parties of their right to take any exception to the award however vitiated it may be and an acquiescence that unless opposed to public policy, it will by all means conclude the suit as a final adjustment of the subject matter. Looked from another aspect, it amounts to ouster of Court's jurisdiction.

[16] On such an assumption, the questions that would confront us would be (i) whether such an agreement is good in law and as such irrevocable and inviolable (ii) what is the status of the award obtained in the arbitration. The proviso to S. 47, which is the theme of our consideration is new and had no equivalent in the Schedule 2, Civil P. C. which occupied the field of all arbitration with exceptions already noted in the earlier part of this judgment. An award of the kind, we have before us, became the subject of long continued controversy in Courts of law giving rise to conflict of views in the various High Courts in India. Accordingly, resting upon *Arumuga* v. *Balasubramania*, A. I. R. (32) 1945 Mad. 294: (I. L. R. (1946) Mad. 39), decision already referred to for the view that the newly enacted provision in the proviso (of S. 47 of the Act) has not altered the law, the counsel for respective parties have made their citations of authorities according as they sup-

port one view or the other. Instead of dealing with those decisions one by one I should consider it more useful to refer to Mulla's comments in his Commentary on the Code (9th Edn.) at pp. 820-821 under head *Submission and Award*. As would appear plain from the comments, the majority view is based upon *supposed force* of the arbitral agreement *under the general law of contract* that rules the validity and binding character of a compromise in a suit enforceable under O. 23, R 3 and that it is saved from the operation of the special law of Arbitration by the words, "Save as provided by any other law for the time being in force" in S. 89, Civil P. C., the exception that has been re-enacted in S. 47 of the Act by the words "save in so far as is otherwise provided by any law for the time being force". With very great deference to the agrument of the learned Judges to the contrary, I venture to say that the fallacy behind it is (i) that under the general law of contract an agreement to refer to arbitration present or future differences irrespective of the same being subject matter of a suit or not is not specifically enforceable and is therefore revocable. (ii) that compromise enforceable under O. 23, R. 3, Civil P. C., derives its strength not from its basis on any reference to arbitration nor how else the parties arrived at the terms of the compromise but their agreement to abide by the terms themselves. The latter is an agreement bestowing consent on the terms after they are fixed and settled but not an agreement to give consent to a further settlement if and when made or in other words an anticipatory consent.

[17] As I have already hinted a reference of a suit to arbitration without an order of Court involves ouster or, at any rate, suspension for the time being, of the Court's jurisdiction to proceed with the trial of the suit. Looked at from this perspective, it is opposed to public policy and as a contract it is unenforceable even under the general law of contract.

[18] The validity of such a contract was the subject-matter of consideration in the case of *Doleman & Sons* v. *Ossett Corporation*, (1912) 3 K. B. 257: (81 L. J. K. B. 1092). Slight difference in the circumstances of that case and this does not effect the applicability of the principles pronounced therein.

[19] The facts of the case are that the plaintiffs sued upon a contract made between themselves and the defendants, a Municipal Corporation for the construction of certain sewerage disposal works, in accordance with specifications, conditions, plans drawings and quantities prepared by defendants' engineer, to recover sums alleged to be due to them from the defendants under the contract and damages for wrongful termination of the contract.

[20] In cl. 32 of the contract were incorporated certain conditions which provided that

"in case of any dispute due or difference arising or happening touching or concerning the works or relating to quantities, qualities, description or manner of work done and executed or to the quantity or quality of the materials employed or in any wise whatsoever relating to the interest of the Corporation or of the contractor, they shall from time to time be referred to and be settled and decided by the engineer who shall be competent to enter upon subject-matter of such disputes with or without formal reference notice to the parties to the said contract or either of them and who shall judge, decide and determine thereon, and to the engineer shall also be referred the determination of the sum or sums or balance of money to be paid to or received from the contractor by the Corporation and the awards of the engineer shall be final and binding upon the Corporation and the contractor respectively."

[21] Two pleas were advanced by the defendant in the action: (i) the award is conclusive and binding on the plaintiff and that they are not entitled to reopen the matter thereby determined, (ii) alternatively, it is a condition precedent to this action that the matter aforesaid should be referred to and settled and decided by the said engineer (arbitrator). The plaintiff's reply was

"At the date of the said alleged award this action was pending and previously thereto the defendant had taken steps in the proceedings in the action which *precluded them from proceeding to arbitration* upon any of the *matters which are the subject of this action.*" It was held by the Court that the award was not binding on the party and could not conclude the suit."

[22] Fletcher-Moulton L. J. reviewed the position of the parties litigants in relation to arbitrations and awards obtained therein. With regard to an award obtained in an arbitration before suit his Lordship said:

'If a dispute has been brought before the private tribunal thus constituted, and an award made, that award is binding on both parties and concludes them as to that dispute. In effect the parties have agreed that the rights of the parties in respect of that dispute shall be as stated in the award, so that in essence it partakes of the character of "accord and satisfaction by substituted agreement." The original rights of the parties have disappeared and their place has been taken by their rights under the award." (p 267)

With regard to whether a party to a contract containing an arbitration clause was precluded thereby from appealing to a Court of law to enforce his right under the contract, he said:

"No provision in a contract which ousted the jurisdiction of the Courts of law could be valid but that a clause agreeing to refer disputes to arbitration was valid because it did not oust the jurisdiction of the Courts. In other words, they decided that the jurisdiction of the Courts to compel a defendant to appear before them, and their jurisdiction to pronounce finally and conclusively on the rights of the parties after due hearing, were left untouched by such a clause, or by the appointment of a specific arbitrator to decide the matter, or even by proceedings having been commenced under such a submission. *Neither a general agreement to*

> *submit disputes to arbitration, nor the submission of the dispute in question to a particular arbitration, nor even the pendency of an arbitration thereon, could be pleaded in answer to a claim in an action.*" (*p. 267*)

[23] It has further been said:

> "There cannot be two tribunals each with the jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision. To my mind this is clearly involved in the proposition that the Courts will not allow their jurisdiction to be ousted. Their jurisdiction is to hear and decide the matters of the action, *and for a private tribunal to take that decision out of their hands, and decide the questions itself, is a clear ouster of jurisdiction.* Therefore to hold that the private tribunal is still effective after the dispute has come before the Court would be to say that, in all cases in which S. 4, Aribitration Act, 1889, applies, the defendant may still force on an arbitration and, by obtaining an award from the aribitrators, oust the jurisdiction of the Courts to decide the question they have in hand In each case where the Court has decided that it will retain in its own hands the decision of the case, there would thus be a race between it and a private tribunul which should be the first to give a decision in the matter. The learned Judge had decided, that, if during the pendency of the action an award is obtained from the arbitrator, it can be pleaded in bar to the action, or, in other words, the *decision of the arbitrator and not that of the Court, decides the rights of the parties. If this were good law, there would in every case be the race between the public and private tribunals which I have described, and the decision of the speediest would prevail. This would be ousting the jurisdiction of the Court in a most ignominious way.*" (*p. 269*).

Farwell L. J. at page 274 observed :

> "The King's Courts do not compete with arbitrators, or permit their own proceedings to be interfered with in any way by them ; when the defendant has submitted to the jurisdiction, he cannot withdraw without the leave of the Court, or the consent of his opponent. If this is not so, what would happen if the action and the arbitration go on together, and the plaintiff succeeds in his action but the arbitrator makes his award on the same day in favour of the defendant ? Is one to be set off against the other, or which is to prevail? Or suppose that the arbitrator refrains from publishing his award in deference to a protest from the plaintiff who has succeeded in the action. Would such protest be a breach of the covenant to refer, and entitle the defendant to his action for damages against the plaintiff ? It appears to me impossible to allow more than one proceeding to continue without landing the Court and the parties in inextricable difficulties."

[24] I shall pause for a moment to consider the application of the principles enunciated in *Doleman's case*, (1912-3 K. B. 257 : 81 L. J. K. B. 1092), which has stood the test of time in England and has been followed in numerous Indian decisions notwithstanding the prominent difference between the facts of that case and the present. In that case the parties referred their future differences to arbitration. While the agreement was in force, one of the parties in disregard of it filed a suit relating to the subject-matter of reference. As in India so in England the other party, if he chooses to enforce the contract of reference, has to apply, to the Court before whom the suits pending under S. 4, Arbitration Act of *1889* (of England) corresponding to S. 34 of the Act which has replaced R. 18 of the Second Schedule of the Code, to stay proceedings in the suit. This application has to be filed before defendant takes any steps in the suit. In India he has to do so before issues are framed. Failure to do so amounts to *waiver* of his right of enforcement of the contract of arbitrations. Thereafter, the arbitration proceeding even if it terminates in a completed award is of no avail to the defendant. As a plea in bar it is bad in law. The award is not binding as, to hold that the suit is concluded by the award tantamounts to snatching away the jurisdiction from Court. It is against public policy that the statutory tribunal should be running a race with a private tribunal and the speedier will win the race. It is a matter of public policy that the Court's jurisdiction should not be flouted. An arbitration agreement can be enforced with the leave and order of the Court and that by three ways. (i) by making the agreement a rule of Court (ii) by an order of reference by Court in a pending suit (iii) by asking the Court having jurisdiction to enforce an award. The Court has to be satisfied that there was a valid agreement to refer and that there was no misconduct or corruption in the proceedings and the like.

[25] In the present case the parties had already submitted their differences to the jurisdiction of the statutory tribunal. While adjudication by Court and in Court was pending, the parties started arbitration proceedings without leave of Court though the statute provides that such arbitrations shall be submitted to by an order of Court or consent of all parties. This also amounts to ouster of jurisdiction of Court and setting up two tribunals to run a race side by side. This offends against public policy and against jurisdiction of Court as such in one case as in the other Doctrines laid down in *Doleman's case*, (1912) 3 K. B. 257 : (81 L. J. K. B. 1092) fully apply to the present case. On the other hand, they apply with greater force and cogency. I shall not however, be understood to say that the arbitration proceeding and the award obtained therein are null and void but they shall not be allowed to supersede the trial. A Court can order supersession of arbitrators and arbitrations and not *vice versa*.

[26] It has been contended by the learned counsel for the opposite party that in case the necessary post award consent that would make it enforceable as compromise be lacking, it could be filed as an award and the Court could make necessary investigation into matters relevant in order to pass a judgment in terms thereof. The

argument seems at the first instance very attractive. But on a little careful consideration, it is unsound. In order to attract the provisions of the Arbitration Act which provide for review of an award by the Court, the reference—agreement must have been one falling into either of the three categories of reference to arbitration. It is somewhat difficult to find a parallel case in the judicial decisions of the Indian Courts to serve as a precedent. But the English case of *Darlington Wagon Co., Ltd.* v. *Harding*, (1891) 1 Q. B. D. 245 : (60 L. J. Q. B. 110), is largely in point. In that case, the plaintiff company contractors for the erection of the pier sued the defendants for works done under the contracts that had been entered into. In course of the trial it was agreed between the parties that an order of reference should be made and an order was drawn up by consent referring all matters in difference between the parties to an arbitrator. In one of the clauses of the order the costs of the pending suit and that of the reference and award was agreed to abide the event and in another clause it was also agreed that in the event of either of the parties disputing the validity of the said award the Court should have power to remit the matters thereby referred or any or either of them to the reconsideration of the arbitrator. By a subsequent agreement (without an order from Court) it was agreed between the parties that all claims and counterclaims and matters of dispute between them should be referred to arbitrator as if the same have been in existence at the commencement of the action and have been the subject of the action. The arbitrator awarded that there was due from the defendants to the plaintiffs a sum of money largely exceeding the amount claimed in the action. The defendant filed an application in Court asking to set aside or remit the award of the arbitrator. The application was refused on the ground that the Court had no power to review the award. The reference in this case had been made before the Arbitration Act, 1889, which however had come into force at the time of the award-making. It was assumed that according to S. 25 of the Act it could be brought within its purview. Section 25 reads :

> "This Act shall apply to an arbitration commenced after the commencement of this Act under any agreement or order made before the commencement of this Act."

Under the Act, the subject-matter of a suit could be referred by an order of Court to an arbitrator under S. 14, Lord Esher, M. R. who delivered the judgment of the Court observed :

> "The question then is whether this case can be brought within the scope of the Act. Section 14 gives power to refer in certain cases and we must consider whether this order could have been made under that section. I think, it could not. It is not a reference by the Judge of the whole cause or matter or of any question or issue of fact arising therein. It is an order made by consent for the reference of all matters in difference. That is a much larger order than any which a Judge has authority under the Act to make . . . . . . The order was not therefore made under S. 14, even if by reason of S. 25, the case is brought within the Act . . . . . . The whole validity and force of the order of reference arises from the consent of the parties . . . . . . It is obvious to my mind that the parties who consented to this order did not intend to operate under either Act. I have come therefore to the conclusion that there is no power to review the award."

Similarly, in the present case, the parties' reference to arbitration was not in accordance with the provisions of the Arbitration Act. The Court, therefore, cannot take notice of the award except, if at all, under the proviso. The award will stand or fall on the basis of a post-award consent as an accord and satisfaction of the suit as between the parties.

[27] Arbitration Acts 1889-1934 and the Supreme Court of Judicature Consolidation Act, 1925 comprise the entire law of arbitration prevalent in England just as arbitration (Protocol and Convention) Act, 1937, and the Arbitration Act, 1940 at present constitute the entire code of the law of arbitration in India. The scheme and the fundamental principles underlying the arbitration law in both the countries are almost the same. The Indian Arbitration Act, 1940, has gone to a very large extent, though not to the fullest extent, to implement the provisions relating to arbitration, either through or without the intervention of the Court, of the English Acts. On careful comparison, I have found that except for certain additional powers in Courts in England by which they can proceed either by attachment of properties by issuing writs of contempt of Court against a party who resiles from or revokes an agreement to refer to arbitration which has been made into a rule of Court on which is based upon an order of Court, the provisions of law are almost the same. As I have already shown from the reported cases cited above, the arbitration proceeding and an award obtained therein which do not strictly conform to the provisions of the Arbitration Acts are not recognized as good defence to a suit nor do the awards *ex proprio vigore* conclude determination of the subject-matter of the suit. As has been pointed out by one of the learned Judges Vaughan-Williams L. J., in *Doleman & Sons' case*, (1912-3 K. B. 257 : 81 L. J. K. B. 1092) who was dissentient in his reasons for the conclusion reached in that case, the plea upon executed award completed after action is allowed as a good plea as an accord and satisfaction. The learned Judge for this observation relied upon the case of *Lowes* v. *Kermode*, (1818) 8 Taunt

146 : (129 E. R. 339). This appears to be the view accepted in U. S. A. to be noticed presently. This to my mind appears to be nearly equivalent to what is laid down in the proviso of S. 47, Indian Arbitration Act, 1940.

[28] As I have been telling all the while, the Legislature has prescribed specific ways and *modus operandi* for enforcement of otherwise specifically unenforceable agreements for arbitration of disputes by a domestic tribunal and its decision; and that contracting out of such prescribed modes, either expressly or by implication, should be guarded against by Courts. In this connexion, I shall quote a paragraph from Quinton McGarel Hogg's Law of Arbitration, 1936 Edn. Chap. IX, p. 113 :

> "These provisions are so fundamental to the law of arbitration that it was held under the old S. 19 of the Act of 1889 that the parties could not contract out of them. An agreement between the parties not to require a consultative case or to apply to the Court for an order directing one was held void and unenforceable [*Re : Hunsloh and Reinhold, Pinner & Co.*, (1893) 1 Com. Cas. 215 and *Czarinikow Co. Ltd.* v. *Roth Schmidt & Co.* (1922) 2 K. B. 478 : (127 L. T. 824)]."

[29] Quite a different approach to the question may be adverted to, namely, the favour which the Courts accord to an award of arbitrators is predicated upon the assumption that in the conduct of the arbitration the parties to the controversy had a full and fair hearing and that the award is the honest decision of the arbitrators and involves no mistake so gross as to work manifest injustice and furnish misconduct of evidence on their part. Enforcement of an award must be in accord with this assumption. In America too, as in England, the Courts look and guard with great jealousy against the ouster of their jurisdiction. I shall quote a passage from Corpus Juris, Vol. 5, p. 20 :

> "While arbitration is now favoured by Courts and every reasonable presumption indulges to give effect to such proceedings it is not to be understood that parties can, by agreements to arbitrate, oust the jurisdiction of the Courts over the matters submitted to arbitration . . . . parties will not be permitted, by agreement, to submit to arbitration to oust the jurisdiction of the Courts . . . . in other words, assume jurisdiction and determine the matters, in dispute, which constitute the subject-matter of the agreements on the principle that the parties cannot deprive themselves of the right to resort to the proper legal tribunals for the submission of their controversies."

[30] With regard to the effect of arbitration in a pending action, there has also been divergence of opinion of the Courts in America. The majority rule has been summed up in a few articles in Corpus Juris, vol. V, p. 48 *et seq.* The substance of it is that the submission of a cause of action to arbitration pending a suit thereon *ipso facto* works a discontinuance of a uit. The ground upon which the doctrine rests is that the parties have selected another tribunal, one of their own creation, to settle the controversy, and that they thereby to (sic) and do withdraw the cause from the Court. Where such a discontinuance is wrought the Court will not look beyond the submission. Likewise, it is not material whether the submission is valid or invalid. This discontinuance is not affected by a subsequent revocation of the submission. If the plaintiff after such submission does not voluntarily dismiss his case, the defendant can compel him to do so by a motion setting up the submission or by answer in the nature of a plea in abatement. It is open to the parties while agreeing to the submissions pending suits to make an express reservation that the cause is to be retained in the docket until the arbitration is perfected by an award. This discontinuance, however, may be waived by a party by appearing at the trial of the cause and defending it. Such a submission of a pending cause without a rule of Court does not furnish sufficient ground for stay of proceedings in the cause though the parties may agree expressly to the contrary. In the former case, the defendant must plead the award *puis darrein continnance* (a plea in which the defendant pleaded some matter of defence which had arisen 'since the last continuance' or adjournment). It may be noted here that under the Rules relating to the Practice of Supreme Court of Judicature in England O. 24, R. 2 any ground of defence that arises after the defendant has delivered a statement of defence or after the time limited for his doing so has expired, the defendant may within eight days after such ground of defence had arisen, or at any subsequent time by leave of the Court or a Judge, deliver a further defence setting for the same. *In Doleman's case*, (1912-3 K. B. 257 : 81 J. K. B. 1092), already referred to, Vaughan Williams L. J., in his dissentient reasoning, pointed out that a completed award in such a submission could be pleaded pending an action *duis darrein continuance* under O. 24, R. 2 of the Supreme Court Rules. This view, however, was not conceded to by the other two Lords Justices.

[31] The minority rule in the United States is to the effect that mere submission to arbitration in a pending suit does not *ipso facto* work a discontinuance, thereof. But an award would be necessary to work a discontinuance. Both the rules, however, agree that an award in submission of a pending cause to arbitration without rule of Court can be pleaded *puis darrein continuance*. With regard to the revocability, the rule that either party can revoke the submission at any time before an award has been made is

too well settled to admit of doubt. Here too, it is stated (5 C. J. p. 53, Art. 92):

> "the reason why the agreement was revocable under common law was not that arbitration was not favoured by it as tending to end litigation and not for want of consideration as the ending of litigation was strong consideration, but because of that principle of law that parties could not, by agreement, oust the Courts of jurisdiction assigned them by law, and could not debar themselves from appealing to the law and tribunals of the land."

[32] It is apparent that in British Jurisprudence an award on the subject-matter of a pending action without rule of Court is not acknowledged as a valid plea while in America it gives rise to a successful plea of discontinuance of the suit and it produces the same result as if the plaintiff withdrew from the suit. Under both the systems of jurisprudence, however the award can itself be the basis of a fresh cause of action. This, however, is something different from accepting the award as the final adjustment of the suit though according to the American view, the same result may ensue in an indirect way. On equity side of the jurisprudence of both the countries, different rules obtained. According to American View (*Vide* Art. 616, 5 C. J.):

> "Although a mere agreement to submit an arbitration cannot be specifically enforced, yet it is well settled that an award made in pursuance of such submission may be specifically enforced in equity where the thing awarded to be done is such that a Court of equity would compel its specific performance if agreed on by the parties themselves."

[33] The ground is that it is but an execution of the agreement of the parties ascertained and fixed by the arbitrators.

[34] In England, a Court of Equity shall not enforce an award (which is not based on rule of Court) unless the parties acquiesced in the award.

[35] Article, 618, 5 C. J. p. 228:

> "It was formerly held in England that equity would not enforce an award unless the parties had acquiesced in it, or agreed afterwards to have it executed, but this distinction was afterwards overruled in England and has never been recognised as prevailing in the United States."

[36] In the case of *Thompson* v. *Noel* (1738) 1 Atk. 61 : 26 E. R. 40 Lord Chancellor held :

> "A bill to carry an award into execution when there is no acquiescence in it by the parties to the submission or agreement by them afterwards to have it executed, would certainly not lie: *Norton* v. *Mascal*, (1687) 2 Ch. Rep 304 : (23 E R 626); *Webster* v. *Bishop*, (1703) 2 Vern 444 : (23 E. R. 884.)"

[37] What is stated in Art. 618 of 5 C. J., already quoted, to the effect that the rule in *Thompson's case*, (1733-1 Atk 61 : 26 E.R 40) was afterwards overruled does not appear to be quite accurate. The statement seems to have been based on the decision of *Wood* v. *Griffith*, (1818) 37 E. R. 16 : (1 Wils Ch. 35). The report of that case, however, shows that both parties to the submission had given their consent to the execution, that is, specific performance of the award, though they differed later with regard to its meaning. On authority of *Wood's cases*, (1818) 37 E. R. 16 : (1 Wils. Ch. 35) therefore, it could not be said that the rules laid down in *Thompson's and Webster's cases*, (1738 1 Atk 61 and 1703-2 Vern 444) were overruled. The position that stands with regard to English Jurisprudence is that an award not obtained by rule of Court nor sought to be enforced in any of the manners provided for in the Arbitration Acts' 1889-1934 (of England) could not be accepted as an adjustment of the party's dispute for the purpose of its execution or enforcement unless the parties had acquiesced in it or agreed afterwards to have it executed.

[38] In the background of the history of the legislation on the subject both in England and India, the fundamentals on which the entire fabric of the law of arbitration has been constructed and the basic principles by which to parties' liberty of contract ought, as a matter of public policy, to be limited, an award otherwise obtained within the meaning of the proviso to S. 47, cannot *ipso facto* work as an accord and satisfaction of the suit. It must be acquiesced in or agreed to be treated as such after it is made. The earlier agreement at the time of submission to treat the award if and when made as an adjustment is predicated on the assumption, as already stated above, that in the conduct of the arbitration the parties to the controversy had a full and fair hearing and that the award is the honest decision of the arbitrators and involves no mistake so gross as to work manifest injustice and furnish misconduct of evidence on their part. If the award *ipso facto* and without any further concurrence of all parties works as an adjustment of suit the party unwilling to abide by the award loses the benefit of an enquiry by the Court as to basic requirement of a valid award having been fulfilled in its obtainment. To give effect to the anticipatory contract to replace the post-award concurrence would work as if the party had contracted out of his right to appeal to the Court of law of the land. Such contracting out is bad in law being against public policy.

[39 I shall now read S. 47 of the Act:

> "Subject to the provisions of S. 46, and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder :
>
> Provided that an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a com-

promise or adjustment of a suit by any Court before which the suit is pending."

[40] The provision is an enabling one and allows an award "otherwise obtained" to be taken into consideration as a compromise or adjustment of a pending suit, provided all parties interested *give consent to such consideration.* The provision is not capable of any other construction. It is used, this consent is already there at the time of submission; but there is no doubt, from the fundamental nature of a contract of submission to arbitration as discussed above, that the contract is a revocable one. 'Contract to accept it as a compromise in the suit' cannot be, in anywise placed higher than a contract to abide by the award' which is indulged in every arbitration agreement. The Legislature, therefore, provides that after the award all the interested parties should ask the Court to consider it as an adjustment of a suit. The Court thereupon shall proceed under O. 23, R. 3 and pass a decree thereon. The anticipatory consent is not only a contingent one but also is on the assumption that every thing goes on well with the arbitration proceedings and the arbitrators. A party finding that the assumption pre-assumed did not materialise and there being no venue for correction in a proceeding under O. 23, R. 3, Civil P. C., withholds his consent and he is at liberty to do. I have come across some Indian decisions that have partially dealt with arbitration out of Court during the pendency of a suit in which it was held that "the reference and the award were bad for there could not be two conflicting jurisdictions relating to one and same matter": *vide* Sambu Dayasing's Commentary on the Law of Arbitration, Second Edition, para 392 at p. 247—referring to *Gohram Shambay* v. *Jumo Obhayo*, A.I.R. (29) 1942 Sind 41: (I.L.R. (1941) Kar. 570).

[41] The American (U. S.) view that such a submission perfected in an award works out compulsory discontinuance of the suit is not without logical cogency but does not compare favourably with English view which the Indian Statutes embody and incorporate. The former is inconsistent with the fundamental theory that no party can oust jurisdiction of Court of law of the land by contract which though is acknowledged in U. S. Courts. Besides, it has the disadvantage that unless parties otherwise agree they are driven to a fresh proceeding for enforcement of the award. According to the view taken by me which is the settled view in British Courts, the parties are, by agreement free to treat the award as conclusive in the suit or the suit will have its normal course ending in a judgment and decree. The party which is guilty of breach of contract may be liable to indemnification of his adversary in a separate proceeding. That is, however, quite another matter. Section 47 of the Act, like S. 89, Civil P. C. contains the words "save in so far as is otherwise provided by any law for the time being in force" The limitation clause governs the applicability of the provisions of the Act to arbitrations and proceedings thereunnder. Order 23, R. 3, Civil P. C., does not expressly provide for any mode of arbitration and hence it cannot be considered to be within "any law for the time being in force." Besides, it is law of procedure which prescribes the mode to ascertain the validity and enforceability an adjustment of compromise of the suit. It does not exclude the application of arbitration law to a proceeding set up by parties by their consent to settle the terms for their acceptance for the purpose. The proviso. however, is not hemmed in or circumscribed by any such limitation clause and it requires acquiescence or agreement after award that it should be taken into consideration as an adjustment of the subject-matter of the suit.

[42] In the circumstances, I am unhesitatingly of opinion that the award set up by the opposite party cannot be treated as adjustment of the suit and there is no point in making any enquiry into the matter of its existence and the fact of its being obtained by a valid agreement of the parties. As the parties did not avail of the procedure of setting up the arbitration under order of Court, the suit must proceed in its normal course.

[43] Before closing, I must record my appreciation of the learned trial Court's sound commonsense that led him to come to a correct decision in law notwithstanding the contrary decision of Madras High Court already referred to.

[44] In the result, the civil revision is allowed with costs. The order of remand passed by the learned District Judge is reversed and the order of the learned Subordinate Judge is restored. The hearing fee is assessed at two gold mohurs.

[45] **Das J.**—I agree with the order proposed by my Lord the Chief Justice

[46] The question that arises in the case is whether an award obtained on an agreement for reference to arbitration between the parties during the pendency of a suit and without any order from the Court is to be treated as an adjustment of the suit under O. 23, R. 3 *ipso facto* and without a fresh consent between the parties given after the award. The decision really turns upon the construction of the proviso to S. 47, Arbitration Act. Prior to the enactment of the Arbitration Act (Central Act X [10] of 1940), there was

considerable difference of opinion in the various High Courts as to whether such an award operates *ipso facto* as a compromise. Excepting the High Courts of the Calcutta and Patna, all the other High Courts were of the view that the award operates *ipso facto* as a compromise under O. 23, R. 3. *See Gajendra Singh* v. *Durga Kumari*, A. I. R. (12) 1925 ALL. 503: (47 ALL. 637 F.B.); *Chanbasappa* v. *Baslingayya*, A. I. R. (14) 1927 Bom. 565: (51 Bom. 908 F. B.); *Subba Raju* v. *Venkata Rama Raju*, (A. I. R. (15) 1928 Mad. 1025: (51 Mad. 800 F. B.); *Rohinikanta* v. *Rajani Kanta*, A. I. R. (22) 1935 Cal. 643: (151 I. C. 661) and *Bhimraj Kanailal Firm* v. *Munia*, A. I. R. (22) 1935 Pat. 243: (14 Pat. 799). The difference of opinion broadly turned upon the differing constructions put on S. 89 and O. 23, R. 3, Civil P. C. According to one view, the effect of S. 89 was (apart from any other specific statutory provisions) to prescribe Paras. 20 and 21 of Sch. II, Civil P. C., as the only method by which parties can proceed to arbitration when a suit is pending and by implication to render all proceedings by way of arbitration during the pendency of the suit otherwise than under the above provisions virtually invalid; while according to the other view the said provisions were only permissive and there was nothing in S. 89 to compel the contrary conclusion. With reference to O. 23, R. 3, one view was that the agreement to be bound by a future award is in itself a compromise and that therefore the award results automatically in an adjustment of the suit while the other view was that though the award may be the ultimate result of an agreement, it is not an adjustment or compromise by agreement. As stated by the learned Judges in *Rohinikanta* v. *Rajanikanta*, A. I. R. (21) 1934 Cal. 643: (151 I. C. 661) this view was:

> "Reference to arbitration and award given by an arbitrator which award is not accepted by the parties does not appear on a plain view to come within the meaning of O. 23, R. 3."

Similarly it was stated in *Bhimraj Kanailal firm* v. *Munia*, (A. I. R. (22) 1935 Pat. 243: (16 Pat. 799) that:

> "If the parties come to the Court with a cut and dry statement that the matter in dispute between them has been adjusted, then O. 23, R. 3 applies; but if they come to the Court stating that it is true that they have referred the dispute to an arbitration, but that they do not agree mutually to accept the decision which has been arrived at by another person, then the matter is no longer governed by O. 23, R. 3 and in that case, there being no agreement, the matter must be considered in the light of Sch. II. In fact O. 23, R. 3 distinctly contemplates that if the agreement, compromise or satisfaction presented to the Court is fit to be recorded then and there, a decree in accordance therewith shall be passed. It is obvious that an agreement to go to arbitration and accept the award is not of such nature that a decree can be pssed in accordance therewith and the award which is ultimately made by the arbitration is in no sense a part of the agreement."

[47] It is in this state of conflict of law that S. 47, Arbitration Act has come to be enacted. It runs as follows:

> "Subject to the provisions of S. 46, and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder:
>
> Provided that an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending."

[48] This section by its proviso was obviously meant to settle the conflict in favour of the view taken by the High Courts of Calcutta and Patna. The proviso refers to an arbitration award obtained otherwise than under the provisions of the Act and this is irrespective of the question whether the provisions in Chap. II are applicable to an arbitration in a pending suit. It is meant to provide that such an award is neither necessarily invalid, nor *ipso facto* operative as an adjustment of the suit; but that it can be taken into consideration by the Court. If the award on an agreement operated *proprio vigore* as a compromise, then under O. 23, R. 3, there is no option left to the Court and if such an award is necessarily invalid, there is nothing to be taken into consideration. But the proviso also requires in terms, the consent of all the parties interested as a condition precedent for the exercise of the power to take the matter into consideration. It is to be noticed that the award cannot be taken into consideration on the application of one only of the parties, nor by Court itself *suo motu*. The context indicates that the "consent" specified in the proviso is a "consent" given at the time when the matter is to be taken into consideration. It has been held however in *Arumugha Mudaliar* v. *Balasubramania Mudaliar*, A. I. R. (32) 1945 Mad. 294: (I. L. R. (1946) Mad. 39), that the word "consent" in the proviso might equally well cover "antecedent" consent given at the time when the parties agreed to refer the matter to arbitration. It has been suggested in that case that the parties may agree not only that the matter in dispute between them shall be decided by an arbitrator, but that they may agree in advance that the award so given will be accepted by them as binding. It is said that such an agreement satisfies the requirement of "consent" specified in the proviso. With very great respect, the learned Judges have failed to notice that such an agreement to treat the award as binding is effective as antecedent consent, the award itself is an adjustment and no option is available to the Court, except to pass a decree in terms of the award. But this is just what the proviso

expressly meant to negative. It may also be noticed that the consent required under the proviso is the consent to take the award into consideration and not a consent to the award itself. The position, therefore, under the proviso appears to me to be this. An award pending a suit on an adjustment of the suit, *proprio vigore* or by virtue of any specific clause in the agreement to treat the award when given is binding. If the award is agreed to, after it is given, it operates as an adjustment and a decree in terms will have to follow under O. 23, R. 3, and if the facts relevant to such a situation are disputed, they will have to be enquired into as in any disputed adjustment. If there is an award, and all the parties thereafter consent that it may be taken into consideration, though they do not agree to the award itself then the Court will go into the merits of the award—presumably on grounds germane to arbitrations under the Act —and if satisfied, will treat the award as an adjustment and give effect to it as such under O. 23, R. 3.

[49] I have, therefore, no hesitation in coming to the conclusion in agreement with my Lord the Chief Justice that an award in a pending suit is not a plea in bar and cannot operate to oust the jurisdiction of the Court to continue the proceedings in the suit and that it does not operate by itself as an accord and satisfaction of the claim in the suit.

[50] Whether after obtaining the award, during the pendency of a suit, without intervention of the Court, the parties could rely on it, otherwise than under the proviso to S. 47, Arbitration Act, does not arise for consideration in this case. It is recognised that such an award is not altogether invalid. That an award not made a rule of Court, can be sued upon and can form the basis of rights and liabilities, is well recognised both in England and in India. (See *Rani Bhagoti* v. *Ranichandan*, 11 Cal. 386: (12 I. A. 67 P. C.), and also the judgment of Marten C. J. in *Chanbasappa* v. *Baslingayya*, A. I. R. (14) 1927 Bom. 565: (51 Bom. 908 F. B.). Whether that continues to be so under the present Arbitration Act, depends on the construction of Ss. 31, 32 and 33 of the Act, on which there appears to be difference of opinion as disclosed in *Moolchand Jothajee* v. *Rashid Jamshed, Sons & Co.*, A. I. R. (33) 1946 Mad. 346: (I. L. R. (1946) Mad. 840): *Munshilal & Sons* v. *Modi Bros.*, 51 C. W. N. 563 and *Suryanarayana Reddi* v. *Venkata Reddi*, A. I. R. (35) 1948 Mad. 436: (I. L. R. (1949) Mad. 111). That such an award could be the basis of a suit for specific performance also appears from S. 30 of the Specific Relief Act. Whether this continues to be so under the present Act may require consideration. If a remedy by way of suit on the award, or by way of specific performance is available, it may be open to the parties to file such a suit and ask for the pending suit to be stayed. The question as to whether the parties could invoke the provisions of the Arbitration Act itself to enforce the award (otherwise than under proviso to S. 47) does not appear to me to be altogether free from difficulty. There is very considerable force in the various circumstances pointed out by my Lord the Chief Justice, which justify the conclusion that the Act does not apply to such an award, without intervention of a Court in a pending suit. But it may be suggested on the other hand that there is nothing specific in the Act itself negativing its application. The Act itself as the premble shows is meant to consolidate and amend the entire law relating to arbitration. Section 47, in terms makes the provisions of the Act applicable to all arbitrations. There appears to be nothing in Ss. 14 to 17 of the Act which renders them inapplicable to such an award though probably other sections are not quite appropriate. It cannot be said that the jurisdiction of the Court is ousted when under the said sections the Court is asked to examine the validity of the award and pass a decree in terms thereof. The view that the appearance of an unseemly race between the arbitration and the Court is to be avoided has much in its favour to commend it. But on the other hand, if the only remedy of a party to an award so obtained is to plead it as an adjustment under proviso to S. 47, there might be great inconvenience in a case where an award deals with a number of matters—some involved in a suit and some outside it and one of the parties refuses to abide by it and the terms of the award are not separable. The modern tendency being in favour of upholding arbitrations, especially in the circumstances of this country, the matter requires further consideration than what I have found myself able to give, in the absence of any arguments from the bar. I would therefore prefer not to express any final opinion on the matter.

V.R.B. *Revision allowed.*

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*A. I. R. (37) 1950 Orissa 183 *[C. N. 28.]*

PANIGRAHI AND NARASIMHAM JJ.

Mt. Jinatun Nisa Bibi and another — Defendants — Appellants v. *Mt. Idrakun Nisa, Plaintiff and others, Defendants — Respondents.*

First Appeal No. 15 of 1945, D/- 15-12-1949, from decision of Ad. Sub-Judge, Cuttack, D/- 4-12-1944.

*Civil P. C. (1908), O. 33, Rr. 7, 8, 15, 2 and S. 149 — Application to sue as pauper refused —

Power of Court to allow court-fee to be paid — Limitation.

An application to sue as a pauper is composite document consisting of an unstamped plaint and an application for permission to sue in forma pauperis. If the application is rejected, the plaint still remains and the Court may, in its discretion, while rejecting the application, allow the petitioner to pay the requisite fee, and in such a case the suit shall be deemed to have been instituted on the date of presentation of the application. [Para 9]

Quære : — Where however, the Court passes an unconditional order rejecting the application, whether it can, by a subsequent order, permit the applicant to pay the requisite court-fee. [Para 9]

Annotation : ('44-Com.) Civil P. C., O. 33, R. 7 N. 5.

S. N. Sen Gupta and R. N. Sinha—for Appellants.
M. S. Rao and A. S. Khan — for Respondents.

Panigrahi J. —This is an appeal against the judgment of the Additional Subordinate Judge, Cuttack, granting a decree to the plaintiff in a suit for recovery of Rs. 7530 as her dower debt due from the estate of her deceased husband. The point debated on this appeal is whether a Court, while rejecting an application to sue in *forma pauperis*, can grant time to the petitioner for payment of court-fee and whether in such a case the suit shall be deemed to have been instituted on the day of the presentation of the pauper application.

[2] The facts briefly are that the plaintiff started her suit with an application under O. 33, R. 2, Civil P. C. praying for permission to sue in *forma pauperis*. That application sets out in detail all the particulars required for a plaint, states the cause of action and the relief that the plaintiff is entitled to, and in the prayer portion contains a request (1) that the petitioner be permitted to sue as a pauper; and (2) that she may be given a decree for their recovery of her dower money amounting to Rs. 7530 together with costs. The learned Subordinate Judge registered this application as Misc. Case No. 142 of 1939 on and 27th May 1940 allowed the application of the plaintiff and registered the suit as O. S. No. 77 of 1940. The defendants went up in appeal to the High Court against this order of the Subordinate Judge. The order of the Subordinate Judge was reversed and the petition was remanded, by the High Court's order dated 30th October 1940, for instituting a fresh enquiry into the pauperism of the petitioner. On 8th March 1941 the Subordinate Judge restored Misc. Case No. 142 of 1939 and directed that the proceedings in the original suit which had been registered as O. S. 77 of 1940 shall be stayed. The enquiry into the pauperism of the petitioner was taken up and was being adjourned from time to time till 30th October 1941 when further proceedings in the suit were dropped; and on 20th December 1941, the petiton for leave to sue as a pauper was rejected. The order of the learned Subordinate Judge reads as follows :

> "Hence the original application of applicant for permission to sue in *forma pauperis* shall stand rejected with costs and pleader's fee at Rs. 16.
>
> C. C. Coari.
> Subordinate Judge.
>
> The applicant is now called upon to pay court-fees for the plaint by 10th January 1942.
>
> C. C. Coari.
> Subordinate Judge.

The point for determination is whether this order of the learned Subordinate Judge is really one order or constitutes two separate orders passed at different times. The two portions are separately numbered as Orders Nos. 46 and 47 of the same date. Mr. Sen Gupta appearing for the defendant-appellants contends that these are two separate orders and that the latter order was beyond the jurisdiction of the Subordinate Judge as he became *functus officio* when he rejected the application to sue in *forma pauperis* by his order numbered as 46. The defendant-appellants went up in revision to the High Court again against the order of the Subordinate Judge permitting the plaintiff to pay court-fee, i.e., against the order numbered as 47. In dismissing the revision (Civil Revn. No. 28 of 1942) Shearer J. observed that the learned Subordinate Judge in making the order complained against acted *suo motu* and that he was dealing with the matter simultaneously by two orders and that "it is impossible to say that the order under revision was without jurisdiction." Mr. Sen Gupta's contention is that this order of the High Court does not prevent him from raising the point once again in this Court in first appeal as the earlier order of the High Court was passed in revision.

[3] We allowed Mr. Sen Gupta to argue the point at length irrespective of whether or not the previous order of the High Court operated as *res judicata*; and after hearing him we take the same view of the proceedings as Shearer J. did previously. The learned Subordinate Judge had throughout treated the document which was filed as a petition by the plaintiff, in initiating her suit, as a composite document consisting of plaint and a petition. In fact, he kept both the suit and the petition pending for a long time, although the High Court directed a fresh enquiry into the pauperism of the petitioner. Though the learned Subordinate Judge ultimately directed the proceedings in the suit to be dropped he was aware throughout that the document was capable of being converted into a plaint on payment of court-fee. He therefore called upon the petitioner to pay court-fee while rejecting her application to sue as a pauper. The fact that the learned Judge divided the order into two portions and signed twice has given rise to the

contention that he passed two separate orders as indeed they have been separately numbered as 46 and 47. We are however unable to accede to this contention as we find, on a reference to the orders, that they were written by the learned Subordinate Judge himself in his own hand, at the same time and on the same day, though the numbering was done by the clerk subsequently. The expression used by the learned Judge is also significant. He says: "The applicant is *now* called upon to pay court-fees." The use of the word "now" clearly indicates that the petition having been rejected, there was an unstamped plaint before the Court which could be registered as a suit on payment of the court fee. The applicant was, therefore, given the option to pay court-fee. This contention of Mr. Sengupta must, therefore, fail.

[4] It is now necessary to examine whether the Court had the power to grant time, after he had rejected the application for permission to sue in *forma pauperis*.

[5] Order 33, Civil P. C. is entitled "Suits by Paupers" and prescribes the procedure to be adopted by a suitor who claims to be a pauper. Rule 2 lays down that the application for permission to sue as a pauper shall contain the particulars required in regard to plaints in suits and shall be signed and vertified as a pleading. Rule 8 says that where the application is granted, it shall be numbered and registered and shall be deemed the plaint in the suit and shall proceed in all other respects as a suit instituted in the ordinary manner. The expression 'shall be deemed the plaint in the suit" used in R. 8 gives rise to a contention that until the application is granted the document filed by a pauper is not a plaint. This argument is further strengthened by the language used in R. 15 which lays down that an order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right provided that he first pays the costs, if any, incurred by the Provincial Government and by the opposite party in opposing his application for leave to sue as a pauper. The appellants' contention is that if the petitioner is permitted to pay Court fee, simultaneously with the rejection of his application then R. 15 would be reduced to silence inasmuch as the obligation to pay the costs of the opposite party, devolving on the unsuccessful applicant, will be circumvented. It has been pointed out that R. 15 contemplates the institution of a suit by the filing of a fresh plaint, after payment of the costs of the opposite side. In support of this contention Mr. Sen Gupta relied upon a decision of King J. In *Uthuman Pillai* v. *Mohd. Yusuf*, A. I. R. (26) 1939 Mad. 316: (1939 1 M. L. J. 738); *Bishwanath Das* v. *Khejerali Molla*, A. I. R. (26) 1939 Cal. 394: (I. L. R. (1939) 2 Cal. 68) and *Lala Mistry* v. *Ganesh Mistry*, A. I. R. (25) 1938 Pat. 120: 17 Pat. 281. All these cases are based on a Full Bench decision of the Allahabad High Court reported in *Chunna Mal* v. *Bhagwant Kishore*, A. I. R. (23) 1936 ALL. 584: I. L. R. (1937) ALL. 22 (F. B.)

[6] The Allahabad High Court has consistently held the view that the Court has no power, while rejecting the application for permission to sue as a pauper, to allow the applicant to pay the requisite court-fee and treat the application as a plaint. In *Chunna Mal* v. *Bhagwant Kishore*, A. I. R. (23) 1936 ALL. 584, (I. L. R. (1937) ALL 22 F. B.), the Full Bench held that the Court could grant time under S. 149, Civil P. C. only if the application was rejected under R. 5. Allsop J., who was also a party to the Full Bench decision, however, held that

> "when the Court refused to allow an applicant under O. 33 to sue as a pauper it may at the same time give him permission to stamp it as an application and treat it as a plaint. The point is that we should look to the substantial intention of the Court at the time when it still had jurisdiction under S. 149, Civil P. C. and if it means to exercise that jurisdiction before the proceedings came to an end, we should not say that it is incomplent to do so merely because it expresses its intention at the same time not to allow the applicant to sue as a pauper."

[7] The leading case on the subject which has given rise to a conflict of opinion, is the Privy Council decision reported in *Stuart Skinner* v. *William Orde*, 6 I. A. 126: (2 ALL. 241 P. C.). This was a case under the old Civil P. C. which did not contain any provision corresponding to S. 149 of the present Code. Their Lordships of the Judicial Committee after considering the provisions of the Code held that

> "the intention of the statute evidently was that unless the petition was rejected, as it contained all the materials of the plaint, it should operate as a plaint without the necessity of filing a new one . . . . "

Their Lordships then posed the question:

> "Is there anything in the Act which requires that in such a state of things the petition of plaint shall be rejected altogether and the plaintiff be compelled to commence *de novo*. Their Lordships do not see their way to the middle course followed by the Court in holding that the petition was converted into a plaint from the date of the payment of the fees."

In the view of the Judicial Committee the petition to sue in *forma pauperis* contains in itself all the particulars that the statute requires in a plaint plus the prayer that the plaintiff may be allowed to sue in *forma pauperis*. If the prayer to be exempted from payment of court-fee is rejected, the particulars required for a plaint and the prayer for relief based on these particulars still remain which, on payment of the requisite court-fee, entitle the plaintiff to continue the suit in the ordinary manner. It has accordingly been held consistently by the different High Courts in India that the application to sue in *forma pauperis* is a composite document and that the plaint must be deemed to be pending when the application to sue as a pauper is rejected. *See* in this connection, *Sundarathammal* v. *Paramaswami*, A. I. R. (20) 1933 Mad. 883: 146 I. C. 566; *Nellavadivammal* v. *Subramania Pillai*, 40 Mad. 687: (A. I. R. (5) 1918 Mad. 1039): *Thangathammal* v. *Iravatheswara Aiyar*, 28 I. C. 504: (A. I. R. (3) 1916 Mad 685); *Chidambaram* v. *Nataraja Mudaliar*, A. I. R. (26) 1939 Mad. 80: I. L. R. (1938) Mad. 1060, *Brahamaramba* v. *Seetharamayya*, A. I. R. (34) 1947 Mad. 405: (I. L. R. (1947) Mad. 820) and *Periasami Padayachi* v. *Ulaganathan*, A. I. R. (36) 1949 Mad. 162: (I. L. R. (1949) Mad. 333).

[8] The practice in the Madras High Court has consistently been to treat the application as a plaint and regard the suit as having been instituted from the date of presentation of the application itself. Even interlocutory orders such as the appointment of a commissioner have been passed on the basis that the suit has been instituted on presentation of the application to sue as a pauper. The same view has been taken in the Calcutta High Court in the cases reported in *Jagdeeshwari Devi* v. *Tinkarhi Bibi*, 62 Cal. 711: (A. I. R. (23) 1936 Cal. 28) and *Kali Dassi* v. *Santosh Kumar*, I. L. R. (1939) 1 Cal. 112: (A. I. R. (25) 1938 Cal. 730). The view taken by Edgley J. in *Viswanath Das* v. *Khejerali Molla*, A. I. R. (26) 1939 Cal. 394: (I. L. R. (1939) 2 Cal 68) cited above followed an earlier decision of that High Court reported in *Aubhoya Churn* v. *Bisseswari*, 24 Cal. 889, but the earlier decision was distinguished in *Durga Charan* v. *Dukhiram*, 26 Cal. 925 and has not since been followed in that Court. The Patna view has also consistently been that the document referred to in R. 2 of O. 33 is a composite document consisting of an application for permission to sue as a pauper and a plaint and that therefore the Court has jurisdiction under S. 149, Civil P. C. while refusing leave to sue in *forma pauperis*, to permit the payment of the requisite stamp on the plaint within a specified time, and after this is done to treat the unstamped plaint as having been validly presented with proper court-fee, on the date it was originally filed. See *Bank of Bihar Ltd.* v. *Shri Thakur Ramchandraji*, 9 Pat. 439: (A. I. R. (16) 1929 Pat. 637). The case reported in *Lala Mistry* v. *Ganesh Mistry*, 17 Pat. 281: (A. I. R. (25) 1938 Pat. 120) is not in conflict with the earlier decision of that Court as, indeed, Fazl Ali J. (as he then was) takes care to point out in his judgment. All that this case lays down is that the Court has no power to grant time by a separate order on a petition filed by the plaintiff on the subsequent date. The Bombay High Court has also taken the same view, viz., that the Court may, in its discretion under S. 149, Civil P. C. while rejecting an application for permission to sue in *forma pauperis*, allow the applicant time to pay the requisite court-fee; and treat the document as an unstamped plaint while refusing to allow the applicant to sue as a pauper under O. 33, R. 7. It was laid down, however that in doing so the Court should make the payment of costs mentioned therein a condition precedent, but for purposes of limitation the suit will be deemed to have been instituted on the day on which the application for leave to sue as a pauper is made; but that if the Court does not keep the application alive as an unstamped plaint, the proceedings will come to an end the Court has no power to do so by a separate and subsequent order. It has also been held by the Bombay High Court in *Abdul Rahman* v. *Aminali Sayed*, I. L. R. (1943) Bom. 525: (A. I. R. (30) 1943 Bom 409), that the payment of costs prescribed under R. 15 of O. 33, Civil P. C. is not a condition precedent and can be waived.

[9] On a review of these decisions, we are satisfied that the view taken by the Madras, Calcutta, and Patna High Courts is consistent with the decision of the Judicial Committee in *Stuart Skinner* v. *William Orde*, 6 I. A. 126: (2 ALL. 241 P. C.), and we hold that an application to sue as a pauper is composite document consisting of an unstamped plaint and an application for permission to sue in *forma pauperis*. If the application is rejected the plaint still remains and the Court may, in its discretion, while rejecting the application, allow the petitioner to pay the requisite fee, and in such a case the suit shall be deemed to have been instituted on the date of presentation of the application. When the Court however passes an unconditional order rejecting the application, the question whether it can, by a subsequent order, permit the applicant to pay the requisite court-fee does not arise for decision. In the present case, as we have held that the learned Subordinate Judge did not in fact pass two separate orders the suit must be held to have been instituted on the day of presentation of the application to sue as a pauper and is not barred by limitation. The learned Advocate for the appellants did not challenge the finding of the lower Court on the merits of the plaintiff's case. The only point that was argued

related to limitation and that having failed the judgment of the Court below must be affirmed.

[10] This appeal fails and is dismissed with costs.

[11] **Narasimham J.**—The appellants are the sisters of one Shah Md. Yaqub Ali who died on 31st December 1936. The plaintiff-respondent claiming to be the widow of the said Shah Md. Yaqub Ali brought a suit for recovery of her unpaid dower debt amounting to Rs. 7530. The suit was originally brought in *forma pauperis* and the application for permission to sue as a pauper was filed before the Subordinate Judge, Cuttack on 13th December 1939. Along with that application, the respondent filed all the particulars of a plaint as required by R. 2 of O. 33, Civil P. C. The learned Subordinate Judge allowed the application 27th May 1940 and then a regular suit (O. R. No. 77 of 1940) was registered in his Court. In the meantime, however, a civil revision (C. R. No. 95 of 1940) was filed against his order and the Hon'ble High Court on 14th February 1941 set aside the Subordinate Judge's order dated 27th May 1940 and remanded the application for fresh hearing in the light of the observations contained in the High Court's judgment. This order was received by the Subordinate Judge along with the record on 8th March 1941. He thereupon restored the original Miscellaneous Case No. 142 of 1939, re-heard the pauper application and by his order dated 20th December 1941 rejected it. Then he allowed the respondent time to pay the court-fees taking the original pauper application to be an unstamped plaint. The suit was, in due course, decreed in favour of the plaintiff-respondent on contest. The relevant portions of his orders are given below.

Serial No.	Date.	Order.
46	20-12-41	Hence the original application of the applicant for permission to sue in forma pauperis shall stand rejected with costs and pleader's fee at Rs. 16. Sd/- C. C. Coari S. J.
47	20-12-41	The applicant is now called upon to pay court-fees for the plaint by 10-1-42. Sd/- C. C. Coari S. J.
	O. S. No. 176 of 1941.	
48	23-12-41	Register and put up on 10-1-42 when the plaintiff should pay the court-fees worth Rs. 606/4/-. Sd/- C. C. Coari S. J.

[12] The only point agitated in this appeal is the question of limitation. Mr. Sengupta, on behalf of the appellants, urged that the first order of the Subordinate Judge dated 20th December 1941 rejecting the application to sue in *forma pauperis* was completed when the Subordinate Judge put his signature below the order and that his subsequent order of the same date calling upon the respondent to pay court-fees and giving time till 10th January 1942 for that purpose would be a distinct order. Consequently for the purpose of limitation the relevant date was 20th December 1941 and not the original date of application (13th December 1939). The former date is admittedly beyond the period of limitation of three years and he, therefore, urged that the suit should have been thrown out.

[13] The whole question, therefore, turns on the construction of the various provisions or O. 33, in particular, of Rr. 8 and 15. Under R. 8 if the application to sue as a pauper is allowed that application shall be deemed to be a plaint and shall be deemed to have been instituted on the date on which it was originally presented. If, however, the application is rejected there is no express provision in O. 33 or any other part of the Civil Procedure Code directing that the application may still be deemed to be an unstamped plaint which on payment of court-fee would become a regular plaint and would relate back to the original date of presentation.

[14] The decisions of the various High Courts on this question are conflicting though they all seem to be based on the observations of the Privy Council in *Skinner* v. *Orde*, 6 I. A. 126: (2 ALL. 241 (P. C.)). One view is that an application for permission to sue *in forma pauperis* which must necessarily contain all the particulars of a plaint, is in the nature of a composite document and that even though the application may be refused there is nothing in the Code to prevent the Court from treating it as an unstamped plaint and giving the applicant time under S. 149, Civil P. C. to pay the necessary court-fee. As pointed out by my learned brother, the Madras High Court has consistently taken this view (see *Nellavadiva Ammal* v. *Subramanie Pillai*, 40 Mad. 687: (A. I. R. (5) 1918 Mad. 1039); *Thangathammal* v. *Iravatheswara Iyer*, 28 I. C. 504: (A. I. R. (3) 1916 Mad. 685); *Sundarathammal* v. *Paramaswami Asari*, A. I. R. (20) 1933 Mad. 883: (146 I. C. 566); *Brahamaramba* v. *Seetharamayya*, A. I. R. (34) 1947 Mad. 405: (I. L. R. (1947) Mad. 820) and *Periyasami Padayachi* v. *Ulaganathan*, A. I. R. (36) 1949 Mad. 162 at p. 163: (I. L. R. (1949) Mad. 333).) There is also a similar Calcutta decision reported in *Jaydeeshwari Devi* v. *Tinkarhi Bibi*, 62 Cal. 711: (A.I.R. (23) 1936 Cal 28). But in the other extreme there are some decisions of

Calcutta, Bombay and Allahabad High Courts to the effect that as soon as an application to sue in *forma pauperis* is rejected, the Court cannot while rejecting the application permit the applicant under S. 149, Civil P. C., to pay the requisite court-fee and treat the application as a plaint. The leading decisions in support of this view are the majority view in the Full Bench decision reported in *Chunna Mal* v. *Bhagwant Kishore*, A.I.R. (23) 1936 ALL. 584 : (I.L.R. (1937) ALL. 22 (F.B.)) and another decision of the Rangoon High Court reported in *Ma Saw Yin* v. *S. P. K. A. A. M. Firm*, A.I.R. (24) 1937 Rang. 185 : (1937 Rang. L. R. 331) both of which have been followed in a single Judge's decision of the Madras High Court reported in *Uthuman Pillai* v. *Muhammad Ysuf*, A.I.R. (26) 1939 Mad. 316 : (1939-1 M. L. J. 738). There is also a decision of a single Judge (Edgley J.) of the Calcutta High Court reported in *Biswa Nath* v. *Khejer Ali*, I.L.R. (1939) 2 Cal. 68 : (A.I.R. (26) 1939 Cal. 394) to the same effect. A single Judge of the Bombay High Court in *Vamanrao Lallubhai* v. *Pranlal Bhagwandas*, A.I.R. (31) 1944 Bom. 63 : (I.L.R. (1943) Bom. 721) has taken the same view. The entire case law has been fully discussed in all the aforesaid decisions and it is unnecessary to repeat it here.

[15] A third view which seems to be a *via media* between the aforesaid two extreme views has been taken by the Patna High Court. In *Bank of Bihar, Ltd.* v. *Sri Thakur Ramchandraji*, 9 Pat. 439 : (A.I.R. (16) 1929 Pat. 637), it was held that if the Court while rejecting the application to sue *in forma pauperis*, by the *same order* grants time to the applicant to pay the court-fee such an order would be a valid order under S. 149, Civil P. C., and if the court-fee is paid within the time allowed by that order the unstamped plaint will be deemed to have been validly presented on proper court-fee on the date it was originally filed. This view has been reiterated in a later Patna decision reported in *Lala Mistry* v. *Ganesh Mistry*, 17 Pat. 281 : (A. I. R. (25) 1938 Pat. 120), where it was pointed out that though after finally disposing of a pauper application the Court has no jurisdiction to grant further time, the Court may in one single order decline leave to sue as a pauper and also give time for filing court-fee. This view is in accord with the minority view in the Full Bench decision of the Allahabad High Court reported in *Chunna Mal* v. *Bhagwant Kishore*, A.I.R. (23) 1936 ALL. 584 : (I.L.R. (1937) ALL. 22 (F.B.)). There is also a later Bombay decision reported in *Mahadev Gopal* v. *Bhikaji Vishram*, A.I.R. (30) 1943 Bom 292 at p. 296 : (208 I. C. 543) supporting the same view. I may quote the relevant passage from that decision.

> "Even if the Court decides to reject the application under O. 33, R. 5, or to refuse to allow the applicant to sue as a pauper under O. 33, R. 7, it may treat the application as an unstamped plaint and either before or at the time of passing the order under R. 5 or R. 7, it may in its discretion under S. 149 allow the applicant time to pay the requisite court-fees, and upon such payment within the time allowed, number and register the plaint. But in doing so, the Court should have regard to the provisions of O. 33, R. 15 and make the payment of the costs mentioned therein a condition precedent. In all these cases, for the purposes of limitation, the suit will be deemed to have been instituted on the day on which the application for leave to sue as a pauper is made. But if once the Court passes an order rejecting the application under R. 5 or refusing to allow the applicant to sue as a pauper under R. 7, without keeping the application alive as an unstamped plaint and granting the applicant time to pay the requisite court-fees, the proceedings come to an end, and it has no power to do so by a separate and subsequent order."

With respect I would agree with the middle view taken in the aforesaid decisions of Patna, Calcutta and Bombay. In the present case, therefore, one has to see whether the two orders of the Subordinate Judge (C. C. Coari) dated 20th December 1941 can in substance be held to be one single order. It will be noticed that though the serial number has been given by the bench-clerk the two orders were written by Mr. Coari in his own hand and the only circumstance from which the two orders can be said to be separate is his signing the first order and then writing out the second order. Otherwise, the second order appears to be merely a continuation of the first order as will be clear from the fact that he has expressly used the word 'now' and further the second order was passed by him *suo motu* without waiting for an application from the party. It is thus clear that he intended while passing an order rejecting the application to sue as a pauper to grant him time to pay the court-fee. But he wrote it as two distinct orders because he was anxious to show that they dealt with two aspects of the application to sue as a pauper. As a matter of mere construction, I am inclined to agree with my learned brother's view to the effect that the two orders dated 20th December 1941 are in substance only one order. The same view has been taken by Shearer J. when the matter went up to him in C. R. No. 28 of 1942 at the interlocutory stage and with respect I would agree with the reasons given there. The question as to whether that decision would operate as *res judicata* is of mere academic interest in view of our accepting his reasons.

[16] The result is that the present case is fully covered by the third line of decisions discussed above. The order dated 20th December 1941 granting extension of time to pay court-fee

is a valid order under S. 149, Civil P. C., and on payment of the court-fee the unstamped plaint relates back to the date of its original presentation, namely, 13th December 1939. The suit is thus well within the period of limitation.

[17] I would therefore agree that the appeal fails and should be dismissed with costs.

V.B.B. *Appeal dismissed.*

A. I. R. (37) 1950 Orissa 189 [*C. N. 29.*]

RAY C. J. AND PANIGRAHI J.

Maturi Mall and another — Objectors — Appellants v. *Bhagaban Das Purna Mall and another — Respondents.*

Misc. Appeal No. 66 of 1947, D/- 2-3-1950, from order of D. J., Cuttack, D/- 31-7-1946.

(a) **Civil P. C. (1908), O. 21, R. 50 (2) — Joint Hindu family concern—Hindu law—Joint family—Trade.**

Order 21, R. 50 (2) has no application to the case of a joint family concern carrying on business in an assumed name and its application must be limited to cases of contractual partnerships only. [Para 4]

Annotation : ('44 Com.) C. P. C., O. 21 R. 50 N 2.

(b) **Civil P. C. (1908), O. 30, R. 10 — Liability of more persons than one.**

Order 30, R. 10 contemplates suits against a single individual carrying on business in a name or style other than his own. If the decree-holder wants to make more than one person liable under the decree, R. 10 would not be applicable. [Para 6]

Annotation : ('44-Com.) C. P. C., O. 30, R. 10 N. 1.

H. Mohapatra and R. N. Sinha — for Appellants.
N. Mukherji — for Respondents.

Panigrahi J.—This appeal is directed against the order of the District Judge, Cuttack, permitting the decree-holder to implead the present appellants as judgment-debtors under O. 21, R. 50 (2), Civil P. C. The decree-holder obtained his decree in Original Suit No. 18/193 of 1932 31 in the Court of the Munsif against Messrs. Biseswarlall Kishori Das *alias* Biseswarlal Kishorilal alleged to be a firm of Commission Agents. The decree was passed on 24th May 1933 and affirmed in appeal on 19th September 1933 and execution was taken out against the judgment-debtor in the year 1935 but it was unsuccessful. A second execution petition was filed on 28th July 1938 in execution case No. 333 of 1938, in which the judgment-debtor was described as Biseswarlal Kishorilal, Firm, Proprietor Mangturam Kishorilal. Mangturam appeared and objected to the execution of the decree against him on the ground that he was not a partner of the firm. The decree-holder, however, did not press his execution and allowed it to be dismissed on 19th November 1938, and the miscellaneous case filed by Mangturam was allowed. The decree-holder thereafter started a third execution case in Execution Case No. 222 of 1941 and described the judgment-debtor this time as Kishorilal Mangturam Kishorilal Firm and impleaded the present appellants as the legal representatives of the judgment-debtors. This execution case was also dismissed on 11th November 1941. A fourth Execution Case No. 184 of 1944 was thereafter started on 19th August 1944 in which the judgment-debtor was described as Biseswarlal Mangturam Kishorilal, Firm, Proprietors Maturi Mall and Jogeswar, the present appellants. This execution case was also dismissed and the Miscellaneous Case No. 161 of 1944 filed by the appellants as objectors was consequently not pressed. Then the fifth Execution Case No. 222 of 1945 was started against the present appellants, who started a Miscellaneous Case No. 147 of 1945. This miscellaneous case was allowed by the executing Court on 22nd January 1946, who absolved the appellants from any liability under the decree sought to be executed. The decree-holder thereafter filed, on 4th January 1945, a petition under O. 21, R. 50, Civil P. C. for leave to execute the decree against the appellants as undisclosed partners of the judgment-debtor firm of Biseswarlal Kishorilal.

[2] The undisputed facts are that Biseswarlal had a son, Mangturam. The appellants are the grandsons of Mangturam. Kishorilal, their father is the son of Mangturam. Appellant 2, Jogeswar, is still a minor and was not born at the time of the passing of the decree. Kishorilal died a few years ago while Biseswarlal is said to have died some forty years ago. It is also said that the firm, Biseswarlal Kishorilal was dissolved about 14 years ago when appellants Manturi Mall was a minor and appellant Jogeswar has not even been born. The appellants' case is that the judgment-debtor firm of Biseswarlal Kishorilal was not joint Hindu family business; that they did not inherit any property belonging to the judgment-debtor firm; and that the decree is now barred by limitation. They further allege that the firm was started by Kishorilal himself and that it existed for only about a year. The case of the decree-holder in the lower Courts was that the firm Biseswarlal Kishorilal was the appellants' ancestral joint family business but this contention has been negatived by both the Courts below. It has also been further found that the members of the joint family were not partners of this firm so as to make them liable under O. 21, R. 50, Civil P. C.

[3] On behalf of the appellants, it is contended that the decree-holder's remedy to proceed against them, as members of a joint Hindu family, is now barred as the order passed by the Court on 22nd January 1946 in Miscellaneous Case No. 147 of 1945 has become final. Nor, it is contended, can the appellants be made liable as undisclosed partners of the firm as the decree-holder did not

at any time since the passing of the decree, execute the decree against the firm as such. It is, therefore, argued that the decree has become barred by limitation.

[4] Mr. Mukherji appearing for the respondent-decree-holder urges that O 21, R. 50 applies to a joint Hindu family, trading as a firm, as well as to a partnership firm and that an enquiry can be started against the appellants as 'undisclosed partners' of the judgment debtor firm and their liability can be ascertained under O. 21, R. 50, sub-r. (2), Civil P. C. Order 21, R. 50 prescribes the procedure to be adopted for executing a decree passed against a firm. Sub-rule (2) of R. 50 enables the decree-holder to apply to the Court for leave to execute the decree against those who had not appeared in the suit as partners, so that the Court may try and determine the issue whether such persons were partners and whether they can be made liable for the decree against the firm. The procedure for the filing of suits by and against firms is laid down in O. 30, Civil P. C. Rule 10 of O. 30 lays down that a suit against a person carrying on business in a name or style other than his own name may be sued in such name or style as if it were a firm name. Both O 30 and O. 21, R. 50, refer to *firms* and do not in terms apply to a joint Hindu family business concern. Persons who have entered into partnership with one another are called individually as partners and collectively known as firm according to S. 4, Partnership Act. Section 5 of that Act lays down that the relation of partnership arises from contract and not from status, and in particular members of a Hindu undivided family carrying on family business are not, as such, partners in such business. The language of R. 50 of O. 21, Civil P. C. appears to contemplate contractual partnership in so far as it refers to the partnership property and service of summons on individual partners. It may be that a Hindu joint family may carry on trade in an assumed name but to me it appears that it would be unduly stretching the language of R. 50 of O. 21, Civil P. C. to attribute to such a family concern the characteristics of a partnership firm. The family business is represented by a 'karta' who can sue and be sued as such and make the entire family liable. There is no property of the partnership as such, as distinct from the property of the family; nor is the liability of the members of a joint family limited to their shares in the family. There is no question of dividing the profits and losses of the partnership in a joint Hindu family business, according to the shares held by each individual member. On a plain reading of the section, therefore, I am convinced that O. 21, R. 50 has no application to the case of a joint family concern carrying on business in an assumed name and that its application must be limited to cases of contractual partnerships only.

[5] Mr. Mukherji, however, has invited our attention to certain decisions of the Patna High Court which apparently lend support to his contention that O. 21, R. 50 applies to the case of a Hindu joint family concern. The first case relied upon by him is *Alekh Chandra* v. *Krishnachandra*, reported in 7 Cut. L. T. 21: (A. I. R. (28) 1941 Pat. 596) where Fazl Ali J. (as he then was) held that R. 10 of O. 30, Civil P. C. would apply to a Hindu joint family trading as a firm, as such a family may be regarded as a legal person. But nowhere in that judgment has it been laid down that sub-r. (2) of R. 50 of O. 21 can be invoked so as to enable the Court to hold an enquiry into the liability the members of a Hindu joint family as undisclosed partners. In that particular case it had been established that the firm of Padan Sahu & Co., against whom a decree had been obtained was a compendious name for all the members of the family and that the decree was against the family as such. It was also found that the family acted through one Natabar Sahu and that, on his death, his sons were substituted in the execution proceedings without any objection. Bhramarabar Sahu and Achhyut Sahu who preferred appeals in that case, had themselves held out to the decree-holder that Natabar represented them in their dealings and that they were principals of the firm of Padan Sahu & Co. In these circumstances it was held that the judgment-debtor firm included the appellants also and that they were liable for the decree obtained against the firm, whom they represented. This case, however, is no authority for the point which has been agitated before us that sub-r. (2) of R. 50 of O. 21, would entitle a Court to enquire into the liability of undivided members of a Hindu family doing business under an assumed name. Reliance was also placed on *Satchidananda* v. *Prayag Sah*, A.I.R. (17) 1930 Pat. 205 : (127 I. C. 573) but in that case it was assumed that R. 50 of O. 21 would apply and the point was not expressly raised or decided. Another case of the Patna High Court on which reliance was placed is *Nathuni Prasad* v. *Firm Radhakrishun Dutt Rai*, A. I. R. (27) 1940 Pat. 149 : (184 I. C. 701). In that case, however, it was expressly found that the firm of Ayodhya Ram was not a joint family business; and the further observation of Chatterji J. that assuming that it was joint family concern there was no reason why the provisions of O. 21, R. 50 should not be applied, is merely an *obiter dictum*. In my judgment, the word 'firm,' used in O. 21, R. 50, Civil P. C. applies to a decree passed against a

contractual firm and not to a decree passed against a joint family business.

[6] In the case before us, the decree was obtained against the firm of Biseswarlal but the execution was levied against the joint family property of the appellants. In none of the previous executions was the property of the partnership—if there was any such property sought to be proceeded against. Execution of the decree against the partnership property would consequently be barred by time as no step-in-aid had been taken within three years of the present execution. Mr. Mukherji, however, relies upon O. 30, R. 10, Civil P. C., and contends that the name of the judgment-debtor is the assumed name of a legal person, viz., a Hindu joint family. Order 30 prescribes how suits by or against firms have to be instituted and R. 1 of that Order contemplates suits by or against two or more persons carrying on business in the name of the firm. Order 30, R. 10 however contemplates suits against a single individual carrying on business in a name or style other than his own. If the decree-holder wanted to make more than one person liable under the decree, R. 10 would hardly be applicable to such a case. The entire O. 30, Civil P. C. is almost a verbatim reproduction of O. 48 (A) of the English Rule and R. 10 of O. 30 is modelled on the corresponding provision contained in R. 11 of O. 48 (A). It has been held in England that that rule applies to a single individual who carries on business under an assumed or trading name: See *St. Gobain Chauny & Cirey Co* v. *Hoyer—Mann's Agency*, (1893) 2 Q. B. 96 and *Maciver* v. *G. & J. Burns*, (1895) 2 Ch. 630: (64 L. J. Ch. 681). I can find no justification for departing from the English practice and would hold that O. 30, R. 10 applies only to a case of a suit against a single person carrying on business in an assumed name. I am, therefore, unable to accept the contention of Mr. Mukherji that the judgment-debtor's name was an assumed name on behalf of more than one individual carrying on business jointly. If it be assumed that the appellants were in existence and were members of the firm, then it must be held that there is no decree against them as such and R. 10 of O. 30 cannot be called in aid.

[7] I am satisfied that there was no decree against anybody other than Biseswarlal Kishorilal, assuming that that firm represented a single individual. The decree not having been executed against the assets of that firm is now barred by limitation. Alternatively, even if it be held that the judgment-debtor represented a joint Hindu family business as the "Karta," the order passed on 22nd January 1946 by the Court in Miscellaneous Case No. 147 of 1945 having become final, the decree is no longer available for execution. In either view the decree has now become inexecutable. No leave under O. 21, R. 50 can therefore be granted to the decree-holder. The order of the learned District Judge, under appeal, is set aside and this appeal is allowed with costs.

Ray C. J.—I agree.

D.H. *Appeal allowed.*

A. I. R. (37) 1950 Orissa 191 *[C. N. 30.]*

RAY C. J. AND JAGANNADHADAS J.

Rangalal Modi — Petitioner v. *Commissioner of Income-tax, B. & O.—Opposite Party.*

S. J. C. No. 17 of 1947, D/- 3-3-1950.

(a) Income-tax Act (1922), S. 25A—Applicability.

Section 25A does not apply to a case where there has been nothing more, between the members of the family, than a division in status and a notional allotment of shares. The phrase "partition in definite portions" has been used in the section to negative such a case. [Para 8]

Annotation: (46-Man.) I. T. Act, S. 25A, N. 1.

(b) Income-tax Act (1922), S. 25A—Partial partition — Order under section, if and when can be passed.

In a case where a joint Hindu family has become disrupted according to substantive Hindu law, but only some properties have been partitioned in definite portions and the others not, while the assessee may not be entitled to a formal order under S. 25-A, it is only the income arising out of the undivided properties that is assessable as joint family income and on the footing of the joint family continuing. But where the entire joint family has in fact, become disrupted in status and where the properties of the family have been partitioned between the members thereof in definite portions, the assessee would be entitled to an order under S. 25-A (1), notwithstanding that some items of the family property which are comparatively small in proportion to the entire family assets and which produce only a substantially small income in relation to the total income of the family properties, are kept undivided for solid and substantial reasons whether of practicability, convenience or reasonable sentiment not affecting the general *bona fide* intention of becoming completely separated units for all purposes. [Paras 12 and 14]

Annotation: ('46-Man.) I. T. Act, S. 25-A, N. 2.

B. N. Mohanty — for Petitioner.
G. C. Das, Standing Counsel — for Opposite Party.

Jagannadhadas J. — This is a reference under the Income-tax Act. This Court by its order dated 3rd January 1949, directed the Income-tax Appellate Tribunal to state a case under S. 66 (2) of the Act. In pursuance of that order the question that has been referred for decision of this Court is stated by the Tribunal in the following terms:

> "Whether on the facts and in the circumstances of the case the Tribunal erred in law in holding that the applicant was not entitled to an order under S. 25-A."

[2] To appreciate the question at issue, the facts and the circumstances of the case as they appear from the records require to be elucidated. They are as follows:

[3] The assessee is one Rangalal Modi of Cuttack. The assessment year is 1944-45 and the

accounting year is Dewali of 1942 to dewali of 1943 which is stated to be from 8th November 1942 to 10th November 1943. Rangalal Modi and his sons constituted a joint Hindu family and were being assessed as such. During the course of the assessment in question, the assessee claimed that this joint family had become distrupted on 9th November 1942 and subsequently as evidenced by a partition-deed dated 25th October 1943, that is, during the course of the accounting year and that accordingly he is entitled to an order under S. 25-A of the Act and for assessment accordingly. The Income tax authorities have held that he was not so entitled and hence this reference.

[4] One Hariram was the father of Rangalal. The original joint family consisting of Hariram and his sons including Rangalal appears to have separated some years previously, i.e., in or about 1934, and we are not directly concerned with the same. After the disruption of the original joint family, Rangalal with his sons constituted a joint family and it is with the alleged disruption thereof we are at present concerned. This family owned or had interest in properties described in Schs. A to E of the registered partition-deed dated 25th October 1943. They consist of lands, buildings and mills. It would appear that one of the sons of Rangalal by name Manalal had brought a suit for partition and got his share in the family property by a decree dated 10th August 1942. The present partition is therefore concerned with the remaining properties of the joint family and is between Rangalal and his three other sons, Basudev, Kanhailal and Chaturbhuj. The partition-deed recites that on 9th November 1942, that is, the day following the Dewali, in 1942, the parties namely, Rangalal and his three sons had divided all business in four equal shares and that since then they were carrying on business in four equal shares and that since then they were carrying on business in partnership, with defined shares and on terms specified in separate deeds of partition executed by the said parties. It also recites that the parties had divided ornaments, utensils, etc., amicably as between themselves and that since 9th November 1942, they were completely separated in interest, mess and property, from each other and that each of the parties is separately dealing with their respective properties and separately managing their respective families. The partition-deed accordingly deals with only immovable property of the family and it recites that parties 1 to 4 have amicably divided the same, some by metes and bounds and some by ascertainment of definite shares as set forth in the schedules. A reference to the schedules shows that the properties in Sch. (A) were alloted to party No. 1 namely, Rangalal, those in Sch. (B) to party No. 2, Basudev Prasad, Sch. (C) to party No. 3, Kanhailal and in Sch. (D) to party No. 4 Chaturbhuj. Properties in Sch. (E) however were not partitioned by metes and bounds and it is stated in the partition-deed para. 6 as follows:

> "We the parties one to four shall own and possess the same with defined shares of four annas each and we will get them partitioned by metes and bounds in future whenever we or any of us parties 1 to 4 deem it convenient and possible and the parties 1 to 4 each remains liable for payment of rent, tax and other charges (one fourth each) with effect from 9th November 1942."

[5] The properties in Sch (E) are (1) *Khas mahal rayati* lands in the town of Cuttack on which stand *pucca* and *kuchha* structures with buildings and appurtenances. It is stated to be of the extent of 186 acres, out of an extent of 796 acres appertaining to *Khatian* No. 1384 and allotted to the share of party No. 1 Rangalal Modi in the deed of family settlement dated 5th September 1934 (i.e, as between Rangalal and his brothers). Item 2 in Sch. (E) is 8.53 acres of permanent lease-hold lands situated in *Mouza* Byree with buildings, structures, appurtenances etc., commonly known as Swastika Rice Mills. Schedule E also mentions lease-hold land under license No. 4 in *summadi* factor platform No. 3 of the total extent of 180.86 acres. But para. 7 of the partition-deed shows that it is not a joint family asset and that it has accordingly been allotted to party No. 1 under the partition-deed and we are therefore not concerned with it. The main reason by the assessee has been refused an order under S. 25 A was the fact that the properties (other than *summadi* lease-hold) in Sch. (E) have not been partitioned by metes and bounds between the members of the family. It may also be mentioned that para. 9 of the partition-deed shows that the family cremation ground and the garden attached to it, the guest-house at Manikghosh Bazar and the ancestral house at Ramgrah in Jaipur state will not be partitioned according to the wish of late Hariram Modi and his five sons. These items have apparently been treated as impartible by agreement not only between the members to this partition deed, but presumably between the members of the original family of Hariram and his sons. It has not been suggested in the course of the income-tax proceedings that the fact that these items of property alone remain without partition is any ground for refusing to make an order under S. 25A. Now coming to the actual findings of the income-tax authorities, it would appear that the income-tax officer was inclined to think that as a fact no partition at all took place as alleged. On that ground he rejected the application

of the assessee for an order under S. 25A. The appellate Assistant Commissioner and the Income-tax Appellate Tribunal however have decided against the assessee on the ground that the entire family assets have not been partitioned by metes and bounds. They were of the view that since there has not been a complete partition of the entire joint family property, the joint family will be deemed to continue for purposes of income tax. They rely on the fact that the properties in Sch. (E) have not been partitioned by metes and bounds. The only question therefore is, if the partition of all the other items of family property as recited in the partition-deed is genuine (and not a make-believe as the income-tax officer was inclined to think), the fact that the two items of property comprised in Sch. (E) have not been partitioned by metes and bounds is enough to disentitle the assessee to an order under S. 25A.

[6] It may be mentioned that though as already stated para. 6 of the partition-deed recites that properties in Sch. (E) will be partitioned by metes and bounds in future whenever all or any of the parties deem it convenient or possible to do so, it is stated to us that item 1 in Sch. (E) is a plot on which the family-house is situated and in which the various parties live in separate portions as a matter of family convenience, though there has been no partition by metes and bounds and also that item 2 in Sch. (E) is a land on which the Swastika rice mill and its appurtenances stand and that it is an item of partnership asset according to the partnership-deed between the parties relating to this mill, expressly or by implication. These suggestions have not been investigated.

[7] It is in the light of the facts and circumstances above stated the question under reference has to be answered. Section 25A (1) runs as follows:

> "Where, at the time of making an assessment under S. 23, it is claimed by or on behalf of any member of a Hindu family hitherto assessed as undivided that a partition has taken place among the members of such family, the income-tax officer shall make such inquiry thereinto as he may think fit and, if he is satisfied that the joint family property has been partitioned among the various members or groups of members in definite portions, he shall record an order to that effect."

[7] The effect of making such an order under sub-s. (1) is dealt with in sub-s. (2) which says that where such an order has been passed the income tax officer is to make an assessment of the income, as if no partition had taken place, but that each member of the family is to be liable for a share of the income-tax so assessed according to the portion of the joint family property allotted to him. Sub-section (3) further says that where such an order has not been passed, the family shall be deemed to continue as a Hindu undivided family for the purposes of the Act.

[8] The interpretation of this section and its application to varying facts and circumstances has come up for notice in a number of decided cases which it is unnecessary to recapitulate, as they have all been noticed exhaustively in the judgment of the Bombay High Court in *Gordhan Das Mangal Das* v. *Commr. of Income-tax*, A. I. R. (30) 1943 Bom. 116: (I. L. R. (1943) Bom. 245). The question has turned on the interpretation of the phrase, in S. 25A (1).

> "If he is satisfied that the joint family property has been partitioned among the various members or groups of members *in definite portions*."

It may now be taken as fairly well-settled that the section does not apply to a case where there has been nothing more, between the members of the family, than a division in status and a notional allotment of shares. It is fairly obvious that the phrase "partition in definite portions" has been used in the section to negative a case of mere notional disruption in the joint family status and a consequent division of interest or allotment of shares. It has also been rightly pointed out that the Act which is of all India application, would be inapplicable on the opposite construction to the case of a Dayabhaga joint Hindu family if what was contemplated was only a division in interest. On the other hand, it has been also held that while actual division of the properties is necessary, it is not necessary that every item of property irrespective of its nature or other relevant considerations should have been divided by metes and bounds. The case in *Gordhan Das Mangal Das* v. *Commr. of Income-tax*, A. I. R. (30) 1943 Bom. 116: (I. L. R. (1943) Bom 245) construes the word "definite portions" as indicating physical division of the property. The learned Chief Justice, Beaumont C. J., says as follows:

> "The expression 'division in definite portions' will have to be construed with regard to the nature of the property concerned. A business cannot be divided into parts in the same manner as a piece of land, division may only be possible in the books, Special cases will have to be dealt with by the income-tax officer when they arise. If he comes to the conclusion that, having regard to the nature of the property, what has been done amounts to a division in definite portions, he will record his finding under sub-s. (1), if he comes to the conclusion that it does not, then he will have to go on assessing the family under sub-s. (3)."

In the same case Kania J. (as he then was), was also inclined to the view that the word 'portion' when read in conjunction with partition of joint family property, would ordinarily mean a physical division, and not a definition or ascertainment of shares only and his Lordship adds:

> "The question is always, having regard to the context in each case what is the proper meaning to be attached to the word portion."

and it was pointed out that "in the case of a business a physical division by metes and bounds was not to be expected." It may therefore be taken as settled on the authority of that decision which has been followed in subsequent cases that while a mere disruption of the joint family status and ascertainment of shares is not enough by itself; neither is it necessary in all cases that there should be a physical division by metes and bounds of each and every item of joint family property. It would follow that the fact that some items of joint family property have not been divided by metes and bounds would not by itself be enough to take the case out of S. 25A, if otherwise taking all the relevant facts and circumstances into consideration, it is reasonable to say that "the joint family property has been partitioned among the various members thereof in definite portions." This Bombay case and other subsequent cases to be noticed later have been taken by the income-tax authorities as laying down a broad proposition that where some of the properties of the erstwhile joint family have remained without a division by metes and bounds and in that sense there has only been a partial partition of the joint family property, S 25A would not be applicable. It is the correctness of this assumption with reference to the facts of the present case that requires to be more closely examined.

[9] When it is asserted that there has been only a partial partition in the family, it must be remembered that it may apply to two different sets of facts, viz., (1) the family may have divided between themselves some items only of the family property either by metes and bounds or by agreeing to hold them in definite shares but in respect of the rest of the properties, they may still continue as an undisrupted and undivided joint Hindu family. (2) The family may be completely disrupted in status and may no longer be a joint Hindu family in respect of family property, but some only of the properties of the family may have been divided between them by metes and bounds or in well-defined portions, but in respect of the other items they may for one reason or another continue to hold them jointly not as undivided Hindu coparceners, but as cosharers under the ordinary law with definite interests. In the first case, as pointed out by the Privy Council in *Sunder Singh* v. *Commr. of Income-tax, U. P. & C. P.*, A. I. R. (29) 1942 P. C. 57 : (I. L. R. (1943) Kar. P. C. 132), the joint family continues, but some items of the joint family property cease to be such and the application of S. 25A is not called for. As the Privy Council says at p. 61 of A. I. R. (29) 1942 P. C. 57 :

> "Section 25A has nothing to say about any Hindu undivided family which continues its existence, never having been disrupted. Such a case is outside sub-s. (3) because it is not within the section at all. No sub-section is required to enable an undivided family which has never broken up to continue. But it need not have the same assets or same income in each year and it can part with an item of its property to its individual members if it takes the proper steps."

[10] With reference to the second set of facts formulated above as constituting a partial partition different considerations arise. *Ex hypothesi* the family has become completely disrupted in status and there is no manager of the joint family against whom the assessment is to be levied and no income of the joint family property is to be assessed, if the strict principles of Hindu law were to be applied. It may therefore follow that if the disruption has taken place in the course of the accounting year, a major or substantial portion of the income would escape assessment by virtue of S. 14, Income-tax Act. It may also happen that the Hindu law provision that there can be a notional disruption of a joint family without any substantial and physical separation of the property, may be fraudulently utilised by the family to escape assessment in respect of the higher slabs. Section 25A, is accordingly intended to provide against these contingencies. It provides against them by saying that for the purpose of income tax a partition of the undivided Hindu family is to be recognised only when the authorities are satisfied that the joint family property has been partitioned among the members "in definite portions" and that when such an order is passed, the income is to be assessed for the accounting year alone on the footing of the continuance of the family and that the liability is to be apportioned between the individual members, but that if no order to that effect is passed, the joint family is to be deemed to continue.

[11] The further questions that arise are when some some properties only are partitioned in definite portions and others are not while the status of the family is completely disrupted, (1) is the joint family in such circumstances to be deemed to continue irrespective of any consideration as to the nature and quantum of the property remaining undivided and the reasons for such non-division and (2) if it is to be deemed undivided, is it to be so considered only in respect of the properties remaining undivided, or in respect of both the divided and undivided properties. It is these questions that arise on this reference.

[12] Some of the considerations relevant to a discussion of the above questions have been dealt with in three recent cases, *Gurumurthi* v. *Commr. of Income-tax, Madras*, A. I. R. (31) 1944 Mad. 368 : (I. L. R. (1945) Mad. 21), *Bansidhar* v. *Commr. of Income-tax, B. & O.*, A. I. R.

(31) 1944 Pat. 137 : (23 Pat. 68) and *Waman Satwappa* v. *Commr. of Income-tax*, A. I. R. (33) 1946 Bom. 328 : (I. L. R. (1946) Bom. 745). In the Madras case it has been broadly assumed that S. 25A will not apply to the case of a partial partition. The learned Chief Justice says as follows:

> "Partition means a completed partition. The fact that some assets are divided and others are left for division at a future date would not be a partition within the meaning of the section."

It has been pointed out in the later case in *Waman Satwappa* v. *Commissioner of Income-tax*, A. I. R (33) 1946 Bom. 328 : (I. L. R. (1946) Bom. 745) that the above dicta in the Madras case are too broadly stated though as a decision in its facts, the case may have been correctly decided. In *Bansidhar* v. *Commr. of Income-tax B. & O.*, A. I. R. (31) 1944 Pat. 137 : (23 Pat. 68) the facts found were that the undivided family had become disrupted and so far as the businesses of the family were concerned there has been a partition in definite portions to the extent that the nature of the properties permitted, but that substantial properties in the nature of house-properties and *jote* lands had not been partitioned. Thus it was found that there was no complete partition, but only a partial partition. It was held that the members of the assessee's family in the circumstances must be deemed to continue to form a joint Hindu family for the purpose of assessing them on that portion of the income, which is derivable only from those properties which have not been partitioned in definite portions i.e., other than the businesses. In *Waman Satwappa* v. *Commissioner of Income-tax*, A.I.R. (33) 1946 Bom. 328 : (I. L. R. (1946) Bom. 745) the facts found were as follows: The members of the family decided in July 1941, to separate and make a partition of the family properties and assets. They completed the division of the family cash, jewellery, the businesses of the family on 30th July 1941, and thereafter the members separately carried on those businesses which were assigned to their respective shares. It was also found as a fact that the immovable properties belonging to the family were not allotted to individual members and shares thereunder were not specifically divided till 16th October 1941. The question that arose was whether in those circumstances, the profits and gains of the several businesses for the period from 30th July 1941 to 20th October 1941, have been rightly included in the total income of the Hindu undivided family represented by the applicant for the assessment year 1942-43. Though as a fact the family had become completely disrupted, it was assumed (and it was not disputed) that the family must be deemed to continue joint by virtue of sub-s. (2) of S. 25A in respect of the immovable properties of the family which were not allotted to individual members until 16th October 1941 and that the income therefrom was to be assessed on the footing of its being joint family income, and it was argued for the Income-tax Commissioner that the effect of S. 25A was in such circumstances to enable the income-tax authorities to treat the income from the divided properties also as joint family income for the year. This contention was expressly negatived. The position therefore recognised in both the above cases, namely, *Bansidhar* v. *Commr. of Income-tax, B. & O.*, A. I. R. (31) 1944 Pat. 137 : (23 Pat. 68) and *Waman Satwappa* v. *Commissioner of Income tax*, A. I. R. (33) 1946 Bom. 328 : (I. L. R. (1946) Bom. 745) is that in a case where the family has become disrupted according to substantive Hindu law, but only some properties have been partitioned in definite portions and the others not, while the assessee may not be entitled to a formal order under S. 25A, it is only the income arising out of the undivided properties that is assessable as joint family income and on the footing of the joint family continuing.

[13] These cases are authority for the position that in the case of complete disruption in status of joint family, followed up by only a partial partition of the family properties by metes and bounds or in definite portions, the joint family is to be deemed to continue only as regards the properties remaining undivided, but that as regards the property already divided, the income therefrom cannot be assessed as the joint family income. Following these cases it would be clear that any broad proposition to the effect that S. 25A does not recognise partial partition would be misleading and wide of the mark. It would be correct only in the sense that an assessee would not be entitled to an order under S. 25A, but it would be incorrect if it is meant to say that the entire erstwhile joint family property is to be treated as the property of the fictional joint family that must be deemed to continue under sub-s. (3) of S. 25A.

[14] The further question that arises not so far been dealt with in any decided case, so far as I am aware, is this. Is the fictional joint family to be deemed to continue in respect of the undivided properties and an order under S. 25A to be refused if such undivided properties are comparatively small in relation to the entire family property and they have been left so undivided for *bona fide* and satisfactory reasons based either on practicability, convenience, or reasonable sentiment? I am inclined to think that there is nothing in S. 25A which compels such a construction. What the section requires

as a condition precedent for an order thereunder is that "the joint family property has been partitioned among the various members thereof in definite portions." While it may be that this condition would not be satisfied if a very substantial portion of the joint family property remains undivided by partition in definite portions, there is no reason to assume that it is applicable only when each and every item of the family property without exception has been partitioned. It must be noticed that the section does not say that what has to be found is the partition of the *entire* joint family property in definite portions. There is no ground for importing to the phrase "joint family property" occurring in the section, the qualifying word "entire," nor to read the word "property" as being properties. The phrase "joint family property" has reference not necessarily to each and every individual item thereof but to the group in a rather abstract sense. The joint family property "may well be considered as having been partitioned" notwithstanding that a few items thereof have been kept undivided. It is well-known that there may be circumstances in the case of a family partition which would justify certain items of the family property being left out of partition between the members of a family, who proceed to make a partition between themselves as final and as complete as the circumstances of the situation at the time reasonably permit. For instance, an item of property may not at the time be in the possession of the family, an item of property may be required to be kept in the possession of one of the female members of the family for maintenance during her lifetime, to be divided between the members thereafter, an item of property in the nature of a family trust in which the members have rights, either of trusteeship or of beneficial enjoyment of the surplus may have to be kept joint as a matter of reasonable convenience. There may be family heirlooms, residential houses, cremation or burial grounds and the like, which as a matter of reasonable sentiment may be kept undivided. There may conceivably be other circumstances justifying the keeping of some properties undivided by metes and bounds between the members without detracting from the *bona fides* of the partition as a complete separation and partition with reference to the circumstances of the family at the time. It may of course happen that some or all of such properties may not produce any income. There is no reason why on such facts, the fiction of the continuance of the joint family should be imported for income-tax purposes in respect of the divided properties and it has been correctly pointed out in the case in *Waman Satwappa* v. *Commissioner of Income-tax*, A. I. R. (33) 1946 Bom. 328 : (I. L. R. (1946) Bom. 745) that the application of that fiction to the divided properties would be contrary to sub-s. (2) of S. 25A. Is it however necessary that the fiction should be imported to apply in respect of the undivided properties where such undivided properties are comparatively small in relation to totality of the family property and where in spite of their remaining undivided, it is reasonable to come to a fair conclusion taken as a whole or that the joint family property has been partitioned in definite portions? Is it necessary that the assessee should be declined the benefit of an order under S. 25A in his favour under those circumstances? I am inclined to think that it would be unreasonable to construe S. 25A to that effect and to continue to assess the group of members constituting the original joint family on the footing that they continue to be joint. My view therefore is that where the entire joint family has, in fact, become disrupted in status and where the properties of the family have been partitioned between the members thereof in definite portions, the assessee would be entitled to an order under S. 25A (1), notwithstanding that some items of the family property which are comparatively small in proportion to the entire family assets and which produce only a substantially small income in relation to the total income of the family properties, are kept undivided for solid and substantial reasons whether of practicability, convenience or reasonable sentiment not affecting the general *bona fide* intention of becoming completely separated units for all purposes.

[15] Since the income-tax authorities have disposed of the case on a mere general assumption that S. 25A does not apply to the case of a partial partition, and since they have not investigated and considered the facts approaching the same from the point of view that has been elucidated above, the case will have to go back to the Income-tax authorities for a proper investigation and elucidation of the relevant facts and a decision thereon in the light of this judgment.

Ray C. J. — I agree.

V.R.B. *Order accordingly.*

A. I. R. (37) 1950 Orissa 196 *[C. N. 31.]*

PANIGRAHI J.

Sada Panigrahi and another — Petitioners v. *Raghunath Das—Opposite Party.*

Criminal Revn. No. 459 of 1949, D/- 17-3-1950, from order of Deputy Commissioner, Angul (Dhenkanal), D/- 27-5-1949.

Penal Code (1860), Ss. 379 and 427 — Bona fide claim of right.

The complainant's house encroached upon a tiny bit of land belonging to the accused. The parties had been in dispute regarding their boundary wall between their adjoining plots. The accused in the bona fide belief that the encroached portion belonged to them demolished it and took away the materials:

Held that in the absence of proof of criminal intent, however reprehensible or high-handed their action might have been, the accused could not be convicted under Ss. 379 and 427. [Para 5]

Annotation : ('46-Man.) Penal Code, Ss. 378 & 379, N 9; S 425, N 1.

S. K. De—for Petitioners.

B. N. Das—for Opposite Party.

Order. — The petitioners have been convicted under Ss. 427 and 379, Penal Code and sentenced to pay a fine of Rs. 25 each on each count.

[2] The case against the petitioners is that they pulled down the walls and part of the roof of the house belonging to the complainant on 2nd June 1948 and caused damage to the extent of Rs. 20 or more, and dishonestly removed the roofing materials. The undisputed facts that emerged from the evidence are, that the complainant and the petitioners own adjoining plots of land, namely, plot Nos. 1933 and 1932 respectively; that Plot No. 1933 belongs to the complainant and there is a row of three rooms with a common roof on that plot that plot No. 1932 belongs to the petitioners, and that the disputed house is partly within that plot bounded by A, B, C, D,E, F at S as demarcated in the plan prepared by the mutation officer of Angul. The map shows that the complainant put up the house on a bit of land appertaining to plot No. 1932 belonging to the petitioner. Another fact clearly established by the evidence is that this house is an old house belonging to the complainant and is his ancestral property. The house consists of three rooms admittedly standing on plot No. 1933. Part of the disputed house, however, encroaches upon the land of the petitioner and has been standing thereon for a long time.

[3] It would appear that the petitioners prevented the complainant from repairing the wall on 20th January 1948, which led to the institution of a criminal case against them. In that case they were convicted and fined by the trial Court on 28th May 1948 but were acquitted by the appellate Court on 5th July 1948 on the ground that the evidence of possession of the complainant in respect of the demolished wall was unsatisfactory and that the accused had acted under a bona fide claim of right. The present occurrence took place on 2nd June 1948 when the petitioners demolished 5/8ths of a room, pulled out the roof appertaining to that portion and carried away the materials. On these facts the trial Court held that the petitioners acted in a high-handed manner and committed offences of mischief and theft.

[4] It is beyond dispute that the wall in respect of which the previous quarrel took place between the parties was one of the walls of the very roof which has now been demolished. It is also clear from the evidence of P. W. 1 that at the time the petitioners demolished the roof they pleaded that they had a right to that portion of the house as it stood on plot belonging to them. It appears to me, therefore, that although the house was actually put up by the complainant's ancestors, it actually encroached upon a tiny bit of land belonging to the petitioners. The complainant also avers that he has himself lost possession of a small portion of land to the north of his plot, which has been in the occupation of the petitioners for the last three years. It appears to me, therefore, that the parties have been in dispute regarding the boundary wall between their adjoining plots for some appreciable time prior to the occurrence. The question therefore, is whether the petitioners can successfully claim a bona fide right and be entitled to an acquittal.

[5] It is urged for the prosecution that having regard to the long possession of the complainant and the undisputed ownership of the house, the accused acted in a high-handed manner in taking the law into their own hands and demolishing the roof. While I agree that the action of the petitioners was certainly high handed, that act is nevertheless not incompatiable with their intention not to cause any mischief to the complainant, but only to establish what they believed to be their right however ill-founded or misconceived. What the criminal Court has to ascertain is not whether the act of the accused has resulted in any loss to the complainant but whether the necessary *mens rea* was responsible for the accused's committing the act. In view of the fact that the parties have been quarreling over the boundary line for a long time, it would not be safe to dismiss the contention raised on their (petitioners') behalf that they acted under a bona fide belief that portion of the house which abutted on their plot belonged to them only. While, therefore, I am inclined to accept the complainant's version that the materials of the demolished portions are his, I am bound to give the benefit of doubt to the petitioners so far as the offence of mischief and theft is concerned and absolve them of any criminal intent, however reprehensible or high-handed their action might have been. It will be open to the complainant to recover the value of the materials alleged to have been carried away by the petitioners through the proper Court, and also, if so advised establish his right to remain

in occupation of the disputed portion of the holding by reason of his long possession by taking action in a civil Court.

[6] The conviction and sentence of fine imposed on the petitioners are set aside, and this revision is allowed.

K. S. *Conviction and sentence set aside.*

A. I. R. (37) 1950 Orissa 198 *[C. N. 32.]*

RAY C. J. AND JAGANNADHADAS J.

Debendranath Mittra — Plaintiff — Appellant v. *Gourisankar Sankhanaria and others — Defendants — Respondents.*

A. F. A. D. No. 30 of 1946, D/- 21-11-1949, from decision of Sub-J., Cuttack, D/- 25-10-1945.

(a) **Bihar and Orissa Public Demands Recovery Act (IV [4] of 1914), Ss. 7 and 52—Death of certificate debtor after notice under S. 7—Substitution.**

Where some of the certificate debtors die subsequent to service of notice under S. 7 but before the certificate has been fully satisfied, it is essential under S. 52 that their legal representatives should be substituted. [Para 4]

(b) **Bihar and Orissa Public Demands Recovery Act (IV [4] of 1914), S. 26—Certificate proceedings—Doctrine of representation—Applicability.**

The doctrine of representation which obtains in the case of proceedings of rent suits and rent decree executions also apply to certificate proceedings. In order to hold that one represents another, some relationship between them must be established which will create a right to represent and right to be represented. This may happen when there is a joint family to whom the tenancy belongs and the manager of the family is on record or this may also happen if several tenants while having common ownership and possession allow themselves to be represented before the landlord in respect of the holding by only some of them. [Para 4]

Where the entire body of recorded tenants are not represented in the certificate proceedings consummating in the sale the holding will not pass to the purchaser but only the right, title and interest of the certificate debtor at the time of sale. [Paras 16, 17]

(c) **Bihar and Orissa Public Demands Recovery Act (IV [4] of 1914), S. 26 (3)—Orissa Tenancy Act (II [2] of 1913), S. 212—Scope—Khasmahal homestead tenancy—Applicability.**

Section 26 (3), Public Demands Recovery Act, refers to the area in which Chap. XVII, Orissa Tenancy Act, is in force as its coverage. S. 26 (3) will operate in cases of tenancies to which S. 212 would apply. The two sections are complementary. [Paras 7 and 10]

Section 26 (3), Bihar and Orissa Public Demands Recovery Act, can have no application to a certificate sale of khasmahal homestead tenancy to which the provisions of the Orissa Tenancy Act do not apply. [Para 9]

The rent reserved of such a tenancy has nowhere been declared to be the first charge. In providing that S. 26 (3) would apply in area where S. 212, Orissa Tenancy Act, is in force, the Legislature cannot be predicated to have other meaning but to indicate that the incidents of the concerned tenancies shall be same or similar, one of such incidents being that the rent payable is the first charge. [Para 9]

(Certain concepts inherent in S. 26 (3) which are fully irreconcilable with the incidents of khasmahal homestead tenancies pointed out.) [Para 13, 15]

R. N. Sinha — for Appellant.
S. K. De — for Respondents.

Ray C. J. — This is a plaintiffs appeal in a suit for partition of Plot No. 753, Khata No. 350 bearing an area 190 in the town of Cuttack. The plaintiff claims eight annas interest by virtue of his purchase. The Khasmahal is the landlord and the interest of the tenant is shown as *Patadari* with an annual rent payable. The terms and conditions of the tenancy are incorporated in periodical leases and kabuliyats which are renewed from time to time. In the Khatian papers, Chowdhuri Ramahari Das and Chowdhury Jayahari Das and several other Chowdhuries (all members of Bhingarpur Chowdhury family) stand recorded. It is not controverted that in partition Suit No. 69 of 1924 of the Court of the Subordinate Judge of Cuttack, the lands, in dispute, were allotted to the shares of Chowdhury Ramahari and Chowdhury Jayahari, each having eight annas share therein. Jaihari's interest was sold in execution of a money decree in the Court of the Second Munsif of Cuttack in Execution Case No. 991/36 and it was purchased on 17th March 1937 by one K. C. Mohanty (*vide* Ex. 3). The said Krishna Chandra Mohanty sold his purchased right to the plaintiff on 28th August 1939. The plaintiff got himself substituted in the place of K. C. Mohanty in the Execution Court in order to get a delivery of possession. Eventually, he got it on 12th October 1939, the plaintiff has got himself recorded in the mutation papers maintained by the Khasmahal on 13th May 1940. This narration of events will make it clear that as between himself and the Khasmahal (landlord), he has completed his title and has got it acknowledged.

[2] In the meantime, however, the entire lands have been sold in execution of a certificate debt of arrear of rent due in respect of the lands and defendant 3 has become the auction-purchaser on 15th March 1940 (*vide* Ex. C, sale certificate). Defendants 1 and 2 have purchased (we do not know when) the remaining share of Ramhari by appropriate transfer.

[3] The certificate proceedings were started with the filling of a certificate on 22nd September 1938 for realisation of the Khasmahal rent due in respect of the tenancy as against the entire body of the recorded tenants, the members of Bhingarpur Chowdhury family including Chowdhury Ramahari Das and Chowdhury Jaihari Das who, it is said, got the entire lands in their share in partition suit, already referred to. Notice was taken out against the certificate debtor under S. 7, Bihar and Orissa Public Demands Recovery Act, 1914. It was served on all except certificate debtors Nos. 1, 12, 18 and 20, who were reported dead, on 1st November 1938.

The certificate officer directed notice under S. 52, Public Demands Recovery Act, to be issued. That section prescribes the procedure that on the death of a certificate debtor, a notice should be served under S. 52, and that being done, any further notice under S. 7 is not required. The latter part of S. 52 (1) proceeds to say :

> "52 (1). . . . . and the provisions of this Act shall apply . . . . . as if such notice were a notice under S. 7."

[4] It appears from the order sheet of the certificate officer dated 18th January 1939 that notice under S. 52 was duly served, no objection filed and distress processes for attachment of movables of the certificate debtor were issued to the certificate officer, Puri, in which district the certificate debtors usually used to reside, returnable by 28th January 1939. The proceeding was adjourned on several dates till the certificate officer of Puri, in his letter No. 8788 dated 31st July 1939 stated that the distress warrant was returned unexecuted as the certificate debtor did not allow the peon to attach the movables on the ground that the property under certificate had long been sold. Thereupon, the certificate officer directed the Requisitioning Officer to supply property list. In usual course the Requisitioning Officer supplied the list of the properties for the purpose of sale. Thereafter, notice under R. 25 of Sch. 2 was directed to be issued. Sale proclamation was served on some of the certificate debtors and on the legal representatives of certain others who had died in the meantime and whose legal representatives had not been substituted in the manner prescribed under S. 52, Public Demands Recovery Act, but was never served on one Brajabandhu Das who was reported to have left for Satyabadi P. S. and whose actual address was not supplied. On a date subsequent thereto, fresh notice under R. 25 was issued through Khasmahal and this notice was reported to have been served on 16th January 1940. About the circumstance that some of the certificate debtors' legal representatives were not substituted in the record in the manner provided by S. 52, Mr. De contended that as the death of some of them occurred after service of S. 7 notice, substitution was not vitally necessary and their legal representatives shall be deemed for all practical purposes to have been represented by those already on record. The simple answer to this is that this contention is against S. 52. The section opens with the words "where a certificate debtor dies before the certificate has been fully satisfied." Under the circumstances, the need for substitution is emphasised under the procedure even if they had died subsequent to the service of S. 7 notice. A question naturally arises whether the said representatives shall be taken to have been represented by the others already on record. It is not that the principle of representation does not apply to certificate proceedings. On the authority of the case of *Kameswar Singh* v. *Ishwari Prasad Singh*, A.I.R. (27) 1940 Pat. 692 : (189 I. C. 114), it can be predicated that the doctrine of representation which obtains in the case of proceedings of rent suits and rent decree executions also apply to certificate proceedings. In order to hold that one represents another, some relationship between them must be established which will create a right to represent and right to be represented. This may happen when there is a joint family to whom the tenancy belongs and the manager of the family is on record or this may also happen if several tenants while having common ownership and possession allow themselves to be represented before the landlord in respect of the holding by only some of them. Neither of these conditions is present here. Since 1926, that is, the year of partition suit, already referred to, the family is separate, and it is said that these properties fell to the share of Jaihari and Ramhari. Under the circumstances, by family relationship it cannot be said that either Jaihari or Ramhari or other members of the family would represent the remainder in respect of these properties. This partition, however, was not brought to the notice of the landlord (Khasmahal) not recognised by him. Under the circumstances, none but the recorded tenants would represent the holding in the landlord's dealings with it including the suits or proceedings for recovery of arrears of rent. It is nowhere submitted in the Courts below that on the death of the certificate debtors their legal representatives allowed themselves by any conduct of theirs to be represented by others who were surviving. Under the circumstances, the principle of representation cannot be held to have applied to this case. The result is that the disputed properties were sold not in presence of the persons who represented the holding in relation to the landlord. I shall discuss its bearing on the question at issue presently.

[5] After the sale was completed, the plaintiff filed an application under S. 29 of the Act (B. & O. P. D. Recovery) for setting aside the sale on the ground of irregularity employed in the conduct of the sale and consequential injury flowing therefrom. The Court, in his order dealing with the merits of that application, came to a certain findings which, in my judgment, ought to have vitiated the sale. He came to the finding that it had not been established before him that S. 7 notice had, in fact, been served. He ruled out this irregularity (to use his own words)—though in my view non-service

of such notice is an irregularity—holding that this was not material in a proceeding under S. 29, Public Demands Recovery Act. He also came to the finding that the property had been sold for very low price but he justified it saying that the certificate debtors had no saleable interest in the property at the time of the sale and that it may be the reason for the low price. However, he ultimately rejected the petition and so did the appellate Court. The auction-purchaser got delivery of possession through Court. The plaintiff was then constrained to institute the suit. The contention that has been very vigorously put by Mr. De, the learned counsel for the defendants respondents, is that the earlier purchase of the plaintiff will not avail inasmuch as this is a case governed by S. 26 (3), Public Demands Recovery Act and the holding as such, passed to defendant 3 who purchased at an auction sale held in execution of a decree for rent due in respect of the holding in dispute. This contention, at the first instance, seems to be very attractive. I shall demonstrate that it is unsound. Sub-section (3) of S. 26 reads:

> "Notwithstanding anything contained in sub-s. (1) in areas in which Chap. 14, Bengal Tenancy Act, 1885, or Chap. 16, Orissa Tenancy Act, 1913, is in force, where a tenure or holding is sold in execution of a certificate for arrears of rent due in respect thereof, the tenure or holding shall, subject to the provisions of S. 22 and S. 26 of the said Acts, respectively, pass to the purchaser subject to the interests defined in the said chapters as protected interests, but with power to annul the interests defined in the said chapters as incumbrances."

[6] Bihar and Orissa Public Demands Recovery Act is of the year 1914. The Orissa Tenancy Act is of the year 1913. Like all other Tenancy Acts, it has provided that rents due in respect of certain specified tenancies and holdings (as enumerated in S. 74, O. T. Act) constitute a first charge on them. Section 212, Orissa Tenancy Act, provides that the tenancy or holding sold in execution of a decree for recovery of rent due in respect thereof passes to the purchaser free of all incumbrances but subject to protected interests and some registered incumbrances defined and specified in that behalf. The section, before passage of the Public Demands Recovery Act, stood without the amendments later introduced to wit, S. 212 (1) (c). The amendments were brought about through S. 69, Public Demands Recovery Act (Bihar and Orissa) in order to bring certain provisions in both the Acts into accord with each other. Before this amendment in S. 212, however, Chap. 15 in its pre-amended form found place in the Orissa Tenancy Act. This chapter dealt with and was headed as "Summary procedure for the recovery of rents under the Bengal Public Demands Recovery Act, 1895." According to this, Provincial Government could empower the landlord in whose estate record of rights had been published, to send requisition for recovery of arrears of rent by summary certificate procedure to the certificate officer who, after making certain preliminary enquiries, would sign and issue a certificate. But for these amendments in S. 212, and but for sub-s. (3), Public Demands Recovery Act, any execution sale held in enforcement of the certificate for rent should convey merely the right, title and interest of the certificate debtor at the time even though the properties be specified as the subject of sale. While according to S. 212, Orissa Tenancy Act, in its pre-amendment state, the sole landlord or the entire body of the landlords or even the co-sharer-landlord, who frames his suit for rent in a specified manner, can obtain rent decree in execution whereof the holding or the tenancy would pass. This sort of sale conveying the holding or tenure is of much greater efficacy for purposes of speedy and sure realisation of rent than the sale in a certificate proceeding of the right, title and interest of the tenant. In the former case, unauthorised alienations, mortgages and other kinds of incumbrances will not hold good against the title of the purchaser while in the latter, the purchaser may purchase shadowy nothing besides endless litigations (sic). In order to remove this anomaly, sub-s. (3) of S. 26 as well as the aforesaid amendments in the text of S. 212 and similar amendments both of the Bengal Tenancy Act and Chhota Nagpur Tenancy Act were brought in S. 69, Bihar and Orissa Public Demands Recovery Act reads:

> "69. Chapter 13-A and Ss. 158-B, 167, 171 and 172, Bengal Tenancy Act, 1885, Chap. 15 and Ss. 212, 221, 225 and 226, Orissa Tenancy Act, 1913, and Ss. 244 and 248, Chhota Nagpur Tenancy Act, 1908, are amended in the manner and to the extent shown in Sch. 3."

And in Sch. 3, as ordained by this section, the amendments of S. 212 have been mentioned.

[7] Mr. De's contention is that sub-s. (3) of S. 26 was introduced in order to give benefit of first charge to all landlords irrespective of the tenancies being agricultural or otherwise and being governed or not by the Orissa Tenancy Act. He would, in other words, contend that sub-s. (3) of S. 26 would apply to homestead and other tenancies which are governed by Transfer of Property Act. It is. no doubt, true that some homestead tenancies like the *chandana* holdings and agriculturalists homesteads have been brought into the purview of Orissa Tenancy Act. This, one of many other innovations in the Tenancy Act, has effected some improvement upon the Bengal Tenancy Act and Act X [10] of 1859 which were the laws of landlord and tenant governing formerly the agrarian relationships

in Orissa. The language of S. 26 (3) considered in the light of the historical coincidence, will make it plain that it will operate in cases of tenancies to which S. 212 would apply. On the strength of the Patna decision, already quoted, Mr. De wanted to argue relying upon an observation not material for the purpose of that case of Wort J., that sub-s. (3) of s. 26 applied to all cases, without discrimination, occurring in certain areas or districts in which the section of the Bengal Tenancy Act corresponding to S. 212, Orissa Tenancy Act, was in force. The learned Judge has not amplified the argument nor has he made his meaning otherwise clear. The observation is not apposite to the facts of the present case. The sub-section refers to the area in which Chap. XVI, Orissa Tenancy Act, is in force as its coverage. The word 'area' may be construed in a wider or a narrower sense. I need not enter into that controversy in case.

[8] It is then contended by Mr. De that as Orissa Tenancy Act, as a whole, applies to the town of Cuttack, S. 26 (3), independently of S. 212 Orissa Tenancy Act, would apply to the certificate sale of Khasmahal homestead tenancies of the town. In short his contention is that the two sections are mutually exclusive.

[9] But there are certain features present in the specified conditions of applicability of the sub-section which propel us to hold that the sub-section cannot have any application to tenancies, which do not come within the purview of 'holdings or tenures' of Orissa Tenancy Act on which S. 212 could operate but for the rent dues in respect thereof being public demands. The genesis of the rule 'that in rent decree execution sale, a tenure or holding shall pass' is that rent due in respect thereof is the 'first charge' on it. This charge is enforced by obtainment of 'a rent decree or' or 'certificate' in the manner provided in Chap. XVI of the Orissa Tenancy Act, and only when the landlord elects to proceed against the concerned tenure or holding in strict conformity with the procedure of that chapter. To a Khasmahal homestead tenancy, the provisions of Orissa Tenancy Act do not apply. The rent reserved of such a tenancy has nowhere been declared to be the first charge. In providing that S. 26 (3) would apply in area where S. 212, Orissa Tenancy Act, is in force, the legislature cannot be predicated to have other meaning but to indicate that the incident of the concerned tenancies shall be same or similar, one of such incident being that the rent payable is the first charge.

[10] It should be noted that S. 26 (3), Public Demands Recovery Act, and S. 212, Orissa Tenancy Act, are complementary. Section 212 deals with the scope of sale in execution of certificates issued for recovery of rent on the requisition of a landlord other than the Government under Chap. XV of Orissa Tenancy Act, (vide S. 212) while S. 26 (3), Public Demands Recovery Act, deals with certificates issued for recovery of rents of holdings and tenures which are public demands as defined in S. 3 (6) and enumerated in Sch. 1 of the said Act, items 7 and 8. If S. 26 (3) were not there, the remedies for realisation by certificate procedure of rents due in respect of holdings or tenures within the meaning of Orissa Tenancy Act, to the collector, or to the Court of Wards or the Revenue Authorities in charge of or managing on behalf of a private individual, would suffer from inefficacy, as sales held under the Public Demands Recovery Act would pass merely right, title and interest of the judgment-debtor as remedy by suit is not available to them. That the Public Demands Recovery Act consolidates the law relating to recovery of public demand has, in this connection, to be borne in mind.

[11] The effect produced in the working of sub-s. (3) of S. 26 is the same as if the certificated rent dues were a first charge on the holding or tenure concerned. This should be contrasted with the provisions of S. 8, Public Demands Recovery Act. According to it, from and after the service of notice of any certificate under S. 7 upon a certificate debtor, the amount due in respect of such certificate shall be a charge upon such property to which every other charge created subsequently to the service of the said notice shall be postponed. Such property means 'any immovable property' in the district of any revenue-paying estate borne on the revenue roll of the district or any interest in such property in the district in which the certificate is filed if the Legislature intended that the rent dues of any class of tenancies outside the ambits of the agrarian law of landlord and tenant in the country' it should have specifically and clearly provided for it *(sic)*. It would be against the skill and policy of legislative penmanship to incorporate without express words in that behalf provisions that would be liable to be misinterpreted by production of sharp contrast resulting in inconsistency. Every Act should be interpreted in a manner congenial to production of harmony and consistency amongst its various provisions. The sub-section, under interpretation does not aim at either supplementing or adding to the substantive law governing the incidents of Khasmahal tenancies of the kind and the respective rights and liabilities of the Khasmahal (landlord) and its tenants.

[12] The circumstances that S. 26 (3) was ushered in contemporaneously with the amendment of Chap. XV, Orissa Tenancy Act, cannot be slightly passed over. By the amendment, the words "other than Government" were inserted after the words 'any landlord' in S. 211 of Chap. XV, Orissa Tenancy Act. This detraction from the more efficacious remedy for realisation of rents of holdings and tenures of which the Government was the landlord, effected by the amendment, was made good by addition of sub-section (3) to S. 26, Public Demands Recovery Act.

[13] I shall now advert to certain concepts inherent in the sub-section which are fully irreconcilable with the incidents of Khasmahal homestead tenancies. The sub-section discriminates between holding and tenure. This discrimination is compatible only with the classification of the landed interest of the tenantry in the Orissa Tenancy Act. The classification in Khasmahal tenancies are patadari. (lessee), Dar-patadari (sub lessee) and Dar-Dar-patadari (sub-lessee). Conception of a tenure is foreign to the hierarchy of tenancies with Khasmahal as the supreme landlord of non-agricultural landed interests.

[14] Next, the sub-section makes the sale subject to the provisions of S. 26, Orissa Tenancy Act. The section, broadly speaking, deals with merger of occupancy right when acquired by proprietor and matters analogous thereto. The section textually is inapplicable to the tenancies with which we are concerned in this case. Such tenants are, by the very term of their induction, liable to ejectment at the option of the proprietor (Khasmahal) a liability inconsistent with acquisition of occupancy right. Without such acquisition application of S. 26, Orissa Tenancy Act is inconceivable.

[15] The section further provides that the sale shall be subject to protected interests, registered and notified incumbrances as defined in the Orissa Tenancy Act. These are fundamentally interests or incumbrances carved out or created in respect of either occupancy holdings or tenures within the meaning of the Orissa Tenancy Act. As such. they are incompatible with the incidents of town Khasmahal tenancies.

[16] As I have already indicated the entire body of recorded tenants were not represented in the certificate proceedings consummating in the sale and without such representation it would amount to revolutioning the fundamental idea that no tenancy or holding passes without the entire body of the recorded tenants being represented in the sale proceedings.

[17] In these circumstances, I find it difficult to accede to the contention advanced by Mr. De. The defendants, therefore, purchased merely right, title and interest of the certificate debtors at the time of sale. As they had no such at the time, the plaintiff's earlier purchase should prevail.

[18] In the result, the appeal is allowed, the decision of the learned Court of Appeal below is reversed and the suit is decreed with costs throughout.

[19] **Jagnnnadhadas J.** — I agree.

K.S. *Appeal allowed.*

A. I. R. (37) 1950 Orissa 202 *[C. N. 33.]*

JAGANNADHADAS AND PANIGRAHI JJ.

Behera Tanti — Accused — Appellant v. *The State.*

Criminal Appeal No. 100 of 1949, D/ 20-4-1950, from order of S. J, Sundergarh-Sambalpur, D/-14-9-1949.

(a) Evidence Act (1872), S. 24 — Confession, what is — Criminal P. C. (1898), S. 164.

A confession in order to be admissible under the Evidence Act must either, in terms, admit the offence or, at any rate, substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession, e. g., an admission that the accused is the owner of and was in recent possession of the knife which caused the death is not enough. [Para 3]

Annotation : ('46-Man) Evidence Act, S. 24, N. 2 ; ('49-Com.) Cr. P. C., S. 164, N. 7, Pt. 9.

(b) Evidence Act (1872), S. 33 — Scope — Evidence of witness before committing Magistrate's Court — Admissibility in Sessions Court.

Section 33 must be strictly applied and the circumstances mentioned therein must be strictly proved before a deposition can be accepted as evidence against the accused. [Para 4]

Hence, the evidence of a witness before a Committing Magistrate's Court cannot be admitted before the Sessions Court when it is not proved that the witness is unable to attend. [Para 4]

Annotation : ('46 Man.) Evidence Act, S. 33, N. 1. See also ('49-Com.) Cr. P. C., S. 288, N. 6, 7.

G. Jena — for Appellant.
B. M. Patnik — for the State.

Panigrahi J. — The appellant Behera Tanti was charged with the offence of having committed the murder of his wife by severing her head from the body with a 'Falsia'. He has been convicted by the Sessions Judge, Sundergarh-Sambalpur under S. 302, Penal Code, and sentenced to transportation for life.

[2] The evidence against the appellant consists of a confessional statement alleged to have been made by him — which is marked Ex. 4 — but which was subsequently retracted, the oral evidence of P. Ws. 3 to 5 and the circumstantial evidence relating to his conduct after the occurrence.

[3] So far as Ex. 4 is concerned, the appellant appears to have stated therein that there was

an altercation between him and his wife, but that he did not know what he did with her though he saw his knife stained with blood. He therefore ran to the police station where he realised that he had killed his wife. The appellant went to the police station himself, taking the Falsia with him and there the Sub-Inspector of police seized the weapon as well his clothes suspected to have been stained with blood. This statement of the appellant, recorded by a Magistrate under S. 164, Criminal P. C., was subsequently retracted at the Court where he categorically denied having killed his wife. His statement before the Court was that he did not know how his wife had been killed and that when he came home and saw the body of the deceased he ran to the police station and produced the "Falsia". It is argued by learned counsel appearing for the State that the appellant's statement amounts to an admission of his guilt firstly because the appellant says that he found the knife to have contained stains of blood on it and secondly because of his statement that soon thereafter he realized that he had killed his wife. We are unable to accede to this contention because his statement purports to convey what appears to have been an impression created in his mind regarding the occurrence, and cannot amount to a categorical admission that he had actually killed the deceased. As has been observed by the Judicial Committee in *Pakala Narayanaswami* v. *Emperor*, A. I. R. (26) 1939 P. C. 47 : (40 Cr. L. J. 364), a confession in order to be admissible under the Evidence Act must either in terms, admit the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession, e. g , an admission that the accused is the owner of and was in recent possession of the knife which caused the death is not enough. (After discussing the evidence of child witnesses P. Ws. 3 to 5 the judgment proceeded as follows :)

[4] In addition to the above witnesses, the deposition of Gunna another girl of 12 years of age, which had been recorded by the committing Magistrate, was tendered in evidence in the sessions trial under S. 33, Evidence Act. Prosecution witness 1, the father of the appellant deposed at the sessions trial that Gunna was at that time at Midnapore. No effort appears to have been made to procure her nor is it in evidence that she was otherwise unable to attend. In these circumstances Gunna's evidence tendered before the Committing Magistrate cannot be admitted as evidence under S. 33. Section 33 must be strictly applied and the circumstances mentioned therein must be strictly proved before a deposition can be accepted as evidence against the accused. We are not satisfied that the conditions mentioned in S. 33, Evidence Act, have been proved to have existed in this case, in order to justify the admission of Gunna's deposition as evidence against the appellant. Thus there is no reliable evidence at all against the appellant to bring home the guilt to him.

[5] The circumstantial evidence against the appellant is that he produced a 'Falsia' at the police station (M. O. 1) and that his cloth had been found stained with blood. But unfortunately, for reasons left unexplained, these blood stains were not subjected to any chemical analysis and it has not been established that the stains were of the deceased's blood or that they were of human origin.

[6] It is no doubt clearly established that the deceased met with her death by violent means as the medical evidence indisputably shows, but in view of the lacuna in the evidence the connection of the appellant with the death has not been made out to our satisfaction. In these circumstances we have no option but to give the benefit of doubt to the appellant. We accordingly set aside his conviction and the sentence passed against him and direct that he should be released forthwith.

[7] **Jagannadhadas J.**—I agree.

K.S. *Accused acquitted.*

A. I. R. (37) 1950 Orissa 203 *[C. N. 34.]*

PANIGRAHI J.

Panchanana Mohapatra — *Petitioner* v. *Rex.*

Criminal Revn. No. 343 of 1949, D/- 15-3-1950, from order of S. J., Ganjam-Nayagarh, D/- 17-10-1949.

Criminal P. C. (1898), Ss. 139A and 439—Mode of enquiry — Held there was sufficient compliance with S. 139A and no revision lay.

Section 139A does not prescribe the mode of enquiry that a Magistrate has to adopt, nor does it require that he should record an order that he is satisfied that there was a case against the person proceeded against. [Para 6]

In a proceeding under S. 133, the persons proceeded against denied the existence of a public right and the Magistrate proceeded to take evidence with respect to such denial. After examining some witnesses he passed an order that there was no case against one of the persons and he accordingly discharged him. He then proceeded to take further evidence and ultimately made the preliminary order absolute :

Held that there was sufficient compliance with the provisions of S. 139A and the order could not be challenged in revision especially when the person did not complain of any prejudice by reason of non-compliance with S. 139A in the lower Court and all that he complained was that the rights of parties should have been decided in civil Court. [Para 6]

Annotation : ('49-Com) Criminal P. C., S. 139A, N. 4, 11.

P. Misra — for Petitioner.
Govt. Advocate — for the Rex.

Order.—This revision is directed against an order under S. 133, Criminal P. C., passed by the Magistrate, first class, Aska, directing the petitioner to remove an encroachment made by him on a village path in village Marudi Jagannathpur. The case against the petitioner was that he put up a stone foundation for a house across a public path in survey No. 6 of the said village of Marudi Jagannathpur, and encroached upon an area of 2 (sic) of an acre and thereby caused obstruction and annoyance to the public.

[2] The short facts of the case are that the petitioner purchased a plot of homestead land on 26th June 1937 by a registered sale deed (Ex. 1) from one Ganesh Mohapatra (P. W. 2) of the village. The site is described in the sale deed as 100 cubits long and 11 cubits wide, and is bounded on the east by the house of the petitioner and on the west by a "Rajamarga Khama." The Rajamarga Khama, as the very name implies, is a public path which is used both as a pathway and as a channel for drawing off the rain water from the village.

[3] The petitioner does not deny that there existed a public path to the west of the plot purchased by him but his case is that he has not encroached upon any portion of the public path nor has he caused any obstruction or annoyance to the public. There is, at present, a stone foundation running from north to south which, according to the prosecution, was put up by the petitioner in April 1948, and in June 1948 a Mahajan petition was presented by villagers before the Tahsildar (P. W. 4) complaining against the petitioner. The petitioner was served with notices under the Land Encroachment Act and the Karanam also reported the alleged encroachment in his B-Memorandum. The Tahsildar made a local enquiry and was satisfied that the petitioner had made the alleged encroachment. He accordingly started proceedings against the petitioner simultaneously, both under the Land Encroachment Act and under the Criminal Procedure Code.

[4] On 19th October 1948, the Magistrate passed a conditional order under S 133 (1), Criminal P. C. against the petitioner and his nephew Lokanath Mohapatra (who was discharged by the Magistrate later on) calling upon the petitioner to remove the obstruction within seven days of the receipt of his order. On receipt of this notice, the petitioner appeared on 18th January 1949 and claimed trial in accordance with the procedure laid down in S. 139A, Criminal P. C. The petitioner denied the existence of a public right of way on the disputed land. An enquiry was thereupon started by the Magistrate under S. 139A and the S. I. of police was examined on 21st February 1949. Thereafter a number of witnesses were examined for the prosecution, as well as for the petitioner, and the preliminary order passed by the Magistrate on 19th October 1948 was made absolute on 30th July 1949. It is against this order that the petitioner has obtained a rule.

[5] After listening to the arguments of Mr. Misra, learned counsel for the petitioner, at great length, I am satisfied that the petitioner's case that there has been no encroachment on the public pathway has no merits at all. (After discussion of the evidence the judgment proceeds:) I am accordingly satisfied that there has been in fact, an encroachment by the petitioner on the public path as alleged by the prosecution.

[6] But the point raised by Mr. Misra by which I was impressed is that the Magistrate failed to comply with the provisions of S. 139A, Criminal P. C. and that the trial was thereby rendered irregular. Section 139A says that the Magistrate shall question the person against whom the preliminary order under S. 133 has been made as to whether he denies the existence of any public right in respect of the way, and if he does so, the Magistrate shall, before proceeding under S. 137 or S. 138, inquire into the matter. Sub-section (2) of that section further says that if, in such inquiry, the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceedings until the matter of existence of such right has been decided by a competent civil Court, and if he finds that there is no such evidence he shall proceed as laid down in S. 137 or S. 138 as the case may require. Mr. Misra's point is that all that the Magistrate has done is to enquire whether there is any evidence in support of the denial and that he has not enquired into the merits of the petitioner's case under S. 137 It is doubtless true that if there has been a non-compliance with the language of this section, the order passed against the petitioner would be open to challenge as illegal. But what the Magistrate did was exactly what the section contemplates. On 18th January 1949, the petitioner was examined and he denied the existence of a public right of way over the disputed piece of land. But as the prosecution was not ready with witnesses the Magistrate adjourned the case to 21st February 1949. On that day he started an enquiry under S. 139A as he himself has noted at p. 27 of the records—and examined the Sub-Inspector of police. This witness however admitted that he did not visit the spot and that therefore he was not in a position to say whether

the petitioner had made any encroachment on any public land. The Magistrate thereafter asked the Sub-Inspector of police to furnish a list of witnesses. The case underwent several adjournments owing to absence of witnesses for the prosecution and was finally re-posted to 6th April 1949 when two witnesses were examined for the prosecution. The prosecution wanted to produce some records and asked for further adjournment. On 6th May 1949, three more witnesses were examined for the prosecution of whom the tahsildar (P. W. 4) was one. The Magistrate made a note in his order sheet on that day that on the evidence of the Tahsildar there was no case against Lokanath Mohapatra the nephew of the petitioner and he accordingly discharged him. He was however satisfied, from the evidence of P. W. 4 that the encroachment charged against the petitioner was clearly proved and poceeded to take evidence under S. 137, Criminal P. C. both for the prosecution and for the petitioner. On behalf of the prosecution, the Revenue Inspector was examined as P. W. 8 and the Karji (P. W. 3) was recalled. One Natwar Sahu was also examined for the prosecution as P. W. 7 and he proved certain documents. Thereafter, witnesses for the petitioner were examined and the case was closed on 29th July 1949. It is no doubt true that all the witnesses examined for the prosecution have been serially numbered, but it is clear from the record as well as from the order sheet, that the Magistrate was satisfied that there had been an encroachment on a public path on the evidence of the Tahsildar and that he decided to proceed further with the recording of evidence in order to satisfy himself whether the preliminary order made by him should be made absolute. I am unable to accept the contention of Mr. Misra that the entire evidence was in connection with the preliminary enquiry under S. 139A. Section 139A does not prescribe the mode of enquiry that a Magistrate has to adopt, nor does it require that he should record an order that he is satisfied that there was a case against the petitioner. What the Magistrate did on 6th May 1949 is clear indication that he dropped the proceedings against Lokanath Mohaptra and decided to proceed only against the petitioner. I am therefore satisfied that the order of the Magistrate does not suffer from any irregularity as has been alleged. It is significant that the petitioner did not complain of any prejudice having been caused to him by reason of non-compliance with the provisions of S. 139A, in his petition to the Sessions Judge. All that he contended there was that the rights of the parties should have been decided in a civil Court and not under Ss. 133 and 139A, Criminal P. C.

[7] The order under revision is affirmed and the rule is discharged. This petition fails and is dismissed.

[8] I also agree with the observations of the Magistrate regarding the conduct of Satyanarayan Patnaik, the Revenue Inspector of Dhougan Firka who did his best to protect the petitioner and whose attempt failed owing to the supervision of the Tahsildar. The Revenue Inspector is also guilty of having tampered with the report of the Karji in having changed the date from 24th July 1948 to 24th December 1948. The attention of the District Magistrate is invited to the serious misconduct of this officer who has been guilty not only of dereliction of duty but also of a criminal offence. Appropriate proceedings should be drawn up against him.

K.S. *Rule discharged.*

A. I. R. (37) 1950 Orissa 205 *[C. N. 35.]*

RAY C. J. AND PANIGRAHI J.

Ramanarayan Das Madanlal — Petitioner v. Commissioner of Income tax, Bihar and Orissa — Opposite Party.

Special Jurisdiction Case No. 5 of 1947, D/- 28-3-1950.

Income-tax Act (1922), Ss. 30 (1), Proviso 1, 31 and 33 (1) — Order dismissing appeal as incompetent — Appeal, if lies.

An order passed by the Appellate Assistant Commissioner, dismissing the assessee's appeal on the ground of its incompetence, according to the proviso to sub-s. (1) of S. 30 of the Act, is one under S. 31 and as such appealable under S. 33 (1) of the Act. [Paras 1 and 5]

Annotation: ('46-Man.) I. T. Act, S. 30 N. 1, S. 33 N. 1.

B. N. Mohanty — for Petitioner.
Standing Counsel, G. C. Das — for Opposite Party.

Ray C. J.—Under S. 66, Income tax Act, this Court asked the appellate Tribunal to state a case which has since been done. The questions referred to us are:

"(1) Whether the order passed by the Appellate Commissioner, dismissing the assessee's appeal on the ground of its incompetence, according to the proviso to sub s. (1) of S. 30 of the Act, is one under S. 31 and as such appealable under S. 33 (1) of the Act, and

(2) Whether such an order passed before expiry of the time either as originally fixed or later extended by competent authority for payment of the tax is good in law."

[2] Of the two questions, the second one strictly falls within the scope of the appeal before the Appellate Tribunal in the event of our answer to question No (1) being in the affirmative. When the appeal goes back to the Appellate Tribunal it will be for them to consider whether the order of extension, if any, granted by the income tax authorities was a valid order and would conduce to the assessee being considered for the purpose of the proviso to S. 30 as one who has not committed any default, or who

has not been in arrears in respect of income-tax. We have not been posted with all the facts and circumstances which should have enabled us to answer this question with any amount of certainty. We therefore leave the question at large.

[3] With regard to question No. (1), our answer should be in the affirmative. As the point has been thoroughly discussed in our preliminary order issuing a writ to the Tribunal to state a case, I do not like to reiterate what I have stated before. At this stage, a decision of the Bombay High Court Reports, *Commr. of Income-tax, Bombay City* v. *Mysore Iron & Steel Works*, 1949-17 I.L.R 473: (A.I.R. (36) 1949 Bom. 400) has been cited before us. The position, however, is clear, namely, that the order impugned of the Appellate Assistant Commissioner cannot but be one under S. 31 of the Act. According to sub s. (1) of S 30, certain orders as defined in the said sub section are made appealable. An order under sub-s. (1) of S. 46 that is, an order levying a penalty upon an assessee for non-payment of income-tax within the due date, is one such. The proviso limits the right of appeal to those persons who must have paid the tax, or in other words, to those who must not have been in arrears in respect of the payment of the tax. When an appeal is filed against this order, it is a matter for consideration of the appellate authority whether such an appeal does lie, or, in other words, whether the appeal is competent, that is to say, whether the assessee-appellant has fulfilled the conditions which are pre-requisite for an appeal. Within the provisions of S. 31 there is nothing to empower an appellate authority to pass any order by way of admitting an appeal. Admission of an appeal has not been sufficiently provided for within the purview of the Income-tax Act, but it is not strange to the scheme of the Act. By contrast, I refer to the admission of an appeal as provided for in the concluding portion of sub-s. (2) of S. 30. That sub-section provides, in the main, a time limit for appeals of various classes, the starting points of such time limits varying according to the circumstances of each of the cases mentioned therein. The sub-section concludes with the following words:

> "But the Appellate Assistant Commissioner may admit an appeal after the expiration of the period if he is satisfied that the appellant had sufficient cause for not presenting it within that period."

This makes it clear that the stage of admission is interposed between the presentation of an appeal and its hearing and disposal under S. 31 in cases in which an appeal is not presented within the prescribed time-limit. The necessary inference, therefore, is that in all other cases the appeals, as soon as presented, must come up for decision under S. 31.

[4] Looking to how the matter was treated by the Appellate Assistant Commissioner in the instant case, it is clear that he had fixed a date and place for the hearing of the appeal and had invited all the concerned parties. In case we thought any notional stage of admission to be intervening, which according to me is not so much necessary, that stage, according to the appellate authority, had already passed. He had set down the appeal for the purpose of hearing. The matter of hearing is provided for in S. 31 and S. 31 alone. There is no other provision in the Act under which an appeal could be disposed of. Under the circumstances, the order disposing of the appeal is an order under S. 31. Its character as an order under that section does not depend upon the ground on which the order proceeds. The ground may be one of a preliminary character but when decided one way or the other, and particularly when it is decided against the assessee, it goes to the root of the matter and amounts to a final disposal of the appeal.

[5] In the order calling upon the tribunal to state a case, we made a reference to a Full Bench decision of the Patna High Court in which a similar question, though not the same, was debated and it was decided in the same way in which we propose to answer the question before us. As against that, Mr. Das, learned standing counsel, invited our attention to the Bombay case already referred to. The ratio of Bombay decision is that the order in question was one within sub-s. (2) of S. 30 to which I have referred. Such procedure as that of admission is, however, not to be found within the language of the proviso which declares an appeal to be incompetent in cases where the appellant is found not to have paid the assessed tax. That was really the point on which the Bombay High Court distinguished the decision of the Patna High Court. Under the circumstances, apart from our feeling ourselves bound by the Patna decision, we are on considerations of merits, of opinion that the Bombay decision does not apply to the facts of the case before us and that the question referred to us must be answered in the affirmative.

[6] In the result, the Appellate Tribunal should now take up the appeal, entertain it, and dispose it of on merits. The petition is allowed with costs. Hearing fee is assessed at five gold mohurs.

[7] **Panigrahi J.**—I agree.

V.R.B. *Reference answered.*

A. I. R. (37) 1950 Orissa 207 *(C. N. 36.)*

PANIGRAHI AND NARASIMHAM JJ.

Padam Debi — Appellant v. *Raghunath Ray — Respondent.*

M. A. No. 62 of 1948, D/- 13-12-1949, from order of Dist. Magistrate, Puri, D/- 21-5-1948.

(a) Workmen's Compensation Act (1923), S. 3— Accident—Negligence—Effect.

Though the expression 'accident' in S 3 has not anywhere been defined, it is well-settled that it generally means some unexpected event happening without design even though there may be negligence on the part of the workman who suffers from it. [Para 5]

Thus even if an accident is caused to a motor bus by the rash and negligent act of the driver in driving it at an excessive speed, it cannot be said that the dashing of the vehicle against a tree which caused the accident was brought about by any previous design or a wilful act on the part of the driver and hence once it is proved that the accident was caused in the course of his employment, the question of negligence, great or small, is irrelevant. [Para 5]

Annotation : ('46 Man) Workmen's Compensation Act, S. 3, N. 5.

(b) Workmen's Compensation Act (1923), S 3 (1), Proviso (b) (ii)—Death of workman —Disobedience of rule or order.

The applicability of cl. (b) of the proviso to sub-s. (1) of S. 3 is limited to those cases where injury has not resulted in death. Where, however, the injury has resulted in death, the question about disobedience of any rule or order is not material so long as it can be reasonably held that the accident arose out of and in the course of the employment. [Para 6]

Annotation : ('46-Man.) Workmen's Compensation Act, S. 3, N. 3, Pt. 3.

(c) Workmen's Compensation Act (1923), Sch. II, cl. (i) —Motor driver.

A driver of a motor bus is a workman within the meaning of the Act. [Para 8]

Annotation : (43-Man) Workmen's Compensation Act, Sch. II, cl. (i), N 1.

B K. Pal — for Appellant.
H. Mohapatra — for Respondent.

Narasimham J.—This is an appeal under the Workmen's Compensation Act against the order of the District Magistrate of Puri rejecting the appellant's claim for compensation.

[2] The appellant is the widow of one Parikhit Panda who had been engaged as a motor driver by the respondent in September 1946. The respondent had a temporary permit to ply a bus (O. R. P. 265) for hire between Khurda and Banpur in Puri District On 24th September 1946, while the appellant's husband was driving the said motor bus he met with an accident in consequence of which he sustained severe injuries which resulted in his death. The bus dashed against a tree while proceeding at a somewhat high speed and the driver and some other passengers sustained fatal injuries. The police made the usual investigation and submitted final report to the effect that the accident was caused by the rash and negligent driving of the driver but that in view of his death no further action could be taken.

[3] The learned District Magistrate, relying mainly on the police report and also on the evidence of one Fakir Padhan who was one of the occupants of the ill-fated bus, held that the driver met with his death by his own rash and negligent driving and that consequently s. 3, Workmen's Compensation Act, would have no application to this case inasmuch as the death could not be said to be caused by 'accident".

[4] Section 3 (1), Workmen's Compensation Act runs thus :

> "If personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this chapter."

[5] The learned District Magistrate has obviously committed an illegality in construing the expression 'accident" occurring in S. 3, Workmen's Compensation Act. Doubtless that expression has nowhere been defined but it seems to be well settled that the expression "accident' generally means some unexpected event happening without design, even though there may be negligence As pointed out in Halsbury's Laws of England, Edn. 2, Vol. 34, page 816 :

> "To decide whether an occurrence is an accident, it must be regarded from the point of view of the workman who suffers from it, and if it is unexpected and without design on his part, it may be an accident although intentionally caused by the author of it, or caused by some act committed wilfully by him"

As pointed out by Lord Atkin in *Harris* v. *Associated Portland Cement Manufacturers, Ltd.*, 1939 A. C. 71 at pp. 76 and 77 : (108 L J K. B. 145) :

> "Once you have found the work which he is seeking to do to be within his employment the question of negligence, great or small, is irrelevant and no amount of negligence in doing an employment job can change the workman's action into a non-employment job . . . In my opinion if a workman is doing an act which is within the scope of his employment in a way which is negligent in any degree and is injured by a risk incurred only by that way of doing it he is entitled to compensation."

This principle has been followed in India in several decisions reported in *Jaffar Hiptullah Bhoy Ginning and Press Factory* v. *Sheikh Ismail*, I.L.R. (1937) Nag. 88 : (A. I. R. (24) 1937 Nag. 311); *Dhanpal* v. *Superintendent of Collieries*, A. I. R. (21) 1934 Pat 630 : (152 I. C. 1024) and *Lee Shi* v. *Consolidated Tin Mines of Burma Ltd.*, A. I R. (26) 1939 Rang. 428 : (185 I C. 847).

[6] Judged in the light of the aforesaid decisions, there seems to be no doubt that in the present case the death of the appellant's husband was caused by an accident The respondent has frankly admitted that the appellant's husband was engaged (though temporarily) as a driver

on a pay of Rs. 60 per month. Even if it be assumed that the accident was caused by the rash and negligent act of the driver in driving the vehicle at excessive speed, it cannot be said that the dashing of the vehicle against the tree on the road was brought about by any previous design. The driver did not wilfully dash the bus against the tree but because of his negligent driving he lost control of the steering thereby causing the accident. But it is admitted that at the time of the accident he was in the employment of the respondent and the accident itself arose while he was working in that capacity. Mr. Mohapatra urged that the driver committed a breach of the provisions of the Motor Vehicles Act and the Rules framed thereunder by driving the bus at excessive speed and ignoring the caution signals on the road. But these are not factors which would affect the right to claim compensation in a case where death is actually caused because the applicability of cl. (b) of the proviso to sub-s. (1) of S. 3, Workmen's Compensation Act is limited to those cases where injury has not resulted in death. Where however the injury has resulted in death the question about disobedience of any rule or order is not material so long as it can be reasonably held that the accident arose out of and in the course of the employment. Similarly the negligent or rash conduct of the workman also is immaterial. As pointed out by Lord Finlay in *Lancashire and Yorkshire Rly. v. Highley*, 1917 A. C. 352 : (86 L. J. K. B. 715) there is a distinction between an act done in the course of employment but in an improper way and one done outside the course of the employment altogether. In the present case, the driver might have driven the bus in an improper way, but as he was engaged in driving the vehicle at the time of the accident it cannot be said that his action was outside the course of his employment altogether.

[7] Mr. Mohapatra then urged that the appellant's husband was not a "workman" as defined in cl. (n) of S. 2 (1), Workmen's Compensation Act. That clause should be read along with the provisions of Sch. 2 to the said Act. Clause (i) of that schedule says that any person employed otherwise than in a clerical capacity in connection with the operation of a vehicle propelled by mechanical power is a "workman" within the meaning of the Act. An argument was advanced to the effect that a motor vehicle is not a vehicle propelled by mechanical power. But this argument is not convincing. The expression "mechanical power" obviously means power generated or derived from a machine and it cannot be seriously contended that the power in a motor bus is not derived from a machine. Even in the Motor Vehicles Act the definition of the expression "motor vehicle" (see S. 2 (18)) indicates clearly that a motor vehicle is also considered to be a mechanically propelled vehicle.

[8] In *Pollachi Transport Ltd. v. Arumuga*, I.L.R. (1938) Mad. 636 : (A.I.R. (25) 1938 Mad. 480) and *Nanda Kumar Singh v. Pramatha Nath Chatterjee*, 42 C. W. N. 123, it was held that the conductor of a motor bus was a "workman" within the meaning of the Workmen's Compensation Act. This shows clearly that the High Courts in India have taken the view that a motor vehicle is also a vehicle propelled by mechanical power within the meaning of cl. (i) of Sch. 2 to the Workmen's Compensation Act. There seems thus no doubt that the driver of a motor bus is a workman within the meaning of that Act.

[9] The appellant is, therefore, clearly entitled to compensation. In fixing the amount of compensation there is some difficulty chiefly because of the conflict in the evidence regarding the salary of the appellant's husband. The appellant has stated in her evidence that her husband was employed on a monthly salary of Rs. 120 whereas the respondent's Gumasta stated that the salary fixed for the driver was only Rs. 60 per month. But the respondent has not produced any of his registers or any piece of documentary evidence to show the exact amount fixed as the monthly salary of the driver. Mr. H. Mohapatra urged that the case may be remanded to the lower Court with a view to enable the Court to come to a clear finding as to the exact monthly salary of the driver. The accident took place more than three years ago and both parties were given adequate opportunities to adduce all possible evidence as regards the salary of the driver. A further remand at this stage will not only cause harassment to the unfortunate widow (appellant) but may lead to perjured evidence. We are inclined to accept the evidence of the appellant on this point and hold that the driver was getting Rs. 120 per month on the date of the accident. The appellant is therefore entitled to compensation of Rs. 3500 (vide Sch. 4 to the Workmen' Compensation Act).

[10] The appeal is, therefore, allowed, the order of the lower Court is set aside and the respondent is directed to pay Rs. 3500 as compensation to the appellant.

[11] **Panigrahi J.** — I agree with the order proposed and would like to add a few observations. It was first contended for the respondent-employer that the accident which resulted in the death of the workman is not an "accident" which arose out of and in the course of his employment within the meaning of S. 3 (1), Workmen's Compensation Act. Reliance was placed by Mr. Mohapatra on a case reported in *Powell*

v. *Panchu Mokadam*, 21 Pat. 218 : (A. I. R. (29) 1942 Pat. 453). The deceased workman in that case, one Sukhdeo, was employed in a stone quarry. Sukhdeo with others had been removed outside the danger zone as the stones were being blasted by gun-powder. Four shots were fired when Sukhdeo and others ran towards the quarry. The manager of the quarry, who was present and others shouted to these men not to go as the fifth shot had not then been fired. That shot was fired, and a piece of flying stone hit Sukhdeo and killed him. On these facts their Lordships of the Patna High Court made some observations on which the fabric of Mr. Mohapatra's argument is based. The defence in that case was that the deceased was injured while doing a prohibited act. Their Lordships in remanding the case left it to the Commissioner to consider and decide upon evidence whether there was a genuine prohibition or not. Nowhere in the judgment do their Lordships purport to lay down that the deceased man would not be the victim of an accident as defined in the Act on the facts of that case. The law on the subject has been clearly laid down by Lord Sumner in *Lancashire and Yorkshire Rly.* v. *Highley*, (1917) A. C. 352 : (86 L. J. K. B. 715) as below.

> "The test is : Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury ? If yea, the accident arose out of his employment. If nay, it did not, because what was not part of the employment to hazard, to suffer, or to do cannot well be the cause of an accident arising out of the employment."

[12] In *Mt. Champi* v. *Messrs. Shaw Wallace & Co.*, I.L.R. (1938) Nag 200 : (A. I. R. (24) 1937 Nag. 397), the workman met with his death in having violated a statutory rule under the Indian Coal Mines Regulations. Their Lordships held that wilful disobedience of a safety regulation did not exempt the employer from liability in the case of a fatal accident. The point is whether the prohibition is a part of the contract of the employment. It is only if there is such a prohibition at the time of the contract between the employer and the employee that the employer may claim exemption. The word 'accident' has not been defined. But its accepted meaning is no longer in doubt. As Viscount Haldane L. C. put it in *Board of Management of Trim Joint District School* v. *Kelly*, (1914) A. C. 667 : (83 L. J. P. C. 220) :

> "The Act covers a field akin to statutory insurance against injury to the workman arising out of and in the course of his employment, provided that injury is something not expected or designed by the workman himself."

In a later case reported in *Harris* v. *Associated Portland Cement Manufacturers, Ltd*, (1939) A. C. 71 : (108 L. J. K. B. 145), Lord Atkin laid down the law as follows :

> "Once you have found the work which he is seeking to do to within his employment the question of negligence, great or small, is irrelevant : and no amount of negligence in doing an employment job can change the workman's action into a non-employment job. With great respect it is not a question of degree, and does not give rise to a question of fact. The nature of the act is not altered in kind by the degree of negligence with which it was done,"

and as pointed out by his Lordship later in the course of that judgment,

> "if negligence would in any degree preclude compensation, the benefits of the Act would be seriously impaired. In truth the negligence of the workman is as much a risk of his employment as the negligence of his fellow workmen."

To the same effect is the decision reported in *Urmila Dasi* v. *Tata Iron & Steel Co.*, 8 Pat. 24: (A. I. R. (15) 1928 Pat. 508), where it was laid down that in order to claim exemption it was not enough for the employer to prove a reckless and rash act on the part of the workman. We are, therefore, satisfied that the deceased met with the accident while driving the motor vehicle and that it arose out of and in the course of his employment entitling him to compensation within the provisions of S. 3 (1) of the Act.

[13] It was next contended that inasmuch as the driver was driving at a reckless speed contrary to the statutory rules framed under the Motor Vehicles Act he was guilty of wilful disobedience of the rule expressly framed for the purpose of securing the safety of the workman within the meaning of proviso (b) (ii) of sub-s. (1) of S. 3, Workmen's Compensation Act. This argument, however, cannot prevail as this sub-section applies only to cases of injuries not resulting in death. It was next contended that the driver of a motor vehicle is not a workman entitled to compensation under the Act. Schedule II to the Act enumerates the class of persons, answering the definition of 'workman' given in S. 2 of the Act. The following persons are workmen within the meaning of S. 2, and sub-s. (1) (n) says any person who is: '(i) employed ...... in connexion with the operation ...... of a vehicle propelled by steam or other mechanical power ...' Mr. Mohapatra's contention is that a motor bus is not a vehicle propelled by mechanical power. The expression 'motor vehicle' has been defined in the Motor Vehicles Act as meaning "any mechanically propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source ......" It cannot, therefore, be seriously urged that a motor bus is not a vehicle propelled by mechanical power within the meaning of the Workmen's Compensation Act. It was contended that the definition of the expression "motor vehicle" given in the Motor Vehicles Act has no bearing on the interpretation of the expres-

sion "vehicle" used in the Workmen's Compensation Act. But as both are Acts of the Central Legislature I am inclined to hold that the meaning attributed to a motor vehicle is common to both the Acts. Even the conductor of a motor bus has been held to come within the meaning of the expression "workman" under the Workmen's Compensation Act. For instances reference may be made to *Pollachi Transport, Ltd.* v. *Arumuga*, I. L. R. (1938) Mad. 636 : (A. I. R. (25) 1938 Mad. 485) and *Nanda Kumar Singh* v. *Pramatha Nath Chatterjee*, 42 C. W. N. 123.

[14] In the result, none of the objections raised on behalf of the respondent-employer are tenable and the appellant is entitled to compensation under the Workmen's Compensation Act.

D.R.R. *Appeal allowed.*

A. I. R (37) 1950 Orissa 210 *[C. N. 37.]*

JAGANNADHADAS AND NARASIMHAM JJ.

Sheikh Bikala — Plaintiff — Appellant v. *Sheik Ali and others — Defendants — Respondents.*

Second Appeal No. 141 of 1946, D/- 2-3-1950, from decision of Sub-Judge, Cuttak, D/ 14-3-1946.

(a) Transfer of Property Act (1882), S. 52 — Involuntary transfers.

The principle of *lis pendens* would apply to involuntary transfers also though S. 52 in terms may not apply to such transfers. [Para 4]

Annotation: ('50 Com.) T. P. Act, S 52 N 30, 31.

(b) Transfer of Property Act (1882), S. 52 — Involuntary transfer —Execution of mortgage before suit but execution sale pending suit.

A right acquired before the commencement of a suit is not affected by the rule of *lis pendens* even though the remedy for the enforcement of that right may be sought during the pendency of the suit. [Para 5]

A sale in execution of a mortgage decree will not be hit by the doctrine of *lis pendens* if the mortgage had taken place long before institution of the suit even though the sale might have taken place during the pendency of that suit. [Para 5]

(c) Civil P. C. (1908), O. 34, R. 1—Non-joinder — Rights of prior and puisne mortgagees — Transfer of Property Act (1882), S. 67.

The right of the puisne usufructuary mortgagee unaffected by the auction sale in the prior mortgage, he not being a party to the prior mortgage suit, is determined by the date of institution of the suit on the prior mortgage and not by the date of the sale. Where the puisne mortgagee has lost his right to possession by being dispossessed by the mortgagor and by having sued for sale only, his right is only to redeem the prior mortgage which remains unaffected When the puisne mortgagee has not impleaded the prior mortgagee in his suit and is the auction-purchaser in execution of his decree, the priority of the right to redeem between the two auction-purchasers would vest in the prior mortgagee. [Paras 7, 8, 9]

Annotation : ('44-Com.) Civil P. C., O 34 R 1 N 19; ('50-Com.) T. P. Act, S 67 N 19.

G. G. Das—for Appellant.
R. K. Das—for Respondents.

Narasimham J. — This second appeal is against the appellate judgment of the Subordinate Judge of Cuttack-Balasore reversing the judgment of the Munsif of Balasore and dismissing the plaintiff's suit for recovery of possession of about 1.27⅓ acres of land in village Raghunathpur, in Bhadrak Sub-division of Balasore District.

[2] One Sheikh Hadu was the original owner of about 2.19 acres of raiyati land in the village. On 18th October 1924, he executed a simple mortgage of the said property in favour of defendant 1. On 17th September 1936, defendant 1 instituted a mortgage suit (O. S. No 418 of 1936) on the foot of the said mortgage impleading Sheik Halim the son of Sheik Hadu (he having died in the meanwhile) and in due course obtained a final decree on 30th November 1939. The property was sold on 15th January 1943 and purchased by the mortgagee himself (defendant 1) who obtained delivery of possession through Court on 10th June 1943. He then sold the property to defendants 2 and 3 on 27th June 1943. Their claim to the property is thus based on the sale in execution of the mortgage decree in O. S. No. 418 of 1936, delivery of possession through Court and the subsequent private sale by the mortgagee auction-purchaser (defendant 1) in their favour.

[3] The plaintiff's claim to the property is based on a puisne mortgage executed in his favour by Sheik Halim, son of Sheik Hadu on 9th June 1927. The property covered by the puisne mortgage was only one-half of the property covered by the first mortgage of 1924. But the puisne mortgage was a usufructuary mortgage and the mortgagee (the plaintiff) obtained possession of the plots soon after the execution of the mortgage. Subsequently, however, he was dispossessed and then instead of bringing a suit for possession as usufructuary mortgagee he brought a suit for sale on 9th April 1936 (O. S. No 130 of 1936) without impleading the first mortgagee (defendant 1) as a party. In due course he obtained a final decree and purchased the property in execution of the decree on 6th November 1937 and obtained delivery of possession on 15th January 1938. When defendant 1 brought the property to sale in execution of his mortgage decree, the plaintiff objected under O. 21, R. 58, Civil P. C., but his objection was overruled and hence the necessity for the present suit. The plaintiff further stated that he continued in possession since 15th January 1938 and that defendant 1 did not dispossess him by virtue of the delivery of possession obtained by him on 10th June 1943. He, therefore, prayed for confirmation of possession or in the alternative for recovery of possession But the lower appellate Court reversing the finding of the trial Court

held that the plaintiff was actually dispossessed by defendant 1 on 10th June 1943. This finding being a finding on facts is thus concluded. The present suit of the plaintiff is, therefore, in essence a suit for recovery of possession. In the defendant's mortgage suit the plaintiff was not made a party and similarly in the plaintiff's mortgage suit also defendant 1 was not made a party. In this judgment defendant 1 will be referred to as the first mortgagee and the plaintiff as the puisne mortgagee.

[4] The main point in controversy is about the right to possession as between auction purchasers at sales of prior and puisne mortgagees who have not made each other a party regarding which there is a sharp conflict of judicial decisions and a bewildering array of case laws. Before entering into a discussion of this point, I may give below the relevant dates of the two mortgages.

First mortgage, simple in nature, in favour of defendant 1.

Date of mortgage	13-10-24
Date of institution of the suit (O. S. No. 418 of 1936)	17-9-36
Preliminary decree	17-12-36
Final decree	30-11-39
Sale in execution of the final decree ...	15-1-43
Delivery of possession in favour of the mortgagee auction-purchaser ...	10-6-43

Second mortgage in favour of the plaintiff usufructuary in nature and relating to only one-half of the property covered by the first mortgage.

Date of mortgage	9-6-27
Date of institution of the suit (O. S. No. 130 of 1936)	9-4-36
Preliminary decree	17-11-36
Final decree	13-3-37
Purchased by the mortgagee auction-purchaser (plaintiff)	6-11-37
Delivery of possession	15-1-38

[5] The first point to consider is whether the principle of *lis pendens* would apply to the sale dated 6th November 1937 in favour of the puisne mortgagee. It is true that the puisne mortgagee's suit was brought five months before institution of the suit by the first mortgagee. But the court-sale in execution of the decree in the former suit took place while the suit of the first mortgagee was pending. It is now well-settled that the principle of *lis pendens* would apply to involuntary transfers also though S. 52, T. P. Act, in terms may not apply to such transfers. But the further question for consideration is whether a sale in execution of a mortgage decree will be hit by the doctrine of *lis pendens* if the mortgage had taken place long before institution of the suit even though the sale might have taken place during the pendency of that suit. On this question also there is a conflict of decisions but there is sufficient authority for the view that a right acquired before the commencement of a suit is not affected by the rule of *lis pendens* even though the remedy for the enforcement of that right may be sought during the pendency of the suit. Mitra J. in *Har Pershad Lal* v. *Dalmardan Singh*, 32 Cal. 891 : (1 C. L. J. 371) took this view while discussing the effect of sales in execution of mortgage decrees and this view was followed in *Chinnaswami Padayachi* v. *Darmalinga Padayachi*, A. I. R. (19) 1932 Mad. 566 : (56 Mad. 115) ; *Suramma Nayuraly* v. *Surayya*, A. I. R. (21) 1934 Mad. 585 : (152 I. C. 612) ; *Natesa Chettiar* v. *Subbunarayyana Ayyar*, A.I.R. (32) 1945 Mad 91 : (I. L. R. (1945) Mad. 578) and *Gendmal Amolakchand* v. *Laxman Tanba*, A.I.R. (32) 1945 Nag. 86 : (I. L. R. (1944) Nag. 852). I am aware of the contrary view taken by the majority of the Judges in the Full Bench decision of the Allahabad High Court reported in *Ram Sanehi Lal* v. *Janki Prasad*, A. I. R. (18) 1931 ALL. 466 : (53 ALL. 1023 (FB)) though Mukherji J. took a contrary view in a dissentient judgment. There is also a recent single Judge decision of the Calcutta High Court reported in *Muhammad Juman Mia* v. *Akali Mudiani*, A. I. R. (30) 1943 Cal. 577 : (210 I. C. 67) in support of the opposite view. But with respect I am inclined to agree with the former view taken in *Har Pershad Lal* v. *Dalmardan Singh*, 32 Cal. 891 : (1 C.L J. 371) and reiterated in subsequent decisions mentioned above. The rights between a mortgagor and mortgagee are determined at the time of the execution of the mortgage and the subsequent suit which the mortgagee may bring to enforce the mortgage and the consequent sale of the property seem to be in the nature of remedies accruing from the original right. As pointed by Venkatasubba Rao J. in *Suramma* v. *Surayya*, A I. R. (21) 1934 Mad. 585 : (152 I. C. 612) "if a certain right remains unaffected the legal remedy to enforce that right must also continue". The sale in pursuance of a decree on a mortgage seems to be nothing else but a logical result of a transfer which had taken place at the time of the mortgage itself. In the majority decisions of the Full Bench of the Allahabad High Court, *Ramsanehi Lal* v. *Janki Prasad*, A. I. R. (18) 1931 ALL. 466 : (53 ALL. 1023 (F. B.)), a distinction was made between the interest of the mortgagee and that of the mortgagor and it was pointed out that so far as the mortgagee's interest was concerned the transfer took place at the time of the execution of the mortgage deed whereas the mortgagor's interest was transferred at the time of the sale and consequently the rule of *lis pendens*

would apply in respect of the latter transfer. But this point has been fully met in the dissentient judgment of Mukherji J. and in the two Madras decisions noted above. Agreeing with their views I would hold that the doctrine of *lis pendens* does not apply to the present case.

[6] But apart from the question of *lis pendens*, the rights of the two mortgagee auction-purchasers may depend on either priority of sale or priority of the mortgages. There are a series of decisions, *Venkatanarasamma* v. *Ramiah*, 2 Mad. 108; *Ramanadhan Chetti* v. *Alkonda Pillai*, 18 Mad. 500 : (5 M. L. J. 197); *Kutti Chettiar* v. *Subramania Chettiar*, 32 Mad 485 : (4 I. C. 1077); *Chinnaswami Padayachi* v. *Darmalinga Padayachi*, A. I. R. (19) 1932 Mad. 566: (56 Mad. 115) ; *Nanack Chand* v. *Teluck Dye Koer*, 5 Cal. 265 : (4 C. L. R. 358) ; *Dirgopal Lal* v. *Bolakee*, 5 Cal. 269; *Nagendran* v. *Lakshmi*, A. I. R. (20) 1933 Mad. 583 : (56 Mad. 846 (F. B.)); *Ram Kinkar* v. *Hareram Hazra*, A. I. R. (20) 1933 Cal. 181 : (145 I. C. 575) and *Mohd Jumanmia* v. *Akali Mudhani*, A. I. R. (30) 1943 Cal. 577 : (210 I. C. 67) in which it was held that the right to possession was determined by the priority of sale. *Nagendran* v. *Lakshmi*, A.I.R. (20) 1933 Mad. 583 : (56 Mad. 846 (F.B.)) is a Full Bench decision and there is an interesting discussion there about the rights of the two mortgagee auction purchasers and also a full review of the case law on the subject. On the other hand, there is another line of cases in which it was held that the right to possession was determined according to the priority of mortgages: *see Bunwari Jha* v. *Ramjee Thakur*, 7 C. W. N. 11, *Gangadas Bhattar* v. *Jogendra Nath*, 11 C. W. N. 403 : (5 C. L. J. 315); *Har Pershad* v. *Dal Mardan Singh*, 32 Cal. 891 : (1 C. L. J. 371); *Gangadhar Dhanjishet* v. *Lakshman Mahadeb*, 125 I. C. 905 : (A. I. R. (17) 1930 Bom. 221) and *Prag Das* v. *Beni Prasad Jaggu Lal*, 171 I. C. 75 : (A. I. R. (24) 1937 ALL. 556) (though not very similar on facts to the present case). It is not easy to reconcile these conflicting decisions nor do I think it necessary for the purpose of this case to enter into an elaborate discussion about the relative merits of the two opposite views.

[7] But there are certain points on which all are agreed. If a first mortgagee brings a suit for sale on the basis of his mortgage without impleading the puisne mortgagee and purchases the property, the rights of the puisne mortgagee are unaffected by purchase: *Mt. Sukhi* v. *Ghulam Safdar Khan*, A I.R. (9) 1922 P. C. 11 : (43 ALL. 469). The controversy however appears to be as to what are those rights? Are they the rights which he had on the date of the institution of the suit by the first mortgagee or else are they the rights which he acquired after that date but prior to the sale in execution of the decree by the first mortgagee? Though the question is not of easy solution I am inclined to take the view that the right of the puisne mortgagee which is unaffected by the auction sale of the first mortgagee is determined by the date of the institution of the suit by the first mortgagee and not by the date of sale. The first mortgagee's suit is not wholly void because the mortgagor whom he impleaded as a party had still some interest in the equity of redemption on the date of the institution of the suit. In the present case this is unarguable because on 17th September 1936 the puisne mortgagee's right was in respect of only one-half of the property covered by the first mortgage and the equity of redemption of the remaining half still continued with the mortgagor who was made a party. Doubtless the decree obtained by the first mortgagee was imperfect in the sense that all persons interested in the equity of redemption were not impleaded by him as parties. In such circumstances the duty of the Court seems to be to allow the puisne mortgagee an opportunity of occupying the position which he would have occupied if he had been made a party to the first mortgagee's suit. The Privy Council in *Mt. Sukhi* v. *Ghulam Safdar Khan*, A. I. R. (9) 1922 P. C. 11 : (43 ALL. 469) observed that the aforesaid view was the correct principle in cases of this type. Similarly in *Gangadas* v. *Jogendra*, 11 C. W. N. 403 at p. 410 : (5 C. L. J. 315) it was observed :

> "The party who has been improperly excluded from a mortgage suit is entitled to claim that he should not be placed in a worse position than what he would have occupied if he had been made a party to the original suit."

In an old Full Bench decision of the Madras High Court reported in *Multa Veetil* v. *Achuthan Nair*, 9 I. C. 513 : (21 M. L. J. 213); it was pointed out that the purchaser in such a suit does not acquire the rights of the mortgagor as on the date of the first mortgage but only those that subsist in him *at the date of the suit*. In *Ganga Prasad* v. *Mt. Ganeshi Kuer*, A. I. R. (31) 1944 Pat. 119 : (22 Pat. 761), Manohar Lall J. has fully reviewed the entire case law especially of the Patna and Calcutta High Courts regarding the rights of a puisne mortgagee who was not made a party in the first mortgagee's suit. Relying on certain well-known passages on Jones on Mortgage and Dr. Ghose's famous book on the Law of Mortgages in India, the learned Judge observed :

> "If the person who has been left out in the mortgage action was in *possession* or *entitled to possession on that date* as the representative of the equity of redemption or was the person in whom the equity of redemption lay in full or in part then the sale in his absence is not binding on him and he cannot be forced

to redeem. He may if he likes institute a suit for possession only."

With respect I would agree with this view.

[8] Applying these decisions to the facts of the present case, the question is whether the puisne mortgagee was in possession or at any rate was entitled to possession on the date of the institution of the suit (17th September 1936) by the first mortgagee. It is true that the puisne mortgagee was a usufructuary mortgagee and as such entitled to possession also. But it was his own case that he was dispossessed by the mortgagor and then he instituted his suit (O. S. No. 130 of 1936) on 9th April 1936 for sale of the mortgaged property and not for recovery of possession. A usufructuary mortgagee who has been dispossessed has the right either to sue for possession as usufructuary mortgagee or else to sue for sale of the property like a simple mortgagee after giving up his usufructuary right. Thus, when he has elected to sue as a simple mortgagee he lost his right to possession *qua* usufructuary mortgagee on 9th April 1936. Therefore, on 17th September 1936, his right was only the right to redeem and he had neither possession nor was he entitled to possession. It is only this right of his that was unaffected by the sale and auction-purchase in execution of the first mortgagee's decree. His present suit for possession must, therefore, fail.

[9] The whole question may be looked at from another angle. The finding of the appellate Court is that the first mortgagee auction purchaser actually dispossessed the second mortgagee and is at present in possession of the lands. The puisne mortgagee's suit is in essence a suit for eviction and he cannot succeed unless he can show that his title is superior to that of the first mortgagee. It is true that the puisne mortgagee is also an auction-purchaser at a sale in execution of his mortgage decree. But as the first mortgagee was not a party to the same his title is defective. Similarly, the first mortgagee's title also is defective inasmuch as the second mortgagee was not made a party in his suit. Thus as between two parties who have each got defective title to the property there seems to be absolutely no reason as to why the Court should dispossess a party who is already in possession. The defendants' right to possession is derived from the purchase following an action upon his mortgage which was brought in time and which was not a nullity though imperfect. In the Full Bench decision of the Allahabad High Court *Ram Sanehi* v. *Janki Prasad*, A. I. R. (18) 1931 ALL. 466: (53 ALL 1023 F.B.) in answering question 2 (a) (on facts which are similar to the present case) it was observed that the second mortgagee-plaintiff must redeem the prior mortgage. In Mulla's Transfer of Property Act, Edn. 3 at p. 594, the learned author observes:

> "If neither mortgage is usufructuary each auction-purchaser is equally entitled to possession and he who secures possession is entitled to keep it until redeemed, and if both are willing to redeem the auction-purchaser from the prior mortgagee has the prior right to redeem."

In the present case as already pointed out though the puisne mortgage was usufructuary mortgage, the mortgagee after being dispossessed elected to sue as a simple mortgagee and hence the aforesaid observation would apply with full force. As between the two auction-purchasers the priority of the right to redeem would vest in the defendant because his was the prior mortgage.

[10] Though this is a suit for recovery of possession only and neither party had offered to redeem the other mortgage, we consider that inasmuch as all the parties having subsisting interest in the property are before us and with a view to avoid multiplicity of litigation it is desirable in the interests of justice that both the parties should be given an opportunity to redeem subject of course to the prior right of the first mortgage auction-purchaser. The plaintiff and defendant 3 are, therefore, called upon to file statements before this Court on 20th March 1950 as to whether they are willing to redeem each other. If both are willing to redeem, the aforesaid rule of priority would be applied and appropriate orders passed. Issue the aforesaid notice to the parties through their lawyers and put up on 20th March 1950.

[11] **Das J.** — I agree.

D.H. *Order accordingly.*

A. I. R. (37) 1950 Orissa 213 *[C. N. 38.]*

RAY C. J. AND JAGANNADHADAS J.

Purusottam Das and another—Plaintiffs — Appellants v. *S. M. Desouza and another, Defendants and another, Plaintiff — Respondents.*

Second Appeal No. 177 of 1946, D/- 16-12-1949, from decision of Sub-J., Sambalpur, D/- 6-5-1946.

(a) Limitation Act (1908), Art. 144 — Possession under invalid mortgage — Acquisition of limited interest by way of mortgage.

Where a person obtains possession under an invalid mortgage and there is nothing to show that at any time he has asserted possession under any claim of absolute right, he acquires on the lapse of 12 years a prescriptive right to limited interest by way of mortgage: A. I. R. (25) 1938 Pat. 479, *Dissent.*

[Paras 7 and 10]

Annotation: ('42-Com.) Lim. Act, Art. 144 N. 95 Pt. 6.

(b) Registration Act (1908), Ss. 49 and 17 — Unregistered mortgage deed—Evidentiary value—Limitation Act (1908), Art. 144 — Evidence Act (1872), S. 91.

An invalid (unregistered) mortgage deed can be referred to for ascertaining the nature and character of possession, and for determining the quantum of interest for which the defendant prescribed under the invalid mortgage. That quantum is necessarily defined and limited by the terms of the document and does not offend against Ss. 17 and 49, Registration Act, or S. 91, Evidence Act. The attempt to use the document to prove the quantum of the interest and the character of possession thereunder is not the use of the document for the purpose of enforcing the mortgage itself under the document. The document is not used as the source of the mortgagee's title, the title itself having been acquired by adverse possession and prescription. [Para 11]

Annotation: ('49 Com.) Registration Act, S. 49, N. 14; ('42-Com.) Lim. Act, Art. 144 N. 96 Pt. 18; ('46 Man.) Evidence Act, S. 91 N. 6.

(c) Debt laws — Orissa Money-lenders Act (III [3] of 1939), S. 17 — Mortgagee's interest acquired by adverse possession — Possession as invalid mortgagee, if counts.

Where a person acquires a mortgagee's interest by adverse possession of 12 years, for the purposes of the application of the Orissa Money-lenders Act, the prior period for which he was in possession as an invalid mortgagee does not count. [Para 13]

P. C. Chatterjee — for Appellants.
H. Sen and P. Misra — for Respondents.

Jagannadhadas J.—Plaintiffs are the appellants in this second appeal. It arises out of a suit for recovery of possession of certain lands which has been dismissed by both the Courts below.

[2] The suit lands admittedly belonged to the plaintiff's family. The case of the plaintiffs as set out in the plaint is that the father of plaintiffs 2, 3 and 4 allowed defendant 2, some years ago to occupy the suit-lands by some arrangement with her and that defendant 2 has allowed her son, defendant 1, to cultivate the lands since she is unable to take care of herself; that they are not aware of the arrangement under which the defendants were let into possession, but that if it is found that the lands are charged with any sum, they are willing to pay up the same The case of the defendants is that between the years 1927 and 1930, the father of plaintiffs 2 to 4 borrowed from time to time various sums of money aggregating to Rupees 1061 12-0 from defendant 2 on the security of the suit-lands; that the plaintiffs are fully aware of the said mortgages and of the possession of the defendants for over 12 years. They further allege that all the mortgages were invalid and inoperative in law and that plaintiffs 2 to 4 and their father not having recovered possession of the lands within 12 years, have lost their right to them: that the defendants have acquired perfect title by adverse possession and that the plaintiffs not having any subsisting title to the suit-property are not entitled to recover possession thereof.

[3] Both the Courts below have given effect to this plea of adverse possession by the defendants and the consequent extinction of title of the plaintiffs and have dismissed the plaintiffs' suit. The only question therefore that arises in the case is whether the Courts below are right in their view that as a result of adverse possession of the defendants, the plaintiffs' original admitted title to the suit lands has become extinguished.

[4] Exhibits 2 to 2-E are the mortgage-bonds under which the suit-property purported to be mortgaged. Out of them Ex. 2-E was a usufructuary mortgage, while Exs. 2 to 2-D are anomalous mortgages, whereby it was stipulated that if the mortgage amounts were not paid up within the stipulated period, the defendant was entitled to enter into possession as a usufructuary mortgagee. All these documents are unregistered and therefore not valid as such to create any mortgage interest. The view taken by the Courts below relying on the case in *Bhukhan Mian* v. *Radhika Kumari Debi*, A. I. R. (25) 1938 Pat. 479 : (176 I. C. 35), is that since the mortgages are invalid for want of registration, the possession of the defendants was from its inception adverse and that since admittedly the defendants have been in possession for over 12 years, the plaintiffs have lost title by virtue of the adverse possession of the defendants for over the statutory period.

[5] One fact, essential for the further discussion, may be cleared at the outset. Both the Courts below seem to have been under the impression that there has been no delivery of possession to the defendants under the mortgages. They have said so in connection with the argument advanced before them on behalf of the plaintiffs that since the usufructuary mortgage, Ex. 2 E is for a sum less than Rs. 100, it was valid, inasmuch as there has been delivery of possession, though there has been no registration. Whether or not the Courts below were right in their finding that there has been no delivery of possession *by* the plaintiffs to the defendants under the mortgage-documents, there can be no doubt that the defendants entered into possession as mortgagees — presumably under the terms of the mortgages, Exs 2 to 2-E. That is clear from the pleadings themselves. The plaint in para 3 states as follows :

> "Father of plaintiffs 2, 3 and 4 allowed defendant 1 a few years ago to occupy Sch. (A) lands by some arrangement with her and it has now transpired that defendant 1 has allowed defendant 2 to cultivate Sch. (A) lands, as she is unable to take care of herself."

The defendants in para 3 of their written statement state as follows :

> "That the allegation in para. 3 of the plaint is substantially correct. Between 1927 and 1930 the father of plaintiffs 2 to 4 borrowed from time to time various sums of money aggregating Rs. 1061-12-0 from defendant 2 on the security of the suit lands."

There can be no doubt on these pleadings that the defendants themselves have admitted that they have got into occupation by an arrangement as alleged by the plaintiffs in their plaint, and that they set out the details of that arrangement in para. 3 of their written statement by referring to the borrowing from 1927 to 1930 on security—the mortgages Exs. 2 to 2-E being of dates ranging from 1927 to 1930. That the defendants were in possession as mortgagees is also made out by the mutation entries, Exs. 3 and 4, which show that plaintiff 1 is the recorded tenant and that defendant 2 is in possession as a mortgagee on behalf of the father of plaintiffs 2 to 4. The Courts below were inclined to think that there is no evidence that these entries in the mutation registers were made at the instance of defendant 2. But whether this is so or not, there can be no doubt that these entries are relevant and valuable piece of evidence and that taken with what has already been shown to be the attitude of the defendants in the pleadings, it cannot be disputed that the defendants obtained possession as mortgagees and were holding possession as such, though the mortgages themselves may have been invalid. Exhibits 2 to 2-E, though unregistered are admissible to show the nature of the possession and there is no evidence at all to show that the defendants were at any time asserting that they were holding possession on any title other than as mortgagees.

[6] The question then that has to be considered is whether when a person obtains possession under invalid mortgage, and there is nothing to show that at any time he has asserted possession under any claim of absolute right, the title of the original owner is extinguished. Extinction of title by adverse possession is provided for in S. 28, Limitation Act which runs as follows :

> "At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished."

[7] It is argued that the original mortgagors could sue for recovery of possession from the very moment when the defendants entered on possession on the ground that they did not obtain any right to retain possession under the invalid mortgages. It is, therefore, said that since the plaintiffs did not sue for possession for a period of twelve years, their title gets extinguished. To a suit for possession, under circumstances of this kind, the only articles applicable, if any, are Arts. 142 and 144, Limitation Act. It may be seen however that Art. 142 cannot apply, because such a suit is not based on any allegation of dispossession by the defendants. The plaintiff, who has himself put the defendants in possession or allowed them to take possession cannot complain of dispossession. Therefore the only Article that can be applied is Art. 144. Under Art 144, the limitation for a suit for recovery of possession of immovable property or *of any interest therein* is 12 years from the date when the possession of the defendants becomes adverse to the plaintiffs. It is only on the assumption that the possession of the defendants under an invalid mortgage is completely adverse to the title of the rightful owner, from its inception, that it would be possible to say that the title gets extinguished by such adverse possession for twelve years by the combined operation of Art. 144 and S. 28, Limitation Act. But the assumption that the possession of the mortgagee under a void mortgage is adverse in respect of the absolute title of the owner is unfounded. It cannot be doubted that the character of the adverse possession depends on the *animus possidendi* of the person under which the possession has been taken and continued : *see* a learned discussion of this topic in *Manakkal Kuppen* v. *C. Murde Kottil*, 1912 M. W. N. 445 : (37 Mad. 373). Though the mortgage as such may be invalid, the possession itself having been taken on the footing of its being a mortgage, such possession is not in derogation of the absolute title of the owner, but is at least permissive. Therefore though the owner can institute a suit for recovery of possession from the very moment the defendants have entered into possession, he can do so because the defendants' possession is permissive and the permission can be revoked at any time on account of the fact that the document under which such permissive possession is taken is ineffective to create any interest in the property which can give him the right to retain possession. The suit to recover possession in such circumstances is really in the nature of a suit to recover back possession given away under the limited interest by way of a mortgage which has been purported to be conveyed and on account of which the defendant has obtained possession. Such a suit for possession is, therefore, in a sense, a suit to recover back possession of the limited interest in immovable property under Art. 144, Limitation Act. It is only in respect of that limited interest that the possession of defendants is adverse. It would, therefore, follow that when the mortgagee gets possession under the void mortgage, the mortgagor can within twelve years therefrom recover possession of the property freed from the limited interest but beyond the twelve years only subject to that limited interest. On the expiry of the twelve years not only is the right of the original owner to the limited interest extinguished, but the said limited interest gets transferred to the person in possession.

[8] This is the gist of the series of decisions which have laid down that where a person obtained possession under a void mortgage, he acquires on the lapse of twelve years a prescriptive right to the limited interest by way of mortgage *Madhava* v. *Narayana*, 9 Mad. 244; *Sankaran* v. *Periasami*, 13 Mad. 467; *Manavikraman Ettan* v. *Ammu*, 24 Mad. 471 (F. B.); *Sundara Gurukkal* v. *Subramania Archakar*, 16 I. C. 960 (Mad.); *Budesab* v. *Hanmanta*, 21 Bom. 509; *Fatesingji* v. *Bamanji*, 27 Bom. 515: (5 Bom. L. R. 274) and *Gopala Dasu* v. *Rami*, 44 Mad. 946: (A. I. R. (8) 1921 Mad. 410). Similarly other limited interests can also be acquired by adverse possession: *see Subbayya* v. *Maddu Letiah*, 17 M. L. J 469: (3 M. L. T. 187); *Icharam Singh* v. *Nilmony*, 35 Cal 470: (7 C. L. J. 499); *Dwarka Nath* v. *Shashti Kinkar*, 18 I. C. 869: (17 C. W. N. 595); *Venkata Narasimha Appa Rao* v. *Venkata Purushottama* 31 Mad. 321: (18 M. L. J. 409) and *Manikkal* v *Munde Kottil*, 1912 M. W. N. 445: (37 Mad. 373).

[9] In this connection I may also note that the broad dicta of the Privy Council in *Madhav Rao* v. *Raghunath Venkatesh*, 47 Bom. 798: (A. I. R. (10) 1923 P. C. 205) and *Naina Pillai* v. *Rama Nathan*, 47 Mad. 337: (A. I. R. (11) 1924 P. C. 65) to the effect that

> "no tenant of lands in India can obtain any right to a permanent tenancy by prescription in them against the landlord from whom he holds the lands,"

does not militate against this view, as the same refers to a case of an ordinary tenant setting up a change in the character of his tenancy by prescription and not to a case of the present kind where a person enters into possession under a void mortgage or lease.

[10] In *Bhukhan Mian* v. *Radhika Kumari Debi*, A. I. R. (25) 1938 Pat 479: (176 I. C. 35), the learned Judges however held that a person cannot prescribe for a limited interest like a tenancy or a mortgage. With great respect, I am unable to persuade myself that that proposition is correct. On the facts of that case, the question itself did not arise for a direct decision as pointed out by Manohar Lall J. at p. 482, right-hand column where the learned Judge stated as follows:

> "If, as was argued, the defendant must be taken to have prescribed his rights as a mortgagee from the date of this entry, it is enough to state that the period of 12 years from that starting point had not expired when the suit was instituted in 1933."

The dictum of the learned Judge was therefore obiter; but in view of the fact that both the learned Judges discussed the question on principle and were inclined to give their assent to the proposition as above stated, weight and respect is due to that statement. On a close examination, however, of the reasoning of the learned Judges in support of the proposition, it is found that the same is based on two assumptions (1) that the position of the mortgagee under the void mortgage is adverse in the sense that it is entirely in derogation of the owners' full title; (2) that a mortgage interest can be created only by a contract as prescribed in the Transfer of Property Act. The learned Judges have failed to notice that the possession of the mortgagee under a void mortgage is permissive so far as the absolute title is concerned and adverse only in so far as the limited interest is concerned. They have further failed to bear in mind that a mortgagee's interest is an interest in immovable property and not merely a contractual security for a loan and that adverse possession and prescription is as much a root of title to interest in immovable property as a contractual document satisfying the requirements of the Transfer of Property Act. That S. 28, Limitation Act, is operative not only to extinguish the title of the rightful owner, but to transfer the title to the wrongful possessor is now well-settled. *See Gossain Dass* v. *Issur Chunder Nath*, 3 Cal. 224; *Akhauri Haliwant* v. *Deo Narain*, A.I.R. (28) 1941 Pat 181: (19 Pat. 852) and *Fakirappa Jotappa* v. *Ningappa Shidlingappa*, A. I. R (30) 1943 Bom. 265 :: (209 I. C 251) I am therefore unable with all due respect to follow the decision in *Bhukhanmian* v. *Radhika Kumari Debi*, A.I.R. (25) 1938 Pat. 479: (176 I.C. 35) and I am definitely of the view that such a limited interest can be acquired by adverse possession.

[11] The question, however, further remains whether and to what extent the invalid mortgages themselves can be used in evidence to gather the terms of the mortgage, the right to which in the defendant has become ultimately perfected by adverse possession and prescription. On that question, there has been difference of opinion as disclosed in *Appamma* v. *Chinnavadu*, 47 Mad. 203: (A. I. R. (11) 1924 Mad. 292). In that case one of the learned Judges, Spencer J. was inclined to the view that

> "a plaintiff who sues for redemption on the strength of an unregistered mortgage-deed can never succeed because for obtaining a decree to redeem it is necessary to prove what the terms of the mortgage were and they cannot be proved by any other evidence than the document itself. This is the effect of Ss. 17 and 49, Registration Act, read with S. 91, Evidence Act."

The other two learned Judges, however, namely, Venkatasubba Rao and Ramesam JJ. came to a different conclusion It was pointed out by them that in view of the Privy Council decision in *Varada Pillai* v. *Jeevarathnammal*, 43 Mad. 244: (A. I. R. (6) 1919 P. C. 44) the invalid mortgage-deed could be referred to for ascertaining the nature and character of possession, (a proposition which was not disputed even by

Spencer J.) and that accordingly it may be referred to for determining the quantum of interest for which the defendant prescribed. To determine the character of the possession, the quantum of the interest under which possession is purported to have been taken, has to be ascertained by a reference to the document itself. That quantum is necessarily defined and limited by the terms of the document and does not offend against Ss. 17 and 49, Registration Act or S. 91, Evidence Act. The attempt to use the document to prove the quantum of the interest and the character of possession thereunder is not the use of the document for the purpose of enforcing the mortgage itself under the document. The document is not used as the source of the mortgagee's title—the title itself having been acquired by adverse possession and prescription. I would therefore respectfully follow and adopt this view of the majority in *Appamma* v. *Chinnavadu*, 47 Mad. 203 : (A. I. R. (11) 1924 Mad. 292).

[12] In the present case even if the terms of the mortgage-documents themselves are not admissible in evidence to prove the nature of the interest acquired, there is no serious difficulty in the way of the plaintiff, because the defendant himself has asserted and admitted the terms in para. 3 of the written statement as already stated above.

[13] A suggestion has been made in the course of the argument on behalf of the plaintiff-appellants that on the finding that the defendants are in the position of usufructuary mortgagees they would not be entitled to any money being paid for redemption by virtue of the provisions of the Orissa Money-lenders Act S. 17 as amended. This, however, is not sustainable. The documents Exs. 2 to 2-E are of the years 1927 to 1930 and assuming that the defendant has obtained possession under them in or about the year 1930, he acquires a mortgagee's interest only after 1942. For the purposes of the application of the Orissa Money-lenders Act the prior period for which he was in possession as an invalid mortgagee, does not count. It, therefore, follows that the plaintiffs are entitled to a decree for possession against the defendants on the footing of redemption in respect of the principal amount that is due under the documents, Exs. 2 to 2 E namely, the sum of Rs. 961-12-0 (the total of the principal amount under the mortgages, 2 to 2-E). There will accordingly be a decree for redemption in favour of the plaintiffs for the above amount, time fixed for redemption being three months from the date when the decree finally drawn up. The second appeal is accordingly allowed with costs throughout.

[14] The plaintiffs appellants before they can get a decree are bound to pay the court-fee on the amount of Rs. 961-12-0 in all the three Courts on the footing of redemption. They will pay the deficit court-fee in all the three Courts within a month from this date and the decree will issue only on the payment of the deficit court-fees.

[15] **Ray C. J.** — I agree.

V.R.B. *Appeal allowed.*

A. I. R. (37) 1950 Orissa 217 [*C. N. 39.*]

RAY C. J. AND JAGANNADHADAS J.

Manglu Meher and others — Defendants—Appellants v. *Sukru Meher and others — Plaintiffs—Respondents.*

A. F. A. D. No. 133 of 1946, D/- 17-12-1949, from decision of Sub-Judge, Sambalpur, D/- 18-5-1946.

(a) Transfer of Property Act (1882), S. 53A — Transferor—Meaning of—Minor.

If a minor is a party to a sale-deed, through his guardian, he is a transferor within the meaning of S. 53-A and therefore the statutory protection given to the alienee under S. 53-A is equally applicable against him. [Para 3]

Annotation : ('50-Com.) T. P. Act, S. 53A N. 13.

(b) Hindu law — Alienation — Legal necessity —Bona fide inquiry.

In the case of an alienation by way of sale it is not necessary to prove that every portion of the consideration was required for legal necessity or that inquiry as to necessity has been made out in respect of that portion not covered by legal necessity. What has to be judged broadly is whether for raising the amount for which legal necessity has been made out, the particular transaction by way of sale of the extent comprised therein was in fact reasonably necessary and prudent or whether the alienees were reasonably and honestly satisfied that it was so on a *bona fide* inquiry. [Para 7]

(c) Tenancy Laws—C. P. Tenancy Act (XI [11] of 1898), Ss. 46, 47 — Sale of occupancy rights — Validity.

The sale of occupancy right is only voidable and can be avoided, not by the very transferors themselves, but by the persons who are indicated in S. 47, within two years from the date of obtaining possession by the transferee. [Para 2]

P. C. Chatterjee—for Appellants.

B. N. Das and G. B. Mohanty—for Respondents.

Jagannadhadas J.—Defendants 1 to 3 are the appellants in this second appeal. It arises out of a suit filed by the plaintiffs to set aside and alienation and to recover the property comprised therein from the possession of the defendants. Defendant 4 and plaintiff 1 are the sons of one Bhuban Meher. Plaintiff 2 is the son of plaintiff 1. Defendants 5, 6 and 7 are the sons of defendant 4. The alienation sought to be impeached is a sale-deed, Ex C, dated 1st March 1933 of lands of the extent of 1.5 acres (it may be noted that the plaint mentions lands of 1.26 decimals) which admittedly are the joint family property of the plaintiffs and defendants 4 to 7. The sale-deed purports to have been executed by Bhuban and his two sons defendant 4 and plaintiff 1.

Defendant 4 has signed it also for his minor sons 5 to 7 and plaintiff 1 for his then minor son, plaintiff 2. The alienees under the sale-deed are the brothers of Bhuban Meher, viz., defendant 3 and the father of defendants 1 and 2. The consideration for the sale deed is a sum of Rs. 155. The case for the plaintiffs was that plaintiff 1 did not execute the sale deed either for himself or as guardian of his minor son, plaintiff 2 and that he was not a consenting party to the alienation. The signature of plaintiff 1 appearing on the sale deed, Ex. C, was alleged to be forgery. Both the Courts below have found it to be genuine and that finding having become conclusive, it must now be taken that the plaintiff was also an executant of the sale-deed for himself and his son. Since, however, the sale-deed has been executed on behalf of the then minor plaintiff 2 (as also on behalf of minor defendants 5, 6 and 7 who are still minors, though they have not come forward to challenge the alienation), the question as to whether the sale deed is valid and binding as being justified by legal necessity has been raised in the Courts below and is the subject-matter of Issue 3. The Courts below have found that Rs. 106-7-3 out of the sale consideration was for the purpose of discharging the decree amount due to one Narain Gountia from the plaintiff's family and that the said sum was actually utilised for payment of the said decree, as appears from the endorsements on the decree, marked as Exs. B and B-1. Both the Courts however set aside the alienation on the ground that neither the actual necessity nor a *bona fide* inquiry as to the existence of necessity for the balance amount of about Rs. 50 has been made out by the alienees. They accordingly passed the decree in favour of the plaintiffs for possession of the suit property on condition of the contesting defendants 1 to 3 paying up the sum of Rs. 106-7-3 found to have been applied for legal necessity out of the consideration for the same. It is against this decree that defendants 1 to 3 have come up in second appeal.

[2] It is argued for the appellant that the judgments of the Courts below are erroneous and that since the major portion of the consideration for the sale-deed has been found to have been applied for legal necessity, the sale had to be upheld and that the Courts below have not correctly appreciated the material questions arising in a case of this kind. Before dealing with that matter, it is necessary to notice two other questions that arise in the suit. The suit property is a land situated in the district of Sambalpur of which the plaintiff's family are the occupancy tenants. The sale purported to be by means of a document, Ex. C which has not been registered. It is pointed out that under S. 46 (3), Central Provinces Tenancy Act, such a transfer is not valid except as covered by the proviso thereto and that the registration of a transfer not covered by the proviso to sub-s. (3) is prohibited under sub-s. (5). This point, however, is not a substantial one, because it is clear from that sub-section itself as also from S. 47 that such a transaction is only voidable and can be avoided, not by the very transferors themselves, but by the persons who are indicated in S. 47 and that too within two years from the date on which the alienees obtained possession under the transfer. Admittedly the alienees have been in possession from the date of the sale in 1933 and are also themselves the persons being brothers of Bhuban Meher, who might have been entitled to avoid the transfer under S. 47 if the alienation had been in favour of the strangers. This contention has therefore no merit.

[3] The fact that the sale-deed, Ex. C is not registered, raised another difficulty for the contesting defendants, namely, that no title as such has passed to them under the sale deed. They are, however, entitled to rely on S. 53A, T. P. Act, inasmuch as it has been definitely found by both the Courts below and virtually admitted by defendant 4 who is an executant of the sale-deed that the vendees have been in possession of the property sold from the date of the sale in pursuance of the same. The question that has been raised is whether S. 53A would avail the contesting defendants as against plaintiff 2 (and defendants 5 to 7), who were minors at the time of the execution of the sale deed. It may plausibly be contended that since S. 53A, T. P. Act, is a statutory recognition of the principle of estoppel embodied in the doctrine of part performance, the same would not avail as against minors since there can be no estoppel against a minor. There is, however, no scope for any such contention in view of the recent decision of the Privy Council in *Subramanyan* v. *Subba Rao*, A.I.R. (35) 1948 P. C. 95: (I.L.R. (1949) Mad. 141) which has authoritatively decided that if a minor is a party to a sale deed, through his guardian he is as much a transferor within the meaning of S. 53A and that therefore the statutory protection given to the alienee under S. 53A is equally applicable against him.

[4] The question that arises in this case has, therefore, to be considered on the footing that as between the parties to the document, Ex. C, it is to be treated as a valid sale deed in spite of the absence of registration in so far as any attempt to recover possession on the basis of want of title in the alienee is sought to be made, by or on behalf of any of the alienors. The question has, therefore, to be considered

whether on the footing of its being a valid sale-deed, it is binding as against the minors on account of justifying legal necessity. As already stated above, both the Courts below have held that it is not so binding since a portion of the sale consideration has not been proved of any inquiry that that portion was required for legal necessity. In coming to the above conclusion, the Courts below purported to follow the decision in *Durga Prosad* v. *Jewdhari Singh*, 62 Cal. 733: (A.I.R. (23) 1936 Cal. 116). The facts of that case are somewhat peculiar and the case itself was one of a mortgage in which different consideration may apply as pointed out in that very case. There are, however, passages in that judgment which taken out of the context are likely to be somewhat misleading. The principles applicable to a case of this kind have been clearly and unmistakably laid down in the Privy Council cases and it is unnecessary to go beyond them. The fountain source of the case-law on the subject of the power of alienation of limited owners and managers or guardians in Hindu law is the case in *Hunooman Pershad* v. *Mt. Babooee Mundraj Koonweree*, 6 M.I.A. 393: (18 W. R. 81n). The law is stated at pp. 423-424 as follows:

> "The power of the Manager for an infant heir to charge an estate not his own, is, under the Hindoo law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagment of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the partiular instance, is the thing to be regarded. But of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong, to support a charge in his own favour against the heir, grounded on a necessity which his wrong has helped to cause. Therefore the lender in this case, unless he is shown to have acted *mala fide* will not be affected, though it be shown that, with better management, the estate might have been kept free from debt. Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the Manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under such circumstances, he is bound to see to the application of the money."

[5] It is clear from this passage that the primary test for the validity of an alienation by a limited owner is the existence as a fact of necessity (or benefit) for the particular transaction. But it is not a condition precedent. If the alienee has made a *bona fide* enquiry and on such inquiry he finds the existence of the alleged sufficient and reasonably credited necessity, this is sufficient and he need not see to the application of the funds. It is, therefore, to be seen that *bona fide* enquiry as to the existence of necessity and reasonable satisfaction on such inquiry is an alternative to the existence of the necessity but not in addition thereto. That this is the correct view, is clear from the summary of the legal position as mentioned in Mulla's Hindu Law, Edn. 10, p. 285, para. 244, wherein it is stated:

> "Where the manager of a joint Hindu family sells or mortgages joint family property, the purchaser or mortgagee is bound to inquire into the necessity for the sale or mortgage, and the burden lies on the purchaser mortgagee to prove *either* that there was a legal necessity in fact, *or* that he made proper and *bona fide* inquiry as to the existence of such necessity and did all that was reasonable to satisfy himself as to the existence of such necessity."

It is therefore not correct to assume broadly that both legal necessity in fact, and inquiry, have to be made out in all cases. What, however, has to be emphasised and appreciated is that the necessity required to be proved is the necessity for the particular transaction as such which is challenged, which is not quite the same as necessity for each individual item of the consideration or for the entirety of the consideration. For instance, in the case of an alienation by way of a mortgage, the necessity for the entire consideration may have been proved but the terms may be found to be exorbitant and not justified by the circumstances. The mortgage would then be invalid. In the case of an alienation by way of sale, on the other hand, a part of the consideration may have been shown not to be for legal necessity but it may be found that a substantial portion of the consideration was required or applied for legal necessity and that to raise that amount the particular transaction by way of sale was reasonably prudent and necessary. As pointed out in the Privy Council cases, it may not be possible to sell the exact extent of land that may be required to raise the particular amount of money which is covered by legal necessity. The sale would under those circumstances be valid notwithstanding that no necessity or inquiry for the balance is proved. These principles are clearly laid down in the leading cases of *Sri Kishun Das* v. *Nathu Ram*, A. I. R. (14) 1927 P. C. 37: (49 ALL. 149) and in *Niamat Rai* v. *Din Dayal*, A. I. R. (14) 1927 P. C. 121: (8 Lah. 597) and also *Suraj Bhan Singh* v. *Sahchain Sukh*, A. I. R. (14) 1927 P.C. 244: (105 I. C. 257). There it is clearly laid down that the test in each case is whether the sale itself was one which was justified by legal necessity and their Lordships pointed out that it is not the law that the sale will be invalidated whenever part of the consideration is not accounted for which cannot be described as small. It is noteworthy that their Lordships referred in *Sri Kishun Das* v *Nathu Ram*, A.I.R. (14) 1927 P C. 37: (49 ALL. 149) with approval to the earlier case of Privy Council in *Thirumalaiyappa* v. *Nainar Tevan*, A. I. R. (9) 1922 P. C. 307 : (74 I. C. 604). A perusal of this case shows that the sale therein was for Rs. 5,300 and the necessity was made out for Rs. 4588. It was proved that the balance of about Rs. 712 was appropriated by the widow to a purpose which *did not* constitute legal necessity. All the same the sale was upheld by the Privy Council and there was nothing to show that there was any inquiry as to the necessity for the balance. Their Lordships say in the case at p. 309 as follows :

> "He (the Sub-Judge) overlooked the fact that Rupees 711-13-10 merely represented the balance of the sale price of Rs. 5300 and that it was not to raise that Rs. 711-13-10 that the property was sold. The sale would not have been invalid no matter what may have been the purpose for which the defendants applied Rs. 711-13 10."

In *Sri Kishun Das* v. *Nathu Ram*, A. I. R. (14) 1927 P. C. 37 : (49 ALL. 149), their Lordships laid down the principle as follows:

> "It would rather appear that in any case where the sale has been held to be justified but there is no evidence as to the application of a portion of the consideration, a presumption arises that it has been expended for proper purposes, and for the benefit of the family."

[6] It is possible that different considerations may apply to cases of mortgages as distinguished from sales, but that is not the question with which we are concerned in the present case.

[7] The present being a case of an alienation by way of sale, what therefore requires to be proved is not that every portion of the consideration is required for legal necessity or that inquiry as to necessity has been made out in respect of that portion not covered by legal necessity. What has to be judged broadly is whether for raising the amount for which legal necessity has been made out, the particular transaction by way of sale of the extent comprised therein was in fact reasonably necessary and prudent or whether the alienees were reasonably and honestly satisfied that it was so on a *bona fide* inquiry. It is this test that has to be applied to this case and not the test as to whether there was any inquiry as to the necessity for the surplus.

[8] The Courts below not having judged the case from that aspect, the case will have to go back for a fresh consideration of the material on the record in the light of this test. It is necessary further to remark that while undoubtedly, the burden is upon the alienee, it does not mean that if the alienee does not speak positively to the existence of the necessity or to his having made an inquiry, it must necessarily follow that he has to fail. As pointed out by their Lordships of the Privy Council in *Lakshmanna* v. *Venkateswarlu*, A. I. R. (36) 1949 P.C. 278 at p. 285 : (76 I. A. 202), the burden of proof is not to be confused with the burden of adducing evidence. When the entire evidence is before the Court, and when on the evidence and the circumstances, the Court has no difficulty in arriving at a definite conclusion, the burden of proof recedes to the background and the person on whom the burden to prove lies is not to fail when a satisfactory conclusion can be reached in his favour on the existing material, merely because he has not himself adduced positive evidence. For instance in cases of this kind either the fact that the transaction was legally justified, or that there has been a fair and *bona fide* inquiry as to the existence of necessity for the transaction is one that may be possible to infer from the evidence and the circumstances in the case. Since, however, the matter is to go back, we do not propose to say anything further as to what are the circumstances for and against which might enable the Court to come to a definite conclusion in the matter on the existing material. The decree of the lower appellate Court must accordingly be set aside and the appeal must be remanded to that Court for rehearing in the light of the above observations. Costs will abide the result.

[9] **Ray C. J.**—I agree.

D.H. *Case remanded.*

A. I. R. (37) 1950 Orissa 220 *[C. N. 40.]*

JAGANNADHADAS AND NARASIMHAM JJ.

Province of Orissa—Decree-holder—Appellant v. *G. Venkata Rangamma and another — Judgment-debtor — Respondents.*

M. A. No. 31 of 1947, D/- 14-2-1950, from order of Sub-J., Berhampur, D/- 15-4-1947.

(a) Civil P. C. (1908), S. 60 (1) Proviso (n) — Arrears of maintenance—Transfer of Property Act (1882), S. 6 (dd).

The prohibition against attachment in respect of maintenance applies only to future maintenance and not to arrears of maintenance. [Para 3]

Annotation : ('50-Com.) Civil P. C., S. 60 (1) N. 2; ('50-Com.) T. P. Act, S. 6, N. 13.

(b) Civil P. C. (1908), Ss. 51, 60 (1) Proviso (n), O. 40, R. 1—Receiver of property not attachable.

While the future right to maintenance is not assignable as property and hence not attachable, there can be appointed a receiver in respect of the proceeds thereof, which are at the disposal of the judgment-debtor. [Para 10]

Annotation : ('50-Com.) Civil P. C., S. 51, N. 6 ; S. 60, N. 22 ; O. 40, R. 1, N. 21a.

(c) Civil P. C. (1908), Ss. 51, 60; O. 33, R. 10; O. 40, R. 1 — Decree for future maintenance — Government's right to appointment of receiver to realise court-fee—Transfer of Property Act (1882), S. 6 (dd).

Any prohibition against attachment under S. 60, Civil P. C., or against assignability under S. 6 (dd), T. P. Act, must be read in the light of the provisions of O. 33, R. 10. A receiver can be appointed at the instance of the Government in respect of the decree for future maintenance (with the benefit of the charge thereby created) in order to realise the court-fee payable to them under the decree. But it is subject to the safeguards as to leaving adequate provision for the plaintiff. [Paras 10, 11]

Annotation : ('50-Com) Civil P. C., S. 51, N. 6; S. 60, N. 22; O. 33, R. 10, N. 1, 4, 6; O. 40, R. 1, N. 21a; ('50-Com) T. P. Act, S. 6, N. 13.

The Advocate-General — for Appellant.
P. V. B. Rao — for Respondents.

Jagannadhadas J.—The Province of Orissa is the appellant in this appeal. It arises out of an application for execution filed by the Government to recover the costs of a suit in *forma pauperis* decreed in favour of the plaintiff therein. In T. S. No. 9/45, one G. Venkata Rangamma, filed a suit for enhancement of her maintenance against one G. Gunnamma, the former being the mother-in-law of the latter, who was in possession and enjoyment of her deceased husband's ancestral property. The suit was in *forma pauperis*. The Court decreed enhanced maintenance at the rate of Rs. 480 per year payable by 15th September of every year commencing from the year 1944-45, the first payment falling due on 15th September 1945, with a charge on the plaint schedule properties for the same. The plaintiff's claim for arrears of maintenance was disallowed. In view of the fact that the plaintiff made an exaggerated claim of Rs. 1200 per year and also for arrears at that rate and since the major portion of the plaintiff's claim was disallowed, the learned Subordinate Judge ordered that the parties shall bear their own costs and also that the court-fees payable to the Government in respect of the pauper-plaint should be recoverable from the plaintiff herself. By execution application No. E. P. 252/46 filed on 21st October 1946 against both the plaintiff and the defendant in the pauper-suit, the Government applied for recovery of the amount due to it towards the stamp duty on the plaint namely, Rs. 696-4-0, plus the execution costs. The relief that was asked for in the execution application was in the following terms :

> "The decree-holder prays that the amounts claimed in cols. 7 and 8 may be realised with subsequent costs by issuing notice under O. 21, R. 22, Civil P. C., and thereafter by attaching the arrears due to the plaintiff-decree-holder under the decree, by appointing a receiver to collect the future maintenance due to the plaintiff under the above decree under O. 21, R. 53 and O. 21, R. 11, Civil P. C, and the said amount after realisation, may be paid over to the decree-holder Government. The executing decree-holder Government submits that an ad interim order of attachment prohibiting the second judgment debtor from making any payment to the plaintiff first judgment-debtor in the above case or to anybody on her behalf may be passed simultaneously with the issue of notice to the judgment-debtor as otherwise the interest of the executing decree-holder may be seriously prejudiced."

[2] This execution was contested by the first judgment-debtor (the plaintiff in the pauper-suit) on the ground that the right to maintenance obtained by her under the decree was not attachable. The learned Subordinate Judge by his order dated 15th April 1947 upheld this contention. He held that by virtue of the provisions of S. 60 (1) (n), Civil P. C., under which a right to future maintenance is not attachable, the decree obtained by the first judgment-debtor against the second was not attachable. As regards the prayer for appointment of a receiver he held relying on *Secy. of State* v. *Bai Some*, A. I. R. (20) 1933 Bom. 350 : (57 Bom. 507), that the appointment of a receiver in execution virtually amounts to an attachment of the decree which in his view was prohibited by S. 60 and that therefore the relief by way appointment of a receiver could not be granted. As regards the prayer for attachment of arrears of maintenance, he refused the same on the ground that there was no arrears of maintenance granted under the decree. It is against this order of the Subordinate Judge that the Government have come up in appeal to this Court.

[3] The order of the learned Subordinate Judge is clearly wrong so far as the prayer in respect of the arrears of maintenance is concerned. It is true that under the decree, arrears prior to the date of the suit have been disallowed, but the decree itself as already stated, directs payments of maintenance from the year 1944-45, the first payment falling due on 15th September 1945. The execution application was filed on 21st October 1946. By that date two payments under the decree were due to be made on 15th September 1945 and 15th September 1946. If they remained unpaid, there was no reason why the attachment could not have been allowed in respect of such arrears. It is not disputed that the prohibition against attachment in respect of maintenance applies only to future maintenance and not to arrears of maintenance. There is ample authority for the same and it is enough to refer to the case in *Asad Ali* v. *Haidar Ali*, 38 Cal. 13 : (6 I. C. 826) in support of it. What the exact effect of this view would be with reference to what has so far transpired in this case, will be indicated towards the close of the judgment.

[4] The substantial question, however, that arises for decision in this appeal is whether the learned Subordinate Judge is right in his view that the Government is not entitled to relief by way of attachment or appointment of a receiver in respect of future maintenance. Under O. 33,

R. 10, Civil P. C., the amount payable as court-fee in respect of a pauper-plaint shall be recoverable by the Government from any party ordered to pay the same and shall be a first charge on the subject-matter of the suit. By virtue of Rr. 12 and 13 of the same order, the Government can recover the said amount by an application, which is to be treated as one in execution. The subject-matter of the suit in the present case is the right to recover maintenance, with a charge on specified properties. There can be no doubt that the Government have a first charge on this right to maintenance as decreed with the benefit of the charge in favour of the first judgment-debter: *see Gadadhar Mandal* v. *Menaka Dassi*, A.I.R (13) 1926 Cal. 859 at page 860: (94 I. C. 391). The only question is how that charge in favour of the Government is to be realised or whether the Government have no remedy at all on account of the prohibition against attachment of the right of maintenance under S. 60 (1) (n), Civil P. C., and the prohibition against the transfer of the right to future maintenance by virtue of S. 6 (dd), T. P. Act.

[5] There has been considerable difference of opinion in the High Courts with reference to this question. That a mere right to future maintenance as such can neither be attached, nor sold cannot be very well disputed and has been established by a long course of judicial decisions. There has been difference of view, however, as to whether where the right to future maintenance has merged into a decree, that decree right can be attached or assigned. The difference of view on these matters can be gathered from the two cases in *Asad Ali* v. *Haider Ali*, 12 C. L. J. 130: (6 I. C. 826) and *Tara Sundari* v. *Saroda Charan*, 12 C. L. J. 146 : (7 I. C. 80), in which there is very learned and exhaustive discussion of the subject by Mukherjee J. The view has been maintained in *Asad Ali* v. *Haider Ali*, 12 C. L. J. 130 : (6 I. C. 826) that where the right to maintenance has merged into a decree, it is both attachable and assignable particularly where the right has been charged on specific property. It may be doubted, however, in view of the specific amendment of S. 6, T. P. Act of 1929, whereby sub-cl. (dd) to S. 6 has been inserted stating "A right to future maintenance *in whatsoever manner arising secured or determined, cannot be transferred*, whether the distinction that has been laid down in the case in *Asad Ali* v. *Haidar Ali*, 12 C. L. J. 130 : (6 I. C. 826) between the right secured by a decree and the mere right to maintenance can any longer be maintained in respect of a right to maintenance which is merely personal and not heriditary. It would also be reasonable to construe the prohibition of the attachment in S. 60 (1) (n), Civil P. C. of a future right to maintenance as equally applicable to decrees for maintenance, since the attachment is only preliminary to a sale through Court. It is no doubt true that the Transfer of Property Act applies only to transfers by the parties; but S. 6 (dd) has the effect of declaring that a decree for the right of future maintenance is not saleable property. This would, therefore, lead to the consequence that a decree for future maintenance is not attachable and saleable through Court. I would, therefore, assume without deciding that the decree for future maintenance obtained by the first judgment-debtor in this case against the second judgment-debtor is not attachable and that the Government cannot obtain any relief by way of attaching or selling the decree, in so far as any instalment has not, by the date of the application become an arrear. The question then is whether the remedy by way of appointment of a receiver is also not available. On this question *Rajindra Narain Singh* v. *Mt. Sundar Bibi*, A. I. R. (12) 1925 P. C. 176: (47 ALL. 385), *Secy. of State* v. *Venkata Lakshmanayya*, A. I. R. (13) 1926 Mad. 565 : (49 Mad. 567); *Sain Das* v. *Tikka Sant Singh*, A. I. R. (23) 1936 Lah. 830: (165 I. C 519) ; *Keshabati Koeri* v *Mohan Chndra*, 39 Cal. 1010 : (14 I. C. 227) and *Ashfaq Mahmed Khan* v. *Nazir Banu*, A. I. R (29) 1942 Oudh 410 : (201 I. C. 100) are in favour of the appellant's view; while *Palikandi Mammad* v. *Valia Appa*, 40 Mad. 302 : (A. I. R. (4) 1917 Mad. 79); *Secy. of State* v. *Bai Some*, A. I. R. (20) 1933 Bom. 350 : (57 Bom. 507) and *Vishnibai* v. *Bulchand Tikamdas*, 154 I. C. 580: (A. I. R. (22) 1935 Sind. 21) are in support of the opposite view.

[6] It may be seen from a perusal of the above cases that the majority of the decisions are in favour of the view that a relief in execution by way of appointment of a receiver can be granted in a case where reliefs by way of attachment and sale are not available. The opposite view is fully brought out in the cases in *Secy. of State* v. *Bai Some*, A. I. R. (20) 1933 Bom. 350 : (57 Bom. 507) and *Palikandi Mammad* v. *Valia Appa*, 40 Mad. 302 : (A. I. R. (4) 1917 Mad. 79). In *Secy. of State* v. *Bai Some*, A. I. R. (20) 1933 Bom. 350: (57 Bom. 507), it was said that the order appointing a receiver to collect future maintenance and to pay the amount or part thereof to the judgment-debtor is virtually an order for attachment and that the prohibition would equally apply to both. It was said that the exemption from attachment under S. 60 of such future maintenance is based on considerations of public policy and that if these exempted payments can be reached in execution by appointment of a receiver by way

of equitable execution, the protection afforded by the section is to a great extent lost. It was also said that the Courts in England have refused to sanction any form of equitable execution over property not liable to attachment in law. In *Palikandi Mammad* v. *Valia Appa*, 40 Mad. 302 : (A. I. R. (4) 1917 Mad 79), the relief by way of appointment of a receiver was refused on the ground that the Court has power to appoint a receiver in execution only of property which has been attached. A passage from Woodroffe on Receiver at p. 166 to the effect that the Court can appoint a receiver in execution only of property already under attachment has also been cited by the learned counsel for the respondent. This assumption, however, made in *Palikandi Mammad* v. *Valia Appa*, 40 Mad. 302 : (A. I. R. (4) 1917 Mad. 79) and in Woodroffe on Receiver, is based on the old Civil Procedure Code of 1882 and is no longer correct with reference to the Civil Procedure Code of 1908. It is to be noticed that under S. 503 of the old Code, the power of a Court to appoint receivers was in the following terms :

> "Whenever it appears to the Court to be necessary for the realisation, preservation, better custody or management of any property, movable or immovable, the subject of a suit, or under attachment, the Court may, by an order appoint a receiver of such property."

Under this section a receiver in execution can be appointed only of property already in attachment and for the purpose of preservation or management of the property. In the Code of 1908, the corresponding provision, viz., O. 40, R. 1 is much wider in terms and is as follows:

> "Whenever it appears to the Court to be just and convenient, the Court may by an order, appoint a receiver of any property whether before or after the decree."

The power to appoint a receiver in execution is not limited therefore to cases where the property is already under attachment, nor is it limited to the purpose of realisation, preservation, better custody or management of the property. There is, therefore, no foundation under the present Code for the assumption that attachment is the basis for the relief by way of appointment of a receiver in execution. Further, in the old Civil Procedure Code, appointment of a receiver in execution is not in terms provided for, while in the present Civil Procedure Code S. 51 which is new, provides for it specifically. I am also inclined to think that the view taken in *Secry. of State* v. *Bai Some*, A.I.R (20) 1933 Bom. 350 : (57 Bom. 507) that the relief by way of appointment of a reciever is, in substance, the same as that by way of attachment and that therefore where attachment is prohibited, a receiver cannot be appointed, cannot be sustained under the present Code. As already pointed out, the power to grant relief by way of appointment of a receiver has been specifically recognised by the new S. 51, Civil P. C. of 1908 and it is clear from that section that it is not a mere substitute for the relief by way of attachment, but is in terms, an alternative and independent relief. When, therefore, the Civil P. C. under S. 60 prohibits attachments of certain classes of properties, it does not necessarily follow that relief by way of appointment of a receiver is also prohibited. As pointed out in *Keshabati Koeri* v. *Mohan Chandra*, 39 Cal. 1010 : (14 I. C. 227) and *Lahanu Bai* v. *Harakh Chand*, A. I. R. (2) 1915 Nag. 98 (11 N. L. R. 113), there is clear distinction between attaching future payments and appointing a receiver to collect them as they fall due from time to time.

[7] It is no doubt true that even before the Civil Procedure Code of 1908 equitable execution by way of appointment of receiver was being allowed in appropriate cases and that the principles recognised in English cases for such equitable execution were being followed. It may still be that such principles would continue to be of considerable assistance in exercising the discretion for granting relief by way of appointment of receiver in execution. It has accordingly been argued that under the English law, it is well-settled that where the right to a future personal allowance is by statute not transferable equitable execution by way of appointment of receiver to collect the same cannot be granted. The cases in *Lucas* v. *Harris*, (1886) 18 Q. B. D. 127 : (56 L. J. Q. B. 15), *Crowe* v. *Price*, (1889) 22 Q. B D. 429 : (58 L. J. Q. B. 215) and *Robertson* v. *Johnson*, (1893) 1 Q. B. 129 : (62 L. J. M. C. 1) have been cited in support. The first two cases have also been referred to in *Secy. of State* v. *Bai Some*, A. I. R. (20) 1933 Bom. 350 : (57 Bom. 507). It would also appear that a Full Bench in *Surendra Prasad* v. *Tekait Singh*, A. I. R. (16) 1929 Pat 700 : (9 Pat. 368 F. B.) acted on the view that where the raiyati holdings of agriculturists in Santhal Parganas were inalienable by Statute, to allow equitable execution by way of appointment of a receiver would be an evasion and invasion of the Statute.

[8] Learned counsel for the respondent relies on the observations in those cases. He says that since a right to future maintenance is not merely not attachable under the procedural law, but is not transferable as a matter of substantive law by virtue of S. 6 (dd), T. P. Act, the principles recognised in those cases will apply

[9] There does not appear, however, to be any scope for this distinction as a general rule in the law as administered in India. In *Rajindra*

Narain Singh v. *Mt. Sunder Bibi*, A. I. R. (12) 1925 P. C. 176 : (47 ALL. 385) maintenance was payable by way of the rents and profits of certain property allotted for the purpose which in specific terms was made inalienable. Their Lordships recognised that not only was the property inalienable by the settlement, but the rents and profits which constitute maintenance was unattachable by virtue of S. 60, Civil P. C. All the same, they held that the remedy by way of appointment of a receiver could be granted of such future rents and profits. It is submitted with respect that the weight of this decision cannot be whittled down in the way in which *Secy. of State* v. *Bai Some*, A. I. R. (20) 1933 Bom. 350 : (57 Bom. 507) does. In *Wasif Ali Mirza* v. *Karnani Industrial Bank Ltd.*, A. I. R. (18) 1931 P. C 160 : (59 Cal. 1) [which confirmed on appeal the decision of the High Court in *Karnani Industrial Bank Ltd.* v. *Nawab Bahadur of Murshidabad*, A. I. R. (17) 1930 Cal. 159 : (126 I. C. 45)] a similar question arose with reference to property which was inalienable under a statute viz., the Murshidabad Act (Act IV [4] of 1891). It was pointed out by their Lordships that though the property as such was inalienable by the Statute, the owner had the disposing power over the rents and profits thereof and that, therefore, a receiver of the same could be appointed though the property itself could not be attached. Similarly, in *Monohar Singh* v. *Riazuddin*, A. I. R. (21) 1934 ALL 605: (150 I.C. 665), it was pointed out that a statutory prohibition of the sale of any property is not a prohibition of the assignment of the proceeds thereof or of the receipt of its income by a receiver on behalf of the owner of the property to be applied in discharge of his decree debt. Besides, instances of appointment of receiver by way of execution in respect of properties which are inalienable are numerous, the most familiar being cases of Muth properties: *See* ***Vibhudapriya Thirtha*** v. ***Lakshmindra Tihrtha*** A. I. R. (14) 1927 P. C. 131 : (50 Mad. 497) and *Niladri Sahu* v. *Chaturbhuj Das*, A. I. R. (13) 1926 P. C. 112 : (53 I. A. 253). It appears to me on the authority of the above cases that it cannot be maintained as a general proposition that when a property is not alienable as a matter of substantive law, either because of the character of the property or because of the terms on which it is held, or on account of statutory provisions relating thereto, a receiver in respect of that property cannot be appointed in execution. This must depend on the nature and amptitude of the prohibition to be gathered from the context and the three English cases and the Patna Full Bench case above referred to may be distinguished as relating to the construction of the nature of the prohibition in those cases.

[10] On the distinction pointed out in *Karnani Industrial Bank Ltd.* v. *Nawab Bahadur of Murshidabad*, A.I.R. (17) 1930 Cal. 159: (126 I. C. 45) and *Wasif Ali Mirza* v. *Karnani Industrial Bank Ltd.*, A I.R. (18) 1931 P. C 160: (59 Cal. 1) and on the authority of *Rajindra Narain Singh* v. *Mt. Sundar Bibi*, A.I.R. (12) 1925 P. C. 176: (47 ALL 385) it would seem to follow that while the future right to maintenance is not assignable, as property and hence not attachable, there can be appointed a receiver in respect of the proceeds thereof, which are at the disposal of the judgment-debtor. Apart, however, from the larger question whether any judgment-debtor can get a receiver appointed under the decree for future maintenance of his judgment-creditor, in execution of his own decree, the question in the present case so far as Government's position under O. 33, R. 10, Civil P. C. is clear and simple. Any prohibition against attachment under S. 60, Civil P. C., or against assignability under S 6 (dd), T. P. Act, must be read in the light of the provisions of O. 33, R. 10 and must be reconciled with it. A general declaration of unattachability and/or non-transferability by statute in respect of a future right to maintenance, cannot be construed as nullifying a charge expressly created by statute for a specific and limited purpose. It has been held in *Datar Kaur* v. *Ram Rattan*, 1 Lah. 192 : (A. I. R. (7) 1920 Lah. 456 (F. B.)) that a statutory prohibition against alienation of property does not necessarily imply prohibition of a temporary alienation. The charge created by statute under O. 33, R. 10 is limited and for a specific purpose. It is absolute and makes no exception in respect of a maintenance suit by a pauper. To hold that the Government have no right to realise the amount due to it by way of appointment of a receiver in a case like the present one, would be to defeat the express statutory right of the Government, though protected by a charge. It is also well settled that in an appropriate case, a mortgage or a charge can be realised in execution by the appointment of a receiver in respect of the property charged. (See ***Rameshwar Singh*** v. ***Chuni Lal***, 47 Cal. 418 : (A. I. R. (7) 1920 Cal. 545) and *Paramasivan Pillai* v. *Ramasami Chettiar*, 56 Mad 915 : (A. I. R. (20) 1933 Mad. 570 (F. B.))

[11] I have therefore come to the conclusion that the view taken by the Court below on this question relying on *Secy. of State* v. *Bai Some*, A. I. R. (20) 1933 Bom. 350 : (57 Bom. 507) is erroneous. I hold that a receiver can be appointed at the instance of the Government in respect of the decree for future maintenance

(with the benefit of the charge thereby created) in order to realise the court-fee payable to them under the decree. But it is subject to the safeguards as to leaving adequate provision for plaintiff 1 judgment debtor as pointed out in *Rajindra Narain Singh* v. *Mt. Sundar Bibi*, A. I. R. (12) 1925 P. C. 176 : (47 ALL. 385).

[12] In the present case, a maintenance allowance of Rs. 480 per year has been fixed under the decree. The previous maintenance was at Rs. 175 per year and the same has been raised to a sum of Rs. 480 per year on the ground of rise in prices and inadequacy of the previous amount in the altered circumstances. If a receiver be appointed for collection, there will be hardly enough left after meeting the receiver's expenses, to provide for the adequate sustenance of the first judgment-debtor. While therefore the Government have the right to get a receiver appointed, it is not expedient to appoint a receiver at the present juncture. We understand that there is an appeal pending on behalf of the plaintiff-maintenance holder against the judgment of the Subordinate Judge in the suit and that the plaintiff is seeking in the appeal to get higher maintenance allowed. If and when the plaintiff happens to succeed in getting a decree for a larger amount of maintenance, the Government may make an appropriate application for the appointment of a receiver, if so required.

[13] So far as the arrears that may have remained unpaid by the date of the present execution application, namely, the amounts payable on 15th September 1945 and 15th September 1946, are concerned the Government as already held, have a clear case. It would appear from the record that as soon as the Government filed the execution application, they asked for and obtained an *ex parte* interim attachment and that while that attachment was pending, the first judgment-debtor realised in execution some portion of the maintenance amount due to her under the decree. A sum of Rs. 439-2-6 is said to be in Court deposit towards the maintenance due to her by virtue of that execution. To the extent that any portion of that amount or any further amount realised in execution pending the attachment relates to the year 1945 and 1946 the Government would be entitled to the same. The Government would also be entitled to attachment of any further amount that may be payable under the decree for years 1945 and 1946. In so far as any arrears that may have accrued since the present execution application was filed, the Government would clearly *not* be entitled to treat them as arrear, since the same must have been brought about by virtue of the *ex parte* interim attachment made, which we have held the Government not to be entitled to in the present circumstances (see *Lucas* v. *Harris*, (1886) 18 Q B. D. 127 at p. 136 bottom : (56 L J. Q. B. 15).

[14] The order of the Court below is modified as specified in this judgment and the appeal is partly allowed accordingly. Since the appellant has succeeded in respect of the main point raised by him, he is entitled to his costs in both the Courts.

[15] **Narasimham J.** — I agree.

D.H. *Appeal partly allowed.*

A. I. R. (37) 1950 Orissa 225 *[C. N. 41.]*

RAY C. J. AND PANIGRAHI J.

Balaram Rai and others — Plaintiffs — Appellants v. *Mt. Ichha Patrani and others — Defendants — Respondents.*

A. F. A. D. No. 94 of 1946, D/- 1st March 1949, from decision of Sub-J., Berhampur, D/- 12th February 1946.

(a) Grant — Service grant — Essentials.

Where a property can be held revenue-free only so long as the duties in the temple are regularly performed, the grant is one burdened with service and is a *devottar* grant. The fact that proprietary rights are vested on a grantee is not inconsistent with the charge of a trust in favour of a deity. That the grantee is to enjoy the property on condition of performing service is itself an indication that the grant is inalienable and that the grantee is to enjoy it hereditarily does not detract from the character of the grant. Since the grant is made for the performance of *seba-puja* it is necessary that the property should remain in the hands of the grantee, and any alienation of his interests would be opposed to the terms of the grant besides being contrary to public policy. That other members of the family are entitled to share in the income and participate in the *puja* does not imply that the property as such can be partitioned. For convenience of enjoyment the members may agree to hold in definite shares and agree to perform the service by rotation. This is recognised by custom throughout the country and is consistent with the purpose for which the grant is made. There is a unity of title in the family and any member of the family can claim right of worship and consequently the right of enjoyment as well; but this claim to enjoy in shares is confined among the members of the family *inter se* and cannot avail against the grantor or the Government who have the right of resumption. [Para 9]

(b) Grant — Public religious grant — Hindu law — Religious endowment.

Where a deity is a public deity and the temple in which it is enshrined is a public temple, the grant for the service of the deity is a public religious grant for the benefit of the deity. [Para 16]

(c) Hindu law — Religious endowment — Dedication — Absolute dedication and dedication of less complete character — Distinction.

There is a distinction between absolute dedications and dedications of a less complete character. In the case of the latter, notwithstanding a religious dedication property descends beneficiarily to heirs subject to trust or charge for the purpose of religion. But where the dedication is to the deity and to its worshipper the grant is inalienable as being opposed to public policy on the principle that the lands follow the office *ex-necessitate.* [Paras 16 and 17]

G. B. Mohanty and B. N. Das—for Appellants.

P. C. Chatterji and B. Mohapatra —for Respondents.

Panigrahi J.—The plaintiffs, who have lost in both the Courts below, are the sons of one Fakir Charan Rai who held a revenue-free or *muafi* grant of the village of Nunia Jampalli in Bargarh Sub Division of Samblpur district. The defendants are purchasers of Fakir's interest at a court sale in execution of a money decree obtained against the plaintiffs' father.

[2] The plaintiffs alleged that the village of Nunia Jampalli was granted by Maharaja Chhatar Sai to the family of one Lambodar Rai, an ancestor of the plaintiffs, on a permanent and hereditary tenure for doing *puja-seba* in the temple of Sri Samaleswari at Samblpur. It is alleged that the grant being one burdened with service and being a *Devottar* grant, is inalienable and that the court sale in execution of a decree obtained against the plaintiffs' father is void. The plaintiffs admit that the village was being enjoyed in three shares, i.e., an 8 annas share belonging to one Joydeb Rai, a 5 annas 4 pies share belonging to Fakir Rai, the father of the plaintiffs, and a 2 annas 8 pies share belonging to Iswar Rai. Iswar Rai died without leaving any male issue and his widow, Surjyo, used to get the services performed by Fakir and enjoy her share of the income of the village. Surjyo Rai died in the year 1934 or thereabouts and the plaintiffs claim that their father, Fakir, became entitled to the entire 8 annas share.

[3] Defendants 1 to 4 are the daughters and daughters' sons of Surjyo and allege that the grant of the village to the Rai family was an absolute personal grant capable of being partitioned and alienated and that, consequently, they succeeded to the interest of Surjyo under the Hindu law. They filed money Suit No 163 of 1937 against Fakir for arrears of rent collected by him and not handed over to them and obtained and *ex parte* decree. In execution of the decree 5 annas share out of the 5 annas 4 pies interest of Fakir was attached and sold in E. S. No. 345 of 1937. Defendants 1 to 4 purchased the property and took possession through Court on 23rd March 1938. These properties form Schedule 'Ka' attached to the plaint. The balance of 4 pies interest of Fakir Rai had previously been purchased by one Rushi Rai, who is now in possession of the same but whose purchase is not challenged in the present suit. Defendants 1 to 4 also filed Title Suit No. 110 of 1940 in the Court of the Munsif, Bargarh, for a declaration of their right to collect rent from the tenants in respect of the 7 annas-8 pies share which they had acquired by inheritance and court purchase and obtained an *ex parte* decree against Fakir. In execution of this decree for costs they attached some lands of the village. These lands form Schedule 'Kha' of the plaint and are described as *Bhogra* lands. These were sold by auction in E. S. No. 153 of 1941 and defendant 5 purchased the same and has been in possession. In a separate statement, defendant 5 also averred that the suit village was alienable and that consequently he had acquired a valid title by reason of his court purchase.

[4] The Courts below held that the members of the plaintiffs' family were undoubtedly the worshippers of goddess Samaleswari, but that it had not been proved that the grant of the suit village was necessarily connected with service in the temple. The learned Munsif says that "at the most this can be spoken of as a grant burdened with service" and that consequently the same is alienable. The learned Subordinate Judge observes that there was no evidence that the usufruct of the lands in the village was ever used for the *sevapuja* of the deity and that as the name of the deity does not appear in any of the previous settlements the property must be held to be the personal property of the plaintiffs' ancestors.

[5] Neither of the Courts below appears to have appreciated the real point at issue, and they both failed to properly construe the documents that had been exhibited in the case. It is, therefore, necessary that the evidence should be discussed in order to determine the nature of the grant and whether it is alienable or not.

[6] It appears from Mr. Russell's Report that in 1862 an enquiry was made by Major Impey into the history and conditions of grant of all estates which had been granted, either revenue-free or on favourable terms by the previous Rulers. Paragraph 241 of his Report shows that all the temple grants or endowments which are in fact grants enjoyed by the priesthood were fully enquired into by Major Impey in 1863 who also prepared complete registers of all of them. Major Impey's successor was directed to verify the enquiries previously made and to submit cases for fresh orders of Government. The Chief Commissioner accordingly re-opened the cases and sent them with his recommendations, under the rules laid down for the disposal of such cases in other districts, for sanction of Government. The terms under which the temple grants were released, free of all demand, were that "so long as the tenure under which the grants were originally made may be fulfilled." Government accordingly sanctioned all the proposals of the Chief Commissioner in

September 1864. **Mr. Russell** who was engaged in the settlement operations of Sambalpur district in 1872 again went through the terms of these grants and issued certificates or notices of release, under the seal and signature of the Settlement Officer, as no *Muafidar* had up to that time been furnished with a *Sannad* or any other document showing on what terms and under what authority he held his grant.

[7] Exhibit 7, dated 11th September 1873, is the true copy of the petition filed by "Lambodar Rai, *Pujhari* Samaleswari" and Ex. 8 is the order of the Settlement Officer dated 18th December 1874. Exhibit 7 states that the petitioner had been performing the *sebapuja* of Samaleswari and that, therefore, Maharaja Chhatar Sai had granted the village to Lochan Rai on condition that his descendants should be performing the *seva puja* of Samaleswari; that the documents of title had been burnt during the Rebellion but that Lambodar Rai's family had been in enjoyment of the property for thirty to sixty years and that they had been performing the *seva puja* of Samlal for generations; and that Niranjan Rai and Kangal Rai were also equally entitled with Lambodar Rai. The order on this petition which is a part of Ex. 7 is that the Government had already ordered that the *milkeat* rights be vested in Lambodar; that it be recorded in the Settlement and in the Proclamation to the people that he should be engaged in the *puja-seva* of Samlai always. The order recognising this grant is dated 14th September 1863 and reference is made to the Chief Commissioner's order No. 1/100 under R. 10 dated 28th May 1863. The true copy of the *rob kari* entry dated 14th September 1863 was granted by the Settlement Officer, Mr. Russell, and is exhibited as Ex. 7.

[8] Exhibit 8 is the true copy of a similar order dated 18th December 1874, of Mr. Russell during the Settlement operations. The document is entitled "*Nishkara Vrutlhi*' or revenue-free grant—*mouza* Nunia, Tahsil Bargarh, District Sambalpur. It recites:

> "This *mouza* had been granted by the previous Raja for the performance of *puja-seva* of Sri Samaleswari in Sambalpur town. The Chief Commissioner of C. P. had recommended to the Government of India, under R. 10 of the revenue-free or *Maufi* Rules for confirming this grant as a 'permanent revenue-free *mourasi*' and to release the revenue from it. Secretary, Foreign Department, Government of India (Revenue) by his proceedings No. 28 (number torn) dated 30th September 1864 has approved. On enquiry it is found that Lambodar Rai is alive. Hence ordered that the present holder and his lawful heirs shall enjoy permanently and hereditarily and that it shall be resumed in default of heirs."

A portion of this document is torn and it is not possible to make out the rest of the order. But the Register of *Muafi* grants prepared under the authority of Government, which is marked Ex. 6 in the case, gives all the details of the origin, the nature and the conditions of the grant. Column 11 of the Register shows that the village was being enjoyed revenue-free upto 1850 and that its origin was not known. Column 12 gives an extract of the entries of an earlier register prepared at the first Settlement of Sambalpur district in 1850 with the remarks of the investigating Officer. The entry against column 12 is as follows:

> "Anirudhha Rai, descendant of grantee. This is a grant alleged to have been granted by Chhatar Sai Maharaja on condition that the duties of the temple of Samalai are regularly performed. No authority is produced, but enjoyment proved back to grandfather's times 60 years ago. Recommended to be released so long as the terms of the original grant are fulfilled under R. 6 and be held by the present holder and his lawful heirs during good behaviour, but resumable on failure of legal heirs."

The order of Government is entered in Col. 13 of the Register as follows: "Released in full hereditarily. Vide authority quoted in the case of Para 31 of this Register." The authority of Government is quoted in Ex. 5 which is a copy of the entry relating to the village of Para which was No. 31 in the old *Muafi* Register and No. 24 in the subsequent Register. Vide letter No. 288 dated 30th September 1864 from the Under Secretary to the Government of India, Foreign Department (Revenue) to the Chief Commissioner, Central Provinces—Copy forwarded by the Secretary to the Chief Commissioner to the Commissioner, Chhattisgarh Division under his order No. 4856, dated 18th October 1864 a copy of which was forwarded to the Deputy Commissioner, Sambalpur, by the Commissioner, Chhattisgarh Division, under his endorsement No. 3303 dated 22nd October 1864. These documents make it clear that the grant was made to an ancestor of the plaintiffs, who was a worshipper of the deity Samaleswari, and the grant was later confirmed by the British Government during the First Settlement of 1850, the condition of the grant being that "the duties of the temple of Samlai are regularly performed." Both the Courts below have unfortunately overlooked this entry and have fallen into the error of holding that the enjoyment of the village has nothing to do with the service in the temple. The fact, on the other hand, is that the village can be held revenue free only so long as the duties in the temple of Samalai are regulalry performed.

[9] It cannot therefore be seriously disputed that the grant is one burdened with service and is a *Debottar* grant. The fact that proprietary rights are vested on a grantee is not inconsistent with the charge of a trust in favour of a deity. The Government have reserved to them-

that the produce of the village is used for offering *bhog* to the deity, but documentary evidence of unimpeachable authenticity also points in the same direction. I have, therefore, no doubt in my mind that the grant was made to the deity and that the dedication in favour of the deity was of the completest character. In *Ganesh Dharanidhar* v. *Keshao Rao*, 15 Bom. 625, the *Sannad* recited that certain villages had been held as *inam* on account of worship, jubilees, etc., in honour of Shree (or the deity) and the *inam* was confirmed with the direction that it be continued to him, and his sons, and grandsons from generation to generation. It was held that the grant was primarily a grant to the religious foundation and not to the particular individuals for their own benefit. I am not unaware of the distinction existing between absolute dedications and dedications of a less complete character. The cases reported in *Ashutosh Dutt* v. *Durga Charan*, 6 I. A. 182: (5 Cal. 438 P. C.) and in *Sonatun Bysack* v. *Jaggut Sundari*, 8 M. I. A. 66: (1 Sar. 721 P. C.) are instances of less complete dedications in which, notwithstanding a religious dedication, property descends beneficiarily to heirs subject to trust or charge for the purpose of religion. In the case before us, on the other hand, the evidence does not allow any escape from the conclusion that the dedication was to the deity and not to the ancestors of the plaintiffs' family.

[17] That grants of this character are inalienable, as being opposed to public policy, can hardly be disputed, the principle being that the lands follow the office *ex-necessitate*. As was laid down in *Neti Anjaneyulu* v. *Sri Venugopal Rice Mills, Ltd.*, 45 Mad. 620: (A.I.R. (9) 1922 Mad. 197 F. B.) the sale of lands held on temple-service tenure is opposed to the nature of the interest affected and is consequently void. Their Lordships approved of the previous decision of that Court in *Pakiam Pillai* v. *Sitarama Vadyar*, 14 M. L. J. 134: (27 Mad. 465 N), which related to a spiritual office in a village. To the same effect are the cases reported in *Govinda Gounder* v. *Rama Ayyan*, 25 I. C. 600: (A. I. R. (2) 1915 Mad. 235) (service *inam* for the performance of service in a temple); *Subbayya* v. *S. Ramayya*, A. I. R. (12) 1925 Mad. 1046: (91 I. C. 666) (for reciting hymns or *Suddulu* on the occasion of a festival of a village goddess). For other instances of service *inams* connected with a temple, reference may be made to *Sundara Raju* v. *Seshadri*, A. I. R. (15) 1928 Mad. 35: (106 I. C. 426) (*Archak* Service); *Velu Pillai* v. *Secy. of State*, A. I. R. (15) 1928, Mad. 852: (107 I. C. 785) (Biper service); *Meenakshisundaram Pillai* v. *Chokkalingam*, 15 M. L. J. 10 (fanning service), *Ramanathan Chettiyar* v. *Kalidas*, A. I. R. (23) 1936 Mad. 559: (163 I. C. 724) (temple service); *Lakshmudu* v. *Ramudu*, A. I. R. (26) 1939 Mad. 867: (I. L. R. (1940) Mad. 123) (case of *Dasabandham inam* or service of public utility). The same principle applies to other service tenures such as in *Madhava Rao* v. *Raghunath* 50 I. A. 255: (A. I. R. (10) 1923 P. C. 205) (*Watandar*); *Satya Naraian* v. *Satya Niranjan* 51 I. A. 37: (A. I. R. (11) 1924 P. C. 5) (*Ghatwali*); and *Venkata Jagannath* v. *Veerabhadrayya*, 48 I. A. 244: (A. I. R. (9) 1922 P. C. 96) (Village *Karnam* Office). Whether the grant is burdened with service or is grant of an office in lieu of wages, the principle underlying inalienability is equally applicable, and there is no difference between a private sale and an execution sale: *See Subbayya* v. *Mohammed Mustafa*, A. I. R. (10) 1923 P. C. 175 (46 Mad. 751).

[18] The Courts below have wholly misconceived the real point in controversy between the parties and, therefore, their judgment cannot be upheld. The plaintiffs shall have a decree declaring that the suit properties in schedules 'ka' and 'kha' are *Devottar* properties and not liable to be proceeded against in execution of decrees in Money suit No. 1937 and in Title Suit No. 110 of 1940, and that the plaintiffs are entitled to recover these properties from defendants 1 to 5 who are in possession of the same. The plaintiffs shall also be entitled to the costs of this litigation throughout.

[19] This appeal is accordingly allowed with costs.

[20] **Ray C. J.**—I agree.

V.R.B. *Appeal allowed.*

A. I. R. (37) 1950 Orissa 230 *[C. N. 42.]*

RAY C. J. AND JAGANNADHADAS J.

Ramanath Panda—Petitioner v. *Damodar Sahu and others—Opposite Party.*

Civil Revn. No. 131 of 1948, D/- 8th September 1949, from order of Sub-J., Berhampur, D/- 15th July 1948.

(a) Civil P. C. (1908), S. 115—Wrong view of S. 73, Civil P. C.—Mistake as to jurisdiction—Civil P. C., (1908), S. 73.

Where a Judge wrongly holds that a case does not fall under S. 73 of the Code, he denies to himself the jurisdiction which he has of making a proper rateable distribution of the assets and denies to the petitioner a remedy which he is entitled to get on a mistaken view of his powers in this behalf. Such mistake is not a mere mistake of law but a mistake as to jurisdiction based on an erroneous view of the law. [Para 5]

Annotation: ('50-Com.) Civil P. C., S. 73, N. 25; S. 115, N. 11.

(b) Civil P. C. (1908), O. 21, R. 83 (1)—Permission for private sale—Consent of any party, if necessary.

The power of the Court to grant permission for private sale is not based on any consent to be given by any of the parties. It is a discretion fully vested in the Court. Consent might facilitate the passing of the order, but the order itself is based on the discretionary power of the Court. [Para 7]

Annotation: ('44-Com.) Civil P. C, O. 21, R. 83, N. 2.

(c) Civil P. C. (1908), O. 21, R. 83 (2), Proviso 1—Money paid into Court if available for rateable distribution—Consent of attaching creditors—Discretion of Court—Civil P. C. (1908), S. 73.

Proviso 1 to R. 83 (2) is mandatory and once money is paid into the Court, the sale-proceeds become in terms of S. 73, assets held by the Court; and they are none the less so because the amounts have not been realised by a process of compulsory sale. They are moneys which have been realised in the course of the execution which was pending at the time. It is obviously the policy of law that all such moneys, by whatever course realised, once they come into the Court, are to be treated as assets available for distribution amongst all the decree-holders of the judgment-debtor who have been vigilant enough to have applied to the Court for execution by that time. It therefore follows that neither the consent of the attaching decree-holders nor the discretion of the Court can have any bearing on the matter and it must be held that the Court would have no discretion to earmark such sale-proceeds for payment to individual creditors. [Para 7]

Annotation: ('50 Com.) Civil P. C., S. 73, N. 4; O. 21, R. 83, N. 9.

B. Mohapatra—for Petitioner.

P. V. B. Rao—for Opposite Party.

Jagannadhadas J. — The facts giving rise to this revision may be briefly stated as follows:

[2] Original Suit No. 23 of 1943 on the file of the Subordinate Judge, Berhampur, was a partition suit between the members of a joint family owning extensive properties in which were included the Aska Sugar Works and Distillery also the Saw Mills at Russelkonda. One of the parties in the suit was appointed as the receiver of the family properties in the partition suit. A number of creditors of the family had obtained decrees against them and at the relevant date, there were as many as 12 decrees obtained by the creditors against the members of the family and pending execution.

[3] The petitioner before us is one of them having obtained a decree in O. S. No. 45 of 1939. He applied for execution in E. P. No. 301/45. The rest of the 12 decree-holders had also taken steps in execution. Eight of them had attached the Mill at Russelkonda and four of them including the present petitioner had attached the Sugar Works and Distillery at Aska. When these various executions and attachments were pending there was a proposal to sell the sugar factory and the saw mill by private sale for a sum of about Rs. 6 lakhs. In order to assure the intending purchaser that the purchase will be free from the claims of decree-holders under their attachments, the receiver appears to have applied for certificates in the various decrees which were then under execution, for permission to sell the attached properties by private sale under O. 21, R. 83, Civil P. C., and the requisite permission and certificates were accordingly granted.

[4] The two items of properties, that is, the sugar factory and the saw mill appear to have been sold and out of the purchase-money of six lakhs, two lakhs have been deposited in the Court by the purchaser. Meanwhile, it would appear that one Bhabani Sankar Sen, who had brought a suit against the members of the judgment-debtors' family in the original side of the Calcutta High Court, filed an application to implead the receiver as a party in his suit and appears also to have obtained an order that the sale-proceeds of the Aska sugar factory and the distillery were not to be distributed to any of the creditors until further orders of the Court. It is now stated to us that that order has been finally vacated and if that be so, it would appear that none of the parties will ultimately have a grievance by the order now sought to be revised, because there appears to be enough money in Court to satisfy all. But as the parties are not quite clear whether the vacating of that order completely safeguards that right, we have been invited to go into the question raised in this revision petition and it is accordingly necessary to do so. In the total sale price of six lakhs, two lakhs was for the saw mill and four lakhs for the sugar factory. Accordingly out of the two lakhs of the sale-price deposited into the Court the learned Judge treated 1/3rd thereof as being available towards the sale-price of the saw mill and the balance 2/3rds towards that of the Aska Sugar Factory and Distillery. This 2/3rds could not be distributed by virtue of the order of the High Court staying his hands in respect of the distribution regarding the sale-proceeds of the Aska Sugar Factory as already stated. As regards the 1/3rd of two laks available in respect of the Russelkonda saw mill, he has made an order distributing that amount as between the eight decree-holders who have made attachments of the saw mill. The petitioner, who did not attach the saw mill but attached only the sugar factory claimed before the Subordinate Judge that he was also entitled to rateable distribution along with others out of that amount. But the learned Subordinate Judge has overruled his contention-treating the 1/3rd amount of two lakhs as funds ear-marked for distribution only as between such of the decree-holders who had attached the saw mill. It is this order that is now sought to be revised, by the decree-holder who had obtained his decree in O. S. No. 45 of 1939 and who has admittedly made his application to the Court for execution before the sale-proceeds came into the hands of the Court.

[5] On behalf of the respondents, an objection is taken to the maintainability of this revision and it is contended that if the order of the learned Subordinate Judge was wrong, it was only a mistake of law and that in any case, the petitioner had another remedy by suit and that therefore this revision ought not to be entertained. It will appear, however, from what follows in this judgment that what the learned Subordinate Judge has done is not a mere mistake of law as to the construction of any particular legal provision: but what he has said is that this is not a case which falls under S. 73, Civil P. C. and if he is wrong in that view, he has denied to himself the jurisdiction which he had of making a proper rateable distribution of the assets and has denied to the petitioner a remedy which he was entitled to get, on a mistaken view of his powers in this behalf. Such a mistake is not a mere mistake of law, but a mistake as to jurisdiction based on an erroneous view of the law. The objection, therefore, as to the maintainability of this revision cannot be sustained.

[6] On the above statement of facts, *prima facie*, the petitioner would be entitled to a rateable distribution under S. 73, Civil P. C. Admittedly, the assets of the judgment-debtors to the extent of 1/3rd of the two lakhs are in the hands of the Court and are available for distribution. Admittedly also, the petitioner has made an application for execution to the Court which had these assets in its control before they were received. Under this section, therefore, this decree-holder along with others in a similar situation was entitled to get part satisfaction of his decree by rateable distribution. The learned Judge, however, relies on certain other facts which he notices in his judgment as disentitling the petitioner from getting rateable distribution out of this amount. He notices that when the permission for private sale under O. 21, R. 83, Civil P. C. was given, it was with the consent of the respective attaching decree-holders, that is to say, the permission to sell the saw mill was given with the consent of the decree-holders who had attached the saw mill by then and the permission to sell the Aska Sugar Factory and distillery was given with the consent of the decree-holders who had attached the sugar factory by then including the present petitioner. He, therefore, thinks that the moneys realised by the respective sales of the saw mills and the sugar factory are moneys ear-marked for distribution to those particular decree-holders who had given the consent and who have thereby facilitated the private sale of these items of property. Apart from the legal aspect of the matter, it may be pointed out that the learned Subordinate Judge has not been consistent in this view, because by his order he has allowed rateable distribution to two other attaching decree-holders who have attached the saw mill subsequent to the order granting permission for private sale as will be found from the closing part of his judgment wherein he says that the creditors in E. P. 248/47 and E. P. 249/47 who had not attached by the date of the permission for private sale would also be entitled to rateable distribution. In addition to the above facts he also relies upon an order dated 6th November 1947 which is order No. 379, wherein the Court appears to have observed that the attaching creditors of the saw mill shall be paid out of the sale-proceeds of the saw mill after the disposal of the application of Sri Bhanani Sankar Sen and attaching creditors of the sugar factory shall be paid out of the sale-proceeds of the sugar factory.

[7] The question for consideration is whether the learned Judge is right in his view that whether the fact of the permission for private sale having been granted on the consent of the respective attaching decree-holders to waive their objection thereto, or the fact of a prior order having been made by the Court stating that the attaching creditors of the sugar factory shall be paid out of the sale-proceeds of the sugar factory and the attaching creditors of the saw mill shall be paid out of the sale-proceeds of the saw mill, will in any way affect the statutory right that the petitioner has under S. 73 to get a rateable distribution out of the assets of the judgment-debtors that were in the hands of the Court. If it was made out to the satisfaction of the Court that these prior orders on which the learned Subordinate Judge relies were orders passed with the consent of all the parties affected including this petitioner, the position may conceivably be different and it might not have been open to the petitioner to claim his statutory right under S. 73 having waived the same previously. The learned Judge does not base his order on any such ground and we have been shown no material for thinking that these prior orders were based on the consent also of this petitioner. The question therefore is whether apart from any such consent the Court had the right to ear-mark funds available as a result of private sales under O. 21, R. 83 as liable to distribution only among particular creditors. It appears to us that such a view is clearly untenable in the face of the specific provision of O. 21, R. 83. It is to be noticed that the power of the Court to grant permission for private sale is not based on any consent to be given by any of the parties. It is a discretion fully vested in the Court. Consent might facilitate

the passing of the order, but the order itself is based on the discretionary power of the Court. By O. 2, R. 83, sub-s. (2) and proviso thereunder

> "All moneys payable under the private sale excepting in so far as the decree-holder may be entitled to set off must be paid into the Court."

This is mandatory and once it is paid into the Court, the sale-proceeds become in terms of S. 73, assets held by the Court: and they are none-the-less so because the amounts have not been realised by a process of compulsory sale. They are moneys which have been realised in the course of the execution which was pending at the time. It is obviously the policy of law that all such moneys, by whatever course realised once they come into the Court are to be treated as assets available for distribution amongst all the decree-holders of the judgment-debtor who have been vigilant enough to have applied to the Court for execution by that time. It therefore follows that neither the consent of the attaching decree-holders nor the discretion of the Court can have any bearing on the matter and it must be held that the Court would have no discretion to ear-mark such sale proceeds for payment to individual creditors. Learned counsel for the respondent relies on certain decisions, but it is unnecessary to notice them at length. The relevant questions have been dicussed fully in various cases and it is now the generally accepted view that where moneys belonging to the judgment-debtor have come into the Court, either by regular process of execution, or under O. 21, R. 55, or O. 21, R. 83, or O. 21, R. 89, they are assets held by the Court available for rateable distribution. The contrary view which has been accepted in *Sorabji Coovarji* v. *Kala Raghunath*, 36 Bom. 166: (12 I. C. 911) and other cases in that line are no longer accepted as good law. It is enough to refer to the cases in *Thireviyam Pillai* v. *Lakshmana Pillai*, 41 Mad. 616 : (A. I. R. (6) 1919 Mad. 647), *Satnarain Prasad* v. *Mahabir Prasad*, 18 Pat. 404 : (A. I. R. (26) 1939 Pat. 392) : *Sidhnath Tevari* v. *Tegh Bahadur Singh*, 54 ALL 516: (A.I.R. (19) 1932 ALL. 411), *Noor Mahomed* v. *Bilasiram*, 47 Cal. 515 : (A. I R. (7) 1920 Cal. 785) and *Chittagong Urban Co-operative Bank Ltd.* v. *Indo-Burmah Traders Bank Ltd.*, A. I. R. (25) 1938 Cal. 521 : (176 I. C. 607) to substantiate the above view.

[8] The order of the learned Subordinate Judge is therefore unsustainable and it is hereby set aside. The revision is accordingly allowed with costs.

[9] Hearing fee is assessed at one gold mohur.

[10] **Ray C. J.**—I agree.

V.R.B. *Revision allowed.*

A.I.R. (37) 1950 Orissa 233 *[C. N. 43.]*

PANIGRAHI AND NARASIMHAM JJ.

Ramchandra Beharilall Firm —Creditors—Appellants v. *Panu Singh — Insolvent—Respondent.*

Misc. Appeal No. 33 of 1948, D/- 5th December 1949, against order of D. J., Cuttack, D/- 23rd December 1947.

Provincial Insolvency Act (1920), Ss. 37, 78 (2)—Unconditional order of adjudication — Powers of Court.

Under S. 37, in the absence of any conditions imposed by the Court, the properties would automatically revert to the insolvent as soon as the order of annulment is passed. But the Court does not become *functus officio* so as to be incapable of passing a subsequent order in order to make the properties formerly vested in the Insolvency Court available for distribution among the creditors on their applications. [Para 2]

Section 78 (2) has no application to the exercise of such power by the Court. [Para 2]

Annotation: ('46-Man.) Prov. Insol. Act, S. 37, N. 9.

B. N. Mahanti — for Appellants.

Panigrahi J. — This is an appeal against an order passed by the District Judge, Cuttack, dismissing the petition of the creditor in insolvency proceedings praying for distribution of the assets of the insolvent. In Misc. Case No. 17 of 1939, one Panu Singh *alias* Pranbandhu Singh was adjudicated insolvent on 12th February 1940. On 21st December 1940, the creditor filed a petition for the purpose of avoiding some sales alleged to have been made by the insolvent just before the presentation of the petition in insolvency, and by its order dated, 17th May 1941, the Courts set aside the sales. The purchaser went up in appeal to the High Court but his appeal was dismissed on 26th April 1945. The insolvent was a party to this appeal. Meanwhile, however, the date fixed for the application for discharge had expired and the insolvent had failed to apply for discharge within the time fixed by the Court. Consequently, on 16th March 1942, the District Judge passed an order of annulment and the adjudication of Panu Singh as insolvent was annulled. On 17th May 1947, the present appellant, one of the creditors of the insolvent, filed a petition before the District Judge for directing the Receiver appointed in the proceedings to sell the properties of the insolvent and distribute the assets among the creditors. The learned District Judge accepted the contention of the creditor that the Court had jurisdiction to so direct the receiver but held that S. 78 (2), Provincial Insolvency Act was a bar to his exercise of that power.

[2] The point for determination is whether, when an unconditional order of annulment is passed, the insolvency Court still retains seisin over the properties of the insolvent to enable it to make an order relating to his properties and to make the assets available for distribution among the various creditors. In this case the

order of annulment is unconditional. Section 37, Provincial Insolvency Act, lays down that when an order of annulment is passed the properties of the debtor shall vest in such person as the Court may appoint, or, in default of such appointment, shall revert to the debtor to the extent of his right or interest therein on such conditions if any—as the Court may by order in writing declare. Admittedly, no order vesting the properties in an appointee of the Court was passed simultaneously with the order of annulment. On a plain reading of the section, it appears to me that in the absence of any conditions imposed by the Court the properties would automatically revert to the insolvent as soon as the order of annulment is passed. But the question is does the Court become functus officio so as to be incapable of passing a subsequent order in order to make the properties formerly vested in the Insolvency Court available for distribution among the creditors? Section 5 (1), Insolvency Act, defines the general power vested in a Court of insolvency and it provides that the insolvency Court shall have the same power as it has in the exercise of original civil jurisdiction. Section 151, Civil P. C. empowers the Court to pass orders in the exercise of its inherent jurisdiction to prevent abuse of process and otherwise to work out the equities between the parties *ex debtio justitiæ*. This principle has been extended to orders under the Provincial Insolvency Act by a decision reported in *Chouthmall Bhagirath* v. *Jokhi Ram Surajal*, A. I. R. (20) 1933 Pat. 84 : (12 Pat. 163) and which has also been followed by the Calcutta High Court in the case reported in *Abdul Latif* v. *J. R. Percival*, A.I.R. (23) 1936 Cal. 573 : (I. L. R. (1937) 1 Cal. 264). This reasoning appealed to the learned District Judge himself and he held that it was within his jurisdiction to direct the receiver to proceed to sell the properties which were the subject-matter of the appeal before the High Court. Were it not for the fact that the learned Judge took an erroneous view of the applicability of S. 78 (2) of the Act we have no doubt, he would have granted the relief prayed for by the creditor in these proceedings. Unfortunately, however, we are unable to see what application this section has in this case. All that S. 78 (2) lays down is that in computing the period of limitation prescribed for a suit or an application for the execution of a decree, the period from the date of the order of adjudication to the date of the order of annulment shall be excluded. That sub-section has no application to the exercise of the power by the Court. We are accordingly unable to accept that part of the learned Judge's order.

[3] We have therefore arrived at the conclusion that limitation is no bar to the exercise of the power by the Court and that it has got the jurisdiction to make such order as it may choose to make on the application of the creditor.

[4] The order under appeal is set aside and the case remanded to the learned District Judge for disposal according to law in the light of the observations made above.

[5] **Narasimham J.** — I agree.

K.S. *Case remanded.*

A. I. R. (37) 1950 Orissa 234 *[C. N. 44.]*

PANIGRAHI AND NARASIMHAM JJ.

Nishamoni Debi and another — ***Petitioners*** v. *Joy Krishna Panda and others* — ***Opposite Party.***

Civil Revn. No. 27 of 1949, D/- 18-11-1949, from order of Munsif, 2nd Court, Cuttack, D/- 10 11-1948.

(a) **Civil P. C. (1908), O. 33, R. 1, Explanation — Wife applying to sue as pauper— Determination of wife's status on basis of husband's property.**

Where the wife applies for permission to sue as a pauper, her husband's property cannot be the basis for determining the status of the wife. [Para 2]

Annotation : ('44-Com.) Civil P. C., O. 33, R. 1, N. 3.

(b) **Civil P. C. (1908), O. 33, R. 1, Explanation — Wearing apparel—Ornaments of Hindu woman.**

The ornaments given to a girl at the time of her marriage are not such as can be parted with by a Hindu woman who has her husband alive.

These ornaments are worn daily and as such constitute the wearing apparel of a Brahmin Hindu woman. [Para 2]

Annotation: ('44-Com.) Civil P. C., O. 33, R. 1, N. 7.

U. Rath—for Petitioners.

H. Sen—for Opposite Party.

Panigrahi J. — This revision is directed against the order of the Munsif, Second Court, Cuttack, refusing to permit the petitioner to sue in *forma pauperis*.

[2] The petitioners filed a suit for possession of their hereditary *marfatdari* in respect of a certain deity. The plaintiffs paid court-fees in the first instance when the suit was valued at Rs. 411. On objection being taken by the defendants the learned Munsif ordered the valuation of the suit, for the purpose of court-fee, to be raised to Rs. 2786. At this stage the plaintiffs filed a petition praying for permission to sue in *forma pauperis*. On the side of the plaintiffs, plaintiff 1 was examined as P. W. 1 and her evidence was to the effect that she is not possessed of any properties, movable or immovable, out of which she could pay the court-fee. She however admitted that up to the stage of filing her petition her husband was financing the suit. Defendant 1 was examined as O. P. W. 1 and he deposed that the petitioner had some gold and silver ornaments worth Rs. 400. The learned Munsif has indulged in a lot of speculation about the status of the petitioner while trying to

determine her ability to pay court-fee. In the first place the fact that the order about revaluation of the suit was taken to the High Court in revision is urged as a ground indicating the affluent circumstances of the petitioner. In view of the petitioner's evidence that her husband was looking after the litigation this point loses all significance. The husband's property cannot be the basis for determining the status of the petitioner. The second reason given by the learned Munsif is equally fallacious. He says that the petitioner made no attempt to raise any money on the strength of the properties left by her father, Bhikary Panda. The suit properties are the only properties left by her father. These properties being admittedly *Devottar* the petitioner could not raise any money on the pledge or mortgage of these *Devottar* properties. The third reason put forward is that the petitioner must have been given ornaments and utensils at the time of her marriage as dowry as it is usual for girls to be given such presents. The learned Munsif had relied upon the evidence of O. P. W. 1 for the statement that the petitioner has ornaments worth Rs. 400. This after all is the interested statement of a party to the litigation and is contradicted by the evidence of the petitioner herself. But even accepting the evidence of O. P. W. 1 at its face value it cannot be said that these ornaments are such as can be parted with by a Hindu woman, who has her husband alive. These ornaments are worn daily and as such constitute the wearing apparel of a Brahmin Hindu woman.

[3] In these circumstances we are not satisfied that the finding of the learned Munsif has been arrived at properly on the evidence recorded in the case. The order of the Munsif is set aside. This revision is allowed and the petitioner is permitted to sue in *forma pauperis*. There will be no order as to costs.

[4] **Narasimham J.**—I agreee.

V.R.B. *Revision allowed.*

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* A. I. R. (37) 1950 Orissa 235 [*C. N. 45.*]

RAY C. J. AND NARASIMHAM J.

Arjuna Misra — Accused — Applicant v. *The Indian Union—Opposite Party.*

Supreme Court Appeal No. 4 of 1950, D/- 28th April 1950, for leave to appeal to the Supreme Court, against judgment of Panigrahi and Narasimham JJ., in Cri. Revn. Nos. 73 and 116 of 1949.

✠(a) Constitution of India, Art. 134 (1) (c) — Standard of fitness — Conviction on basis of portion of retracted confession—Non-compliance with S. 342, Criminal P. C. — Criminal P. C. (1898), Ss. 342 and 404—Evidence Act (1872), S. 24.

The scope of an appeal to the Supreme Court against a final order or sentence in a criminal proceeding has not at all been widened. That Court will have to interfere with convictions by local tribunals within the same bounds of limitations and restraints laid down by the Privy Council and the fitness has to be judged by the standard that that tribunal laid before it in granting special leave to appeal. The only change that the Constitution has introduced is to endow the State High Courts with powers to certify, or in other words, to grant leave to appeal. [Para 18]

Where a major portion of the retracted confession by the accused implicating a co-accused for offences under Ss. 457, 380 and 461, Penal Code, has been found to be false and the co-accused has been acquitted, the accused cannot be convicted for the same offences on the basis of the remaining portion of the confession which amounts to entangling the accused as one who came into possession of some property recently stolen, unless the accused is given an opportunity under S. 342, Criminal P. C., to explain as to how it came into his possession. The general sort of examination under S. 342 as to why and under what circumstances the accused made the confession would not be sufficient under the circumstances. In such a case there is a disregard of the form of legal process so vital to a criminal trial in the failure of compliance with the statutory rule of accused's examination under S. 342, Criminal P. C., and the case is a fit one for appeal to the Supreme Court under Art. 134 (1) (c) of the Constitution. [Paras 15, 19 and 20]

Annotation : ('49-Com) Criminal P. C., S. 342 N. 14, 15 ; S. 404 N. 2. ('46-Man.) Evidence Act, S. 24 N. 4, 9.

(b) Evidence Act (1872), S. 24 — Retracted confession.

It is unsafe to convict a person on his retracted confession unless there is adequate corroboration. [Para 22]

Annotation : ('46-Man.) Evidence Act, S, 24 N. 8 and 9.

K. N. Agarwala and M. S. Rao—for Applicant.
Government Advocate—for Opposite Party.

Ray C. J. — This is an application by the prisoner (Arjuna Misra) whose convictions under Ss. 457, 380 and 461, Penal Code, have been confirmed by this Court in Criminal Revision No. 116 of 1949. The applicant invokes us to certify that the case is a fit one for appeal to the Supreme Court within the meaning of Art. 134 (1) (c) of the Constitution of India, in order that he may prefer an appeal against the final order of conviction and sentences in the said criminal proceeding. The pith and substance of the various contentions advanced is that, at the end of the hearing before this Court, in the background of the findings recorded therein, there does not exist any reliable evidence upon which a conviction can be safely or justly based and that, accordingly, the principles of natural justice have been violated resulting in substantial and grave injustice to the applicant.

[2] The applicant and one P. J. Patnaik (since acquitted by the final order of this Court in Cri. Revn. No. 73/46 which was heard analogously with Cri. Rev. No. 116/49 and disposed of by one judgment governing both) had been tried jointly on identical charges arising out of one occurrence.

[3] The occurrence related to a theft of a sum of Rs. 2290-14-0 from an iron-safe in the

Office of the Superintendent of Police, Koraput, on 17th November 1946, between the hours 5 30 and 7-30 P. M. The theft was discovered immediately when the night watchman came to the office at about 7-30 P. M. and found the safe broken open. A first information report was lodged which, besides informing about the occurrence of theft of money, was lacking in all relevant details as to when, how and by whom the discovered crime had been committed. Investigation was taken up immediately and a general search of the premises of the Reserve Police Barracks, nearby, of which the applicant (Arjuna Misra) was one of the inmates, under. taken. This continued till the 21st. In the afternoon of that date, investigation changed hands and C. I. D. Inspector from Cuttack took it over. He arrested Arjuna who confessed to him. His confessional statement constitutes the fabric of the prosecution story. The statement, as recorded, by a Magistrate under S. 164, Criminal P. C., is quoted *in extenso* :

> "On Sunday after 3 o'clock I met him (P. J. Patnaik) in the office. He told me to sit on the (illegible) of my house on that evening. When I would stand near the well then you would come to me. On hearing this I went back to my house. There was none in the house where we were present. While it was going to be dark P. J. Patnaik came to me. I went to him as I saw him. He told me to bring a crowbar. On the very moment I ran to C/24 and asked him for crowbar. He gave me. While I was bringing the crowbar he gave me direction by winking his eyes and went 25 cubits ahead of me. I followed him on the hospital road. There is way near the Kana, where the wires had near pressed. He was waiting for me there. We met together there. We both entered into the compound. He gave me a torch and directed me to help him with light and he would do rest. He took the crowbar from my hand. One glass of the back door was missing. He pushed his hand inside it and opened the door. We both entered into the room. On his direction I showed him light. He thrust the crowbar inside the lock. He gave a jerk but the lock did not give way. He gave repeated jerks so the lock was opened. I was waiting outside to watch if anybody was coming. But there was none there. He further directed me to go outside and watch. Accordingly I went outside. Then the door was already opened. The crowbar was lying on the floor. He put the G. C. notes of the box inside his clothes. He directed me to bring the crowbar. He went ahead. I followed him. We went back on the same way we came. We both went to D.I.'s quarter. We both went inside it. He gave me some bundle of G. C. notes and directed me to run away. As I was going with the crowbar and G. C. notes he asked me to give back the crowbar, lest I might show it to anybody. He also brought the lock of the iron cash chest. The lock was broken. He took away the lock, crowbar and rest of G. C. notes. So I told him if you would take the crowbar how could I manage as it belonged to others. So he directed me to say that somebody had taken it. I ran away through the ground. I told C/24 in the morning that I had thrown the crowbar into the well and not to ask me for it. I told him a lie being afraid of "search." I did not tell him about the theft. I kept some of the money in a barley tin and concealed it inside a "Kia" bush. I put some of the money inside a cigarette tin and concealed it inside the almirah of my house. Although there was search in my house in the night none could see the money. Next day C/22, 24 and two Ratho brothers all told the fact of crowbar in the office. The Dy. S. P., S. I. and other officers began to ask me about this. But I did not tell. Next day or after two days I was placed under suspension. On that evening I told G. N. Tripathy that P. J. Patnaik and myself had thrown the crowbar into the well, I made over to him a bundle of 100 G C. notes and told him to throw it in the house of C/24 and report the theft. He told me to throw it in the morning. So I gave him the money in the morning. I told him to give share of the amount if no blame would come to me. He assured me to give help He kept Rs. 100 in his house. I sent for C/382 and requested him to report this fact. He gave me word but did not do it. I came back with a request not to say this fact to anybody. Sometime after some Police Officers came to the line in a car. So then I concealed the cigarette tin containing the money inside the cowdung heap on the way side. It was recovered during search. Afterwards I was called and examined by some Police Officers and I told all the facts. I showed the amount kept inside the barley tin. I was arrested. I first told G. N. Tripathy about P. J. Patnaik. We together had a talk on this matter on that Sunday. We together were putting up in a mess for some days."

[4] The confession has been found to have been made voluntarily and was accepted and acted upon by the trial Court and the Court of appeal below. Both the said Courts recorded a finding that the confession, though retracted at the trial stage, was reliably adequate evidence corroborated as it had been in material particulars by the evidence of various witnesses examined in the case. Accordingly, the applicant petitioner as well as his co-accused were convicted of all the offences with which they had been charged and sentenced. Two learned Judges of this Court, in exercise of their revisional jurisdiction, invoked by both the accused persons, made a detailed examination of the evidence adduced by the prosecution, and the defence evidenced adduced by P. J. Patnaik and recorded a finding of acquittal of P. J. Patnaik while confirming the conviction and sentence of the applicant.

[5] In acquitting P. J. Patnaik, the Court came to certain very definite and unequivocal findings to be stated presently. It is to be seen whether the conviction of the applicant based as it is on the self-same evidence, ought to stand side by side and consistently with those said findings.

[6] As to the confessional statement describing the *modus operandi* of breaking open the iron safe by P. J. Patnaik with the help of a crowbar, the learned Judge (Panigrahi J. who delivered the Court's Judgment) records as follows :

> "According to the Courts below, the fact as to how the embedded lock of the iron-safe was opened still remains a mystery. Whether the safe as well as the padlock were opened by keys, real or false, or whether

> they were opened by violence could not be determined by the Courts below in view of the circumstances negativing the story of alleged violence and forcible opening of the padlock and the iron-safe. The facts disclosed at the time were more consistent with the natural opening of the padlock and the safe with their keys than the forcible opening with the aid of a crowbar ...I am loth to believe that the padlock or the iron-safe itself was broken open as alleged by the prosecution with the help of a crowbar which was never recovered. The marks of violence alleged to have been notice the iron chest were probably those that were made at the instance of the Superintendent of Police while he was conducting the sound test (the sound test made in the course of investigation in order to ascertain whether in case of violence with a crowbar for breaking open the iron-safe, the sound created would be audible to the Magazine Guards on duty very near the scene of occurrence). The removal of the net bag—(leaving alone a small cash box which also contained a fairly large sum of money)—is also a circumstance which does not appeal to be natural. If their had been a burglary, why the small cash box was left untouched and why only the bag was removed defies explanation. The find of a two-rupee note near about the iron safe also raises suspicion. *The whole affair is a made-up job, having regard to the fact that the notes in the* iron safe were stitched. . . . In view of the apparent contradictions in the evidence regarding the borrowing of a crowbar by Arjun and its non-recovery by the Police, I am not inclined to accept the story that a crowbar was actually used to force the safe open."

[7] Besides, the prosecution story, as a whole, was not accepted to be true, the retracted confession of the applicant notwithstanding. The learned Judge, in this connexion, said.

> "A number of witnesses were examined to prove the alleged burglary but after going through the evidence of all these witnesses, I have been left with the impression in my mind that it was a made-up story and that the chest and the padlock were opened with the help of key either by the custodian of the keys or by some one else with his connivance. . . . The presence of P. W. 1, Head-clerk of the Police Supdt.'s Office who was in charge of cash in the iron chest which was sealed and locked up by him in the office on the day of occurrence which was a Sunday and the evidence that he was there till after 5 O'clock lends support to the inference that he was himself the thief or an active participant or abettor of the theft."

In relation to the complicity of the said Head-clerk, the learned Judge further observed:

> "The suggestion of the accused P. J. Patnaik that P. W. 1 was heavily involved in debts and was short of funds and that he therefore resorted to the story of burglary to cover up his acts of misappropriation cannot be brushed aside as untenable. I am loth to believe that the padlock or the iron safe itself was broken open as alleged by the prosecution...."

Except for the evidence of the Head-clerk there is no other proof on record to show that the stolen property was in the iron safe at the alleged hour of occurrence.

[8] It may be noted here that the applicant was a treasury peon attached to the Superitendent of Police's Office and in that capacity he used to attend to the behests of the Head-clerk (P. W. 1) and to sleep sometimes at the latter's lodge. This circumstance and certain others to be mentioned presently have, in the main, been relied upon in corroboration of the retracted confessional statement.

[9] It would be worthwhile to devote a few lines to the general nature of the evidence adduced by the prosecution in corroboration of the material particulars of the applicant's confession and to note, after almost wholesale condemnation of such evidence, how much of it outstood and survived the test so as to ensure the corroboration of the confession relied upon for the applicant's conviction. This becomes particularly necessary as preponderance of what is found to be false in the confessional statement of the applicant over what is found true is so great that reliance on that confession deprives the accused of the substance of the fair trial and the protection of law, and, besides, it is necessary to evaluate the consequence of a departure from the statutory process of drawing the attention of the accused to what is considered an almost conclusively corroborative incriminating circumstance appearing in the case, particularly, if such a circumstance is capable of being pressed home to establish the accused's guilt. The departure from such of the legal processes as are ordained to ensure fair trial and justice tends (to use the language of their Lordships of the Privy Council in the case of *Ibrahim* v. *The King*, 18 C. W. N. 705: (A. I. R. (1) 1914 P. C. 155: 15 Cr. L. J. 326)

> "to divert the due and orderly administration of law into a new course which may be drawn into an evil precedent in future".

[10] The prosecution evidence, in this behalf, may be classified into several categories, with reference to their bearing on the confession. They are to prove (i) the negotiation by the applicant for borrowing and ultimate procurement of the crowbar with which the padlock and the embedded lock of the iron safe are alleged to have been broken by P. J. Patnaik, the co-accused; (ii) the movements of the applicant and P. J. Patnaik together in a suspicious manner on the eve of the alleged hour of occurrence and a short while thereafter, and the conversation between them regarding disposal of the stolen property said to have been overheard by one of the police constables; (iii) the applicant's conduct in getting planted a bundle of ten-rupee notes into the house of one of the constables in the barracks in order to inveigle the latter into complicity in the crime and to track off the course of investigation; (iv) applicant's leading the investigating officer to a *Murga* bush and producing a part of the alleged stolen notes concealed underneath in a barley tin, and (v) the applicant's retracted confession.

[11] The prosecution witnesses, whose evidence comes within the first, second and third categories as enumerated above, were all disbelieved by the learned Judges of this Court, and P. J. Patnaik was exonerated from complicity in the crime. A different version of the crime was supposed instead. The necessary and irresistible conclusions flowing therefrom is that so much of the confession as related to P. J. Patnaik's complicity in the crime and was sought to be corroborated by the evidence aforesaid must be held to have been ruled out as bolstered up in order to save P. W. 1 (Head-clerk)—the real thief, according to the ultimate finding of this Court, who was in a position of dominating the will and enjoying the confidence of the applicant. In this connection, it may be noted that as to P. W. 18, who was examined to establish a very important link incriminating the applicant, namely, his manoeuvring to foist the guilt on P. C. 22 (P. W. 11), the Court pronounced "no reliance can be placed on the worthless evidence of this witness for any purpose."

[12] For facility of reference, I shall quote below the remnants of the confession that alone can be said to have stood unscathed by the Court's condemnation:

> "He (according to the confessing accused P. J. Patnaik) gave me some bundle of G. C. notes and directed me to run away. . . . I kept some of money in a barley tin and concealed it inside a "Kia" bush. I put some of the money inside a cigarette tin and concealed it inside the Almirah of my house. Although there was search in my house in the night none could see the money. . . . So then I concealed the cigarette tin containing the money inside a cowdung heap on the way side. It was recovered during search. Afterwards I told all the facts. I showed the amount kept inside the barley tin."

The question arises whether this part of the confessional statement taken out of its context in which it was originally fitted can be relied upon after the corroborating proof was made unavailable to the prosecution. Stories told by the petitioner were designedly made to harmonise and fit into each other. When one story is rejected as incredible, the reliability of the other is necessarily affected. That the acquitted P. J. Patnaik gave the notes to the petitioner can no longer be assumed. Coming to that position, the Court had to surmise that some body else, most likely P. W. 1, was the thief, or, at any rate, abettor of theft. Leaving that out as a mere conjecture, the remnant of the confession would amount to the applicant petitioner acknowledging having concealed some money in the barley tin in the mango bush and in the cowdung heap. He is not according to the prosecution, associated with the recovery of the latter from the road side cowdung heap, but, with regard to the former, it has been proved that he produced them. The Investigating Officer has deposed that the accused first told him that he had kept the stolen money under the bush, and then produced. The statement that it was stolen money is obviously inadmissible being a confessional statement made to the Police Officer. Assuming that the very notes recovered were the ones that had been issued by the treasury for the use of the Police Office and had been stolen, the position reduced itself to this that the applicant petitioner received the stolen goods from some unknown source under circumstances yet unravelled and had concealed the same. If this is to be pressed home against the accused as an incriminating circumstance, he must be given an opportunity to explain. Such is the purpose for which an examination of accused under S. 342, Criminal P. C., is meant. It, no doubt, affords a very strong corroboration of the accused's confession that he came by some of the stolen money. From this, it may be presumed that he was either the thief or a receiver of stolen property.

[13] As this stage, I shall address myself to the judgment of this Court to demonstrate how the principles of natural justice have been disregarded in determining the applicant petitioner's guilt, particularly, after condemning almost whole of the corroborating evidence. The learned Judge says:

> "The case of Arjun Misra stands on a different footing. The confession that he made before the Magistrate though subsequently retracted finds corroboration from other evidence recorded in the case."

The corroborating circumstances are stated categorically to be (i) his knowledge of the contents of the iron safe; (ii) his opportunities of pilfering the keys from P. W. 1's house and making false keys; (iii) his being hand-in-glove with and enjoying the confidence of P. W. 1. for which it is said he can be regarded as *particeps criminis* with P. W. 1 as against whom, weight has been given to the suggestion of the accused P. J. Patnaik that in order to cover up his acts of misappropriation he resorted to the story of burglary; and (iv) his sudden disappearance from the Police Office at the time of roll call on the night of 17-11-1946 —the day of occurrence—the established position on the evidence is that the petitioner was present among all the Police Constables that had gathered on an alarm being given on discovery of theft at the Police Office but was found absent at the time of roll call which was decided to be taken probably for the purpose of finding out a clue to the crime and that a number of other constables also were absent at the time.

[14] I do not find anything in these circumstances that is demonstrably inconsistent with the facts on any assumptions other than the accused's guilt. The circumstances relied upon are rather conjectural. Their implications are, in my opinion, such as cannot bear the weight of any serious examination so as to read to the conclusion that the accused was none but guilty.

[15] In the course of the hearing, my learned brother Narasimham J. pointed out that the fact of the production of stolen properties from a place where they were secreted by him is a very strong incriminating circumstance and goes strongly to corroborate his confession, on its broad outline, shorn of all such surplusages as had been found to be not true, that he partook in the theft irrespective of whoever else be in the conspiracy with him. This brings into prominence whether the confession was voluntary. It was, no doubt, voluntary considered in the light of the finding that he had not been tutored by the Investigating Officer to make a confession; but the findings recorded in this Court leave no room for doubt that in weaving out a story in a manner so as to implicate P. J. Patnaik, he was under the influence of some interested unknown hand. This leads to the result that it was not a confession which was made with a view to making a full disclosure of the facts, as they are. Making allowance for such facts as have not yet been disentangled from the arena of the unknown and unproved and putting the prosecution case at the highest, the confession amounts to entangling the applicant as one who came into possession of the properties recently stolen, or, in other words, that the prosecution can be said to have established, nothing more and nothing less than, that the accused was in possession of the goods recently stolen from which an inference of guilt of either theft or receiving stolen properties may be deduced in the absence of any explanation as to the way in which they came into his possession. Before such an inference is made as is dictated by the principles of natural justice and rules of fair trial, he should be given an opportunity to explain. Denial of such an opportunity amounts to denial of fair trial. According to their Lordships of the Privy Council in the case of *Otto George Gfeller* v. *The King*, A. I. R. (30) 1943 P. C. 211: (45 Cr. L. J. 241):

> "If an explanation were given which the Jury think might reasonably be true, and which is consistent with innocence although they were not convinced of its truth, the prisoners are entitled to be acquitted inasmuch as the prosecution would have failed to discharge the duty cast upon it of satisfying the jury beyond reasonable doubt of the guilt of the accused, ... The accused did not have to prove his story but if his story broke down the jury might convict."

It is implicit in the rule laid down that the accused should be given an opportunity to explain. I have examined the replies given by the accused in his examination under S. 342, Criminal P. C. The incriminating circumstances now pressed against him were never put to him either directly or indirectly nor was there any other attempt to elicit an explanation from him. He was asked to explain why and under what circumstances he made a confession. His reply (the stock reply that often is resorted to by a confessing but subsequently retracting accused) is that he had been tutored by the Investigating Officer. This sort of examination of a general character might have left no lacuna if the confession were accepted or rejected, as a whole, but different considerations arise in the facts and circumstances of the present case, already dealt with, at length. In the case of *Dwarikanath Verma* v. *Emperor*, 37 C. W. N. 514: A. I. R. (20) 1933 P. C. 124: 34 Cr. L. J. 322), their Lordships of the Judicial Committee have taken pains to point out the seriousness of the failure to follow the statutory rule of legal process in a circumstance, such as this. Their Lordships were dealing with accused's failure to explain an incriminating circumstance upon which much stress was laid by the prosecution in order to prove the accused's guilt. They said:

> "It appears to their Lordships that in this respect the accused has serious ground to complain of his treatment. Section 342, Criminal P. C., provides that for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court shall question him generally on the case after the witness for the prosecution have been examined. . . . . The learned Chief Justice told the jury that the absence of blood in the body cavity was a vital point. If so, it is plain that under S. 342 of the Code it was the duty of the examining Judge to call the accused's attention to this point and ask for an explanation. Probably the departure from the statutory rule was due to the fact that one Judge examined the accused while another summed up. But it deprives of any force the suggestion that the doctor's (accused's) omission to explain what he was never asked to explain supplied evidence."

Applying the principles thus laid down to the facts of this case, it can be urged, with great force, on behalf of the applicant, that he makes a serious grievance of the departure of the elementary principle of a criminal trial consisting in the trial Judge's failure to ask him to explain the incriminating circumstances which looked so fatal to the accused's plea of innocence. I quite appreciate that this circumstance has been focussed on account of the findings recorded in this Court in the criminal revision. But such findings shall be deemed to be findings in the case and the accused's guilt or innocence must be determined in the setting of such findings.

[16] In my judgment, the accused can justly complain that, in this trial, the principles of natural justice have been disregarded, that there had been a departure from statutory rule of a basic character and non-compliance with the requirements of such fundamental procedure as are imperative in a criminal trial for the purpose of ensuring substance of fair trial. It would not be out of place to say that the accused had, at last, been driven to meet a case with which he was never confronted in the course of the trial. It shall be noted also that none of the circumstances relied upon in this Court, as tending to corroborate the retracted confession, had ever been made to appear to the accused in his examination as incriminating circumstances appearing in the evidence on record and requiring an explanation from him. Some of the circumstances either do not find any support from the evidence or find too slender a support which can hardly be sufficient to base a conviction upon. In the context that the applicant weaved out a false story to implicate P. J. Patnaik at the instance of P. W. 1, a non-incriminating circumstance can be easily conceived, in which the accused might have come by a part of the stolen goods without the necessary guilty knowledge and his conduct in concealing some under the bush might have been motivated for reasons explainable on hypothesis other than that of his guilt. This, if not anything else, makes it all the more imperative that he should have been given an opportunity to explain his conduct as it appears in his possession and production of stolen goods.

[17] The question that next arises for consideration is how to judge the fitness standard. The Judicial Committee of the Privy Council was not an appellate Court in criminal cases. They used to exercise the prerogative of His Majesty the King Emperor in matters criminal when there was miscarriage of justice brought about by disregard of the principles of natural justice, denial of substantial trial, and infringement of essential principles of justice and the like. In the case of *Muhammad Nawaz* v. *Emperor*, AIR (28) 1941 P.C. 132 : (43 Cr. L. J. 1) it had been laid down :

> "The Judicial Committee is not a revising Court of criminal appeal : that is to say, it is not prepared or required to re-try a criminal case, and does not concern itself with the weight of evidence, of the conflict of evidence or with inferences drawn from evidence, or with questions as to corroboration or contradiction of testimony, or as to whether there was sufficient evidence to satisfy the burden of proof. Neither is it concerned to review the exercise by the previous tribunal of its discretion as to permitting cross-examination as a hostile witness or in awarding particular punishments."

The earliest dictum of the Board pronounced was that of Lord Watson in the case of *In re Abraham Mallory Dillet*, (1887) 12 A. C. 459 : (56 L. T. 615), his Lordship said :

> "The rule has been repeatedly laid down and has been invariably followed, that Her Majesty will not review, or interfere with, the course of criminal proceedings, unless it is shown that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial or grave injustice has been done."

In the case of *Mohindar Singh* v. *Emperor*, 59 I. A. 233 : (AIR (19) 1932 P. C 234 : 34 Cr. L. J. 18) Lord Dunedin delivering the judgment of the Board laid down the limitations upon the interference of the Judicial Committee with convictions arrived at by tribunals charged with criminal jurisdiction, in the following words :

> "There must be something so irregular, or so outrageous, as to shake the very basis of justice."

Lord Porter, in the case of *Malak Khan* v. *Emperor*, AIR (33) 1946 P. C. 16 : (47 Cr. L. J. 489), relying on Lord Watson's words in delivering the opinion of their Lordships in *In re Abraham Mallory Dillet*, (1887) 12 A. C. 459 : (56 L. T. 615) made it clear that the Privy Council would not review or interfere with the course of criminal proceedings, unless it was shown that, by a disregard of forms of legal process, or otherwise, substantial or grave injustice had been done. When neither of these things are present, the Privy Council will not interfere on the ground that the evidence was wrongly valued or was not sufficient to justify the conclusion reached. It requires more than an allegation or even proof that a Court might take a different view of the compelling force of the evidence given.

[18] In my opinion, the scope of an appeal to the Supreme Court against a final order or sentence in a criminal proceeding has not at all been widened. That Court will have to interfere with convictions by local tribunals within the same bounds of limitations and restraints laid down by the Privy Council and the fitness has to be judged by the standard that that tribunal laid before it in granting special leave to appeal. The only change that the Constitution has introduced is to endow the State High Courts with powers to certify, or in other words, to grant leave to appeal.

[19] The applicant of this case was accused of having done some physical acts in furtherance of the common intention he shared with P. J. Patnaik. The acts were (i) aiding by procuring the implement for breaking open the iron safe by P. J. Patnaik, (ii) standing and waiting for a watch in order that P. J. Patnaik's commission of the crime is facilitated free of any fear from external agencies, and (iii)

receiving from P. J. Patnaik a share in the spoils. On the hypothesis that P. J. Patnaik did not commit the offences under Ss. 457, 380 and 461, the applicant's receipt of stolen property, the only wavering balance in the case against him, would not render him liable for the said offences. To convict him of the same offences, without proving anything more against him, appears to me so irregular and outrageous as to shake the very basis of justice. That there has been disregard of the form of legal process so vital to a criminal trial in the failure of compliance with the statutory rule of accused's examination under S. 342, Criminal P. C. admits of no doubt. I would, therefore, hold that this is a fit case for appeal. I entertain no doubt that there has been miscarriage of justice.

[20] I owe a duty to my learned brother Narasimham J. who was a consenting party to the judgment, sought to be appealed against, to say that he agreed with me in the conclusion of mine after much hesitancy and reluctance. But, however, he shares my view that there has been disregard of the statutory rule of examination of accused under S. 342, Criminal P. C. to his utter prejudice in his defence. The learned Government Advocate, who represented the State, frankly conceded that this is a fit case for appeal.

[21] Therefore, (to use the words of Lord Atkinson in the case of *Vaithinatha Pillai* v. *Emperor*, 21 I. C. 369: (36 Mad. 501 : 14 Cr. L. J. 577)), whatever doubts we may have of the applicant's innocence, or whatever suspicions we may entertain of his guilt or, however, great may be our reluctance that the decisions of this Court and of the Courts below shall be interferred with or overruled, we feel bound to certify that the case is a fit one for appeal to the Supreme Court within the meaning and intendment of Art. 134 (1) (c) of the Constitution of India.

[22] **Narasimham J.**—I have read with great care the reasons given by my Lord the Chief Justice while granting the certificate under Art. 134 (1) (c) of the Constitution. My hesitation and reluctance to grant such special leave were not so much due to my being a party to the judgment under appeal as to the doubts which I entertain regarding the fitness of this case for appeal to the Supreme Court as required by sub-cl. (c) of cl. (1) of Art. 134 of the Constitution. There was no provision similar to Art. 134 in the Government of India Act, 1935, and consequently there are no decisions dealing with the question as to what may be considered 'to be a fit case for appeal to the Supreme Court' against any judgment in a criminal proceeding of a High Court. But there are some decisions explaining similar provisions in cl. (c) of S. 109, Civil P. C., which also empowered the High Court to certify a case 'to be a fit one for appeal to His Majesty in Council.' The tests usually applied to determine fitness for the purpose of this clause were whether the point involved is one of

"great public or private importance and whether the litigation is not oppressively expensive and the elucidation of the real issues in the case by a trial of the suit is not unduly postponed or delayed: *Narsingha Charan* v. *Rajnity Prasad*, A. I. R. (21) 1934 Pat. 564 : (152 I. C. 301) and *Krishna Chandra* v. *Rajendra Narayan*, A. I. R (23) 1936 Pat. 465 : (15 Pat. 659)."

Some of these tests are obviously inapplicable to criminal proceedings. But the main test as to whether the point involved in of 'great public or private importance' if applied to the present case may not justify the granting of the certificate asked for. The only point involved in this appeal is whether when a portion of a confession in so far as it relates to the conduct of a co-accused has been held to be false, the residue of the confession is sufficient to sustain a conviction especially when it has been subsequently retracted. It is now well settled that it is unsafe to convict a person on his retracted confession unless there is adequate corroboration. There was some evidence of a corroborative nature such as the recovery of a large amount of cash from a place pointed out by the appellant. But this piece of corroborative evidence may not be utilised against the appellant because during his examination under S. 342, Criminal P. C., he was not specifically called upon to explain the same. Even then if a Court considers that the retracted confession is voluntary and that it suffices to support the conviction of its maker it is difficult to see how any point of 'great public or private importance' is involved.

[23] However, my Lord the Chief Justice has considered this to be a fit case for granting the certificate and I do not think it necessary to express disagreement with his view.

D.H. *Certificate granted.*

A. I. R. (37) 1950 Orissa 241 *[C. N. 46.]*

JAGANNADHADAS AND NARASIMHAM JJ.

Sri Krishna Chandra Gajpati Narayan Deo —Plaintiff— Appellant v. *K. Hanumantha Rao—Defendant— Respondent.*

A. F. A. D. Nos. 82 to 84 and 90 to 92 of 1945, D/- 21-2-1949, from decision of D. J., Berhampur, D/- 8-12-1944.

(a) Contract Act (1872), Ss. 211 and 212— Negligence of agent— Connection between negligence and misappropriation—Agent's liability.

Where it can be shown that a loss sustained by the principal is directly traceable to disregard on the part of the agent of directions issued to him regarding the conduct of business, even though such disregard may have been due to nothing worse than negligence or over-confidence in the honesty of others, such misconduct on the part of an agent is clearly actionable. [Para 5]

The defendant was the *sheristadar* of the Estate Huzur Office of the plaintiff. He was the ministerial head of the entire Huzur Office and was also the *ex officio* Treasury Officer. Money having been misappropriated by the employees in the office the plaintiff brought a suit against the defendant, his case being that the misappropriations were the direct result of the defendant's gross negligence. He accordingly sought to make the defendant liable for the loss occasioned to him by his negligence. It was found that apart from the duty of general supervision, there was no specific code of rules regulating the duties of the *sheristadar* and it was not shown that, in respect of any specific item, the misappropriation was reasonably likely to have come to the notice of the *sheristadar* if some kind of check or supervision was actually made and what, if any, such check or supervision should have been:

Held, that while the defendant was guilty of negligence and dereliction of duty, the suit must fail because no direct connection between the negligence and all or any of the items of misappropriation was established. [Para 6]

Annotation: ('46-Man.) Contract Act, S. 211, N. 1; S. 212, N. 1.

(b) **Limitation Act (1908), Art. 90— Knowledge contemplated by Article.**

The knowledge contemplated in Article 90 is knowledge of the facts constituting the neglect and not knowledge of the legal consequences of such facts. [Para 8]

Where the plaintiff, after investigation and inquiry into the negligence of his *sheristadar* which occasioned misappropriation of the plaintiff's money, framed a charge against him and he was removed from the service within a few days after the charge was framed, in a suit by the plaintiff seeking to make the *sheristadar* liable for the loss occasioned:

Held, that the knowledge which was clear from the wording of the charge relating to the facts constituting the misconduct of the defendant was not only tentative and, therefore, the plaintiff must be imputed with the knowledge of facts constituting negligence of defendant on the date on which the charge was framed and not on the date on which he was removed. [Para 8]

Annotation: ('42-Com.) Lim. Act, Art. 90, N. 4.

M. S. Rao and S. K. Ray—for Appellant.
P. V. B. Rao—for Respondent.

Jagannadhadas J. — These six second appeals arise out of six suits in which a common judgment was delivered by the trial Court as well as the first appellate Court. The plaintiff-appellant in all these appeals is the Maharaja of Parlakimedi. These six suits along with two other suits arise in the following circumstances. The plaintiff-Maharaja in the course of administration of his estate and collection of rents, obtains decrees for arrears of rent as against defaulting tenants. One section of his office staff attends to the steps necessary to be taken for realisation of these decrees by execution in various Courts. Monies are drawn from time to time from the Estate Treasury for expenses in connection with these execution proceedings towards court-fees, *batta* memos, *vakalats*, etc., and entrusted to the clerk or clerks concerned for getting necessary steps taken in the Courts. In or about August 1938, the plaintiff's Dewan received an anonymous information that the money drawn in the years 1937-38 for the above-mentioned expenses were to a very large extent misappropriated. As a result of the inquiry and investigation following thereon, it was found that a number of employees in the office were involved in it directly or indirectly and consequently eight suits have been brought against them for recovery of the amounts misappropriated, of which the present second appeals relate to six. It has been found by the appellate Court that the persons guilty of the actual misappropriation wholly or partly are (1) Venketasam Patnaik, (2) Sitharamamurti, and (3) Narasingha Rao. The suits have accordinly been decreed as against them and dismissed as against the others. We are in these second appeals concerned only with one K. Hanumantha Rao who is the sole respondent in all the appeals. He was the sheristadar of the Estate Huzar Office at the relevant period. The case of the plaintiff is that the misappropriations were the direct result of his gross negligence and he accordingly seeks to make him liable for the loss occasioned to him by his negligence. The system and method of working in vogue in the plaintiff's Estate Office relating to the execution of rent decrees have been fully described in paras. 8 and 9 of the trial Court judgment and it is unnecessary to repeat the same. The sheristadar is the ministerial head of the entire Huzur Office and is also the *ex officio* Treasury Officer. When monies are required for purposes of execution and decrees, the indent and the pay-slip after being prepared in the office and checked by the Head Clerk of the section go to the Sheristadar who sanctions them for payment. The concerned clerk draws the money thereupon and after utilising the money and filing the execution petition prepares the contingent bill with a certificate that the money has been utilised for the specified execution petitions. The contingent bill is checked by the Head Clerk and is sent to Sheristadar who approves of it by his initials and sends it on the Dewan who forwards it to the Audit Branch and on their check and after their scrutiny the bill is passed for adjustment, as against the advance drawn under the original pay-slip. It may also be mentioned that the Sheristadar as the holder of power-of-attorney for the Maharaja signs the execution petitions. In this process it is clear that each item passes through the hands of the Sheristadar both before actual payment and after the alleged expenditure. The learned Subordinale Judge came to the conclusion that the Sheristadar was negligent in not exercising due supervision over the work of his subordinates in his branch and that the plaintiff's loss was occasioned thereby. He therefore held that the sheristadar was liable to make good the loss to the plaintiff. On appeal the learned District Judge on the contrary held that this lack of general supervision was not enough to saddle the sheristadar with the liability and that the lack of supervision cannot be said to be the real and effective cause of the misappropriation since the conscious act of the person who actually misappropriated intervened. He held that in order to saddle the defendant with the liability it was necessary for the plaintiff to establish that the action of the sheristadar amounted to misconduct, or to fraudulent and deceitful action, which was not proved in this case. Thus though the two Courts came to different conclusions on the question of the liability of the sheristadar, they agreed in dismissing the suits as against him on the ground that the suits were brought after three years from the date when the plaintiff became aware of the defendant's negligence and that accordingly they were barred by limitation.

[2] The learned counsel for the appellant argues that the views of the Courts below both on the question of the substantive liability of the sheristadar and on the question of limitation are erroneous.

[3] As regards the substantive liability of the sheristadar there is no clear evidence in the case as to what exactly are the defined duties of the sheristadar. One of the specific duties relevant to these cases of which evidence was sought to be given in the trial Court was that before the sheristadar signed the execution petitions for the plaintiff as his power-of-attorney holder, (which he was doing in all these cases) he was expected to satisfy himself that the petitions bear the court-fee stamps and thereby satisfy himself that the money already drawn by him for the same has been utilised. In support of this, two employees of the Estate P. Ws. 1 and 7 were examined, but their evidence has been rejected by both the Courts below and therefore it must be taken that it was not proved that this was one of the duties of the sheristadar. The only other evidence of the duties of the sheristadar is furnished by Ex. 135/A dated 15th February 1923. It is the proceedings issued by the then Dewan stating that the duty of supervising the accounts branch and the suits branch of the Huzur Office is cast upon the sheristadar who will be solely responsible to the Dewan for the effecient working of the Huzur Office. It is not disputed that the work relating to the execution of decrees is part of the work of the suits branch. There is no evidence to show that this work has ceased to be part of the duties of the sheristadar since 1923 until the relevant period, namely, 1937-38. The sheristadar himself as D. W. 2 admits that it was the duty of the sheristadar to exercise general supervision of all the departments in the office, but he says he is responsible for the Treasury Department meaning thereby that his personal responsibility is confined to the Treasury Department, because he was the *ex officio* Treasury Officer. He says later in his evidence that as sheristadar, it was not part of his duty to supervise the work of the suits section including rent decree execution although it was under his general supervision and he says that no previous sheristadar used to supervise the work of the suits section including rent decree execution.

[4] It is obvious that in view of proceedings (Ex. 135/A) dated 15th February 1923, and his own admission that the general supervision of the office was part of his duty he cannot absolve himself by the plea that his predecessors were not exercising supervision over the suits branch and that he was not also expected to do the same. The schedules to the plaints in these suits show that a substantial amount amounting to over Rs. 2000 has been misappropriated by the concerned clerks over a period of an year and odd. The decree amounts for which these executions were intended must be considerable. The contingent bills which passed through him to the Dewan bear the certificate of the concerned clerk that the amounts have been actually spent. It was therefore his clear duty to satisfy himself by some kind of check or inspection that there was no gross abuse. It would be a very difficult situation for a person in the position of the plaintiff, if one of his ministerial officers could escape responsibility by saying that his supervision was meant to be nothing more than a mere nominal formality. There can be therefore no doubt that the sheristadar in this case was guilty of negligence. The question however still is, whether his negligence in the circumstances of this case, can be taken to be the direct cause of the loss occasioned to the plaintiff by the misappropriation of the clerks. In Halsbury Laws of England (Edn. 2, Vol. 23) para. 843, the position is summed up as follows:

> "Although a plaintiff may be able to trace even a consequential connection between an injury he has suffered and the negligent act or omission of another the law does not necessarily attach liability to the person who has been negligent. Liability only attaches to negligence which is either the sole effective cause of the injury complained of, or is so connected with it as to be a cause materially contributing thereto. In other words, the plaintiff must prove both that the defendant was negligent and that his negligence caused or materially contributed to the accident. The injury must be capable of being traced as an effect to the negligent-act or omission. The guiding principle is that a person is liable for all the consequences which in fact directly flow from his negligence."

[5] In applying this principle, it is necessary to distinguish between the cases where the person negligent, stands in no relation to the person affected by the negligence and the case of the person standing in kind of fiduciary relation to each other as principal and agent in the way in which the present plaintiff and his sheristadar are related. Sections 211 and 212, Contract Act, relating to the duty of an agent to the principal has to be borne in mind in judging whether or not the loss occasioned by misappropriation cannot reasonably be said to be the direct consequences of the admitted lack of any supervision. In this connection the case in *A. C. Muukherji* v. *Municipal Board, Benares*, A. I. R. (11) 1924 ALL. 467: 46 ALL. 175, is very instructive. The question in that case was about the responsibility of the Executive Officer of a Municipal Board for the defalcation of his subordinates. The Court came to the conclusion that the Secretary had no direct hand in the misappropriations, but was guilty of negligence. The learned Judges stated as follows:

> "The cardinal point to our minds is his (Secretary's) responsibility for the entries in the daily cash book. It was certainly never intended that the signature of the Executive Officer appearing at the close of each day's entries in this cash book should be a mere formality. The Municipal Board relied upon these responsible officers exercising a real and effective supervision over the preparation of this most important register. This fact was emphasised in the rules and regulations laid down for the guidance of these officials . . . Where it can be shown that a loss sustained by the principal is directly traceable to disregard on the the part of the agent of directions issued to him regarding the conduct of business, even though such disregard may have been due to nothing worse than negligence, or over-confidence in the honesty of others, such misconduct on the part of an agent is clearly actionable."

Later in the judgment with reference to the contention that if the Executive Officer had been diligent in the discharge of his duties, the defalcations committed would either have been impossible or would have been immediately detected, or at any rate that the defalcation would have been detected after some reasonable time and that all defalcations thereafter must be taken to be the direct consequences of the negligence, the learned Judges, while rejecting the earlier portion of this argument pointed out that so far as the later portion of the argument was concerned, the difficulty was to fix any one definite date from which that argument could be given effect to, and they added as follows:

> "We are gravely conscious of the responsibility which attaches to us in determining this issue, in view of the large number of Government officials, employees of railways, of corporations, of business concerns of all sorts, on whom it has been laid frequently, as a part only of multifarious duties to bear the responsibility of checking and certifying to the correctness of accounts, the actual maintenance of which is necessarily on the shoulders of lower paid subordinates. We can certainly commit ourselves to no conclusions which would reduce the responsibility of such superior Government servants or other officials to a mere farce. On the other hand we feel that a too stringent insistence upon their responsibility in the matter of observance of all rules and regulations laid down for their guidance might result in making it practically imposible for some of them to carry on the work laid upon their shoulders."

Having thus expressed themselves, the learned Judges in that case limited the responsibility of the Executive Officer to those items where the evidence affected him with personal notice of the arrival of a remittance, the embezzlement of which he failed to prevent, and where in their opinion, the embezzlement would have been prevented by the most ordinary and casual scrutiny of the entries in the accounts. If I may say so with respect, I entirely agree with the principles and standards laid down in this ruling.

[6] The difficulty however in the way of the plaintiff in this case is that apart from the duty of general supervision, there is no specific code of rules regulating the duties of the sheristadar We have also not been shown that in respect of any specific item, the misappropriation was reasonably likely to have come to the notice of the sheristadar if some kind of check or supervision was actually made and what if any such check or supervision should have been. In order to draw our attention to any specific item such such as double payments or the like which might have been easily prevented by a casual check, we gave opportunity to the appellant's counsel after the conclusion of the hearing by re-posting the case to 30th November 1948 and 7th February 1949, but we have not been shown any instance where a casual check by the sheristadar would have led to the disclosure of any specific item of misappropriation. While therefore the defendant — sheristadar must be pronounced to be guilty of negligence and dereliction of duty, we are unable to differ from the view taken by the learned District Judge that the direct connection between the negligence and all or any of the items of misappropriation has not been established. It therefore follows that the plaintiff's suit must fail on the merits.

[7] Coming next to the question of limitation, is not now disputed before us that the proper Article that is applicable in this case is Art. 90, Limitation Act. Under that Article the starting point for limitation is the date when the neglect or misconduct becomes known to the plaintiff. In this case, as already stated the inquiry by the Dewan into the defalcation started on an annonymous information in or about August 1938. On that there was investigation and as a result of that investigation and

inquiry (as appears from the proceedings of the Dewan dated 30th March 1939, marked as Ext. 41/A) a charge dated 5th December 1938 was framed as against this defendant and also individually as against the other employees. On receipt of the various explanations the Dewan drew up his proceedings and passed orders as against the various employees including the sheristadar on 30th March 1939. It would appear, however, that the various employees were actually removed from service on 13th December 1938 that is almost immediately after the charges were framed. The contention for the plaintiff-appellant is that the cause of action for the suit arose on 13th December 1938, when the sheristadar was removed from service. Both the Courts below have held that the plaintiff must be held to have knowledge of the acts constituting neglect on the part of the sheristadar at the latest by 5th December 1938, when a formal charge was given to him and that the dismissal does not furnish the starting point of the limitation. It is urged for the plaintiff-appellant that the charge at the most discloses only what may be called a "tentative" knowledge on the part of the plaintiff about the negligence of the defendant and that when he framed the charge against him and gave him an opportunity for explanation, it would not be reasonable to fix the plaintiff with final and definite knowledge of his negligence, because it may be that he may come to a different conclusion after seeing the explanation of the defendant. It is urged that to hold otherwise and to lay down that if a principal, coming to be appraised of the agent's misconduct framed a charge and gives him an opportunity for explanation and waits to finally make up his mind after considering the explanation, he would do so at the peril of limitation running against him for any civil remedy that he may ultimately have against his agent for such misconduct, would be to penalise a fair-minded investigation of the charge. While there is considerable force in this contention, there is no scope for any such view on the facts of this case. The charge (Ex. B) dated 5th December 1938 is as follows:

> "The Clerk P. V. Venkatasam of this office who was entrusted with money from time to time for filing E. Ps., *battas* etc., in Chicacole Rent Court, misappropriated about Rs. 2,700 during the last two years.
>
> "The sheristadar, Mr. K. Hanumantharao who has been issuing the amounts from time to time should explain why he did not exercise sufficient supervision over this clerk seeing that large amounts were being entrusted to him. He should also explain how he issued some amounts on bills prepared on loose sheets of papers and at times issued amounts for filing E. Ps., without even signing E. Ps., as an authorised agent. He should also explain how he issued certain amounts without even signing in the bill book and at times issued the amounts on the authority of the Court Clerk himself, without the attestation of the suits Head-Clerk or execution Clerk regarding the correctness of the amount claimed."

[8] As already stated it is clear from the proceedings of the Dewan (Ex. 41/A) that this charge was framed after investigation and inquiry and it is therefore reasonably clear in this case that the plaintiff or his Dewan had previous full knowledge of all the facts stated in the charge That it was not tentative is clear from the fact that the defendant was removed from the service on 13th December 1938, that is within a few days after the charge was framed against him and long before the final proceedings on the charge were passed on 30th March 1939. Therefore the plaintiff or his Dewan had sufficient knowledge of the facts prior to 13th December 1938, that is, at the latest on 5th December 1938, which made them to remove the defendant from service. They therefore cannot turn round and say that the knowledge which is clear from the wording of the charge relating to the facts constituting the misconduct of the defendant and which was the result of precedent investigation and inquiry was only tentative. In this connection it is useful to refer to the case in *Anamalai Chettiar* v. *N. M. Cawasjee*, A. I. R. (25) 1938 Rang. 253: (1938 Rang L. R. 457 F. B.) and *Janki Koer* v. *Mahabir Prasad* A. I. R. (1) 1914 Cal. 888: (25 I. C. 706), which lay down the principle that the knowledge contemplated in Art. 90 is knowledge of the acts constituting the neglect and not knowledge of the legal consequences of such facts. I have no doubt therefore on the facts of this case that the plaintiff must be imputed with the knowledge of the facts constituting the negligence of the defendant by 5th December 1938. The suits are all therefore also accordingly time-barred.

[9] The dismissal of the suits consequently by the Courts below is correct and the second appeals must accordingly be dismissed with costs. The respondent will get the consolidated fee of Rs. 100 only in respect of the entire batch of second appeals.

[10] **Narasimham J.**—I agree.

V.R.B. *Appeals dismissed.*

A. I. R. (37) 1950 Orissa 245 *[C. N. 47.]*

RAY C. J.

Hadibandhu Misra—Petitioner v. *King.*

Criminal Revn. No. 321 of 1948, D/- 8th August 1949, from order of Magistrate, 1st Class, Cuttack, D/- 23rd November 1948.

Criminal P. C. (1898), S. 256 — Remaining witnesses — Witnesses whose names were not disclosed before charge — Right of prosecution to examine.

There is no justification for limiting the words "remaining witnesses" in S. 256 to those who were in the list of witnesses who could have been examined by the prosecution in the first instance, but were not actually examined under S. 252. Section 256 clearly enables the Crown (Prosecution) to examine witnesses who had not been examined, or whose names had not been disclosed before the charge was framed: A. I. R. (32) 1945 Lah. 201 (F. B.), *Dissent.*; A. I. R. (29) 1942 Bom. 214, *Approved.* [Para 8]

Annotation: ('49-Com.) Criminal P. C., S. 256 N. 9.

(b) Criminal P. C. (1898), S. 252 (2)—Duty under sub-s. (2).

The filing of a list of witnesses either in the charge-sheet filed by the investigating officer (or by the complainant) would not relieve the Magistrate of the duty cast upon him by sub-s. (2) of S. 252. It is a duty of the Magistrate which must be performed in all its essentialities. Such a duty he can be relieved of only when either the complainant or the public prosecutor has intimated to the Magistrate that he has closed the prosecution case. The mere filing of a list of witnesses will not do. [Para 13]

Annotation: ('49-Com) Criminal P. C., S. 252 N. 7.

M. S. Rao — for Petitioner.

B. K. Pal and Government Advocate—for the King.

Order.—The petition is by the complainant. He feels aggrieved by the order of the trying Magistrate (Shri S. S. Roy) refusing to examine some more witnesses for the prosecution at the stage of the trial where S. 256, Criminal P. C., came into operation.

[2] The facts are that after a long and chequered career, the criminal case started by the petitioner, came to the file of Sri S. S. Roy for disposal. On the date, he received the file, he asked the complainant (petitioner) to produce his witnesses on the following date, on the said date, that is 19th August 1948, the complainant could not be present in Court and an application for excusing his absence was filed. At his instance, the case was adjourned, but the complainant was required to file a list of witnesses within two days. Thereupon, three witnesses were summoned for the prosecution and were present in Court on the next date. They were examined and (partially) cross-examined before the charge was framed. After charge, they were further cross-examined and dischaged. The accused was asked to plead. He pleaded not guilty and claimed trial. He was asked to produce his witnesses on the next date. On that very day, prosecution asked for leave to summon some more witnesses. This was disallowed with the following observations of the Magistrate :

> "The case was transferred to my file on 17th July 1948, and the complainant was asked to produce his witnesses on the next date, i. e., 19th August 1948, on which the complainant did not turn up and he was asked to file a list of witnesses without fail within two days, which the *complainant has not complied with till now* and instead filed a petition to summon three witnesses all of whom have been already examined and cross-examined and the accused examined. Just before fixing up a date for defence the complainant files a petition to examine some more witnesses. In view of the fact stated above the petition is rejected."

[3] This order of the learned Magistrate is the subject-matter of attack in this revision. It is claimed by the learned Government Advocate that the Magistrate could not, without violating the provisions, which are as mandatory as anything can be, of the Criminal Procedure Code, allow the prosecution an opportunity to call more witnesses. He relies very strongly upon a Full Bench decision of the Lahore High Court in the case of *Heman Ram* v. *Emperor*, A. I. R. (32) 1945 Lah. 201 : (47 Cr. L. J. 143 F. B.), which lays down as emphatically as it can that considering the scheme of the code, the words "remaining witnesses", occurring in S. 256, should mean those witnesses who have been named by the complainant or any public servant in charge of the prosecution case under sub-s. (2) of S. 252. This conclusion, according to their Lordships, owes itself to three considerations: (1) That the words "the evidence of any remaining witnesses, for the prosecution, shall next be taken etc." were introduced into S. 256 of the Code of 1898 as consequential to the amendment of S. 254 of the said Code by insertion of the words "or at any previous stage of the case". Under the next preceding Code of 1882, charge could be framed only when such evidence and examination have been taken and made, (ii) That any other interpretation would irreparably prejudice the accused in his defence enabling, as it would, new and fresh evidence to be sprung upon him, and (iii) That the accused should lose the advantage of making such statements as he pleases after hearing the exmination of all the witnesses the prosecution has to examine.

[4] The necessary research for pragmatic treatment of the subject adopted by the Lahore High Court should be carried a little further in order to reach a more convincing result, particularly so, as it has given a contrary indication to what would result from giving a full plain grammatical meaning to the words "any remaining witnesses shall next be taken up." The words "any remaining witnesses" are very wide, but it is sought to be limited to these only that have been named under S. 252 (2) but not examined so far. My first objection to this construction is that if it were so intended, the words "the remaining witnesses" instead of "any remaining witnesses" should have been used. It cannot be presumed or pre-supposed that the draftsman should commit a grammatical mistake such as that unless he had an intention to convey a wider meaning. Witnesses for the prosecution would be those that are acquain-

ted with the facts of the prosecution case and are able to give evidence for it. Of them such as have not been examined till then shall necessarily be "remaining witnesses" The object of using "any" instead of "the" is to widen rather than to limit the meaning of the words that follow.

[5] I shall now address myself to a historical retrospect of the legislation on the subject. The Code, previous to that of 1872, could not be made available to me. I shall, therefore, start with that Code. In that Code, Ss. 190, 191, 192, 193 and 194 and 213 to 221 (both inclusive) prescribe the procedure for trial of warrant cases. Of them, Ss. 192 and 193 are of general character empowering the Magistrate to summon and examine any witness at any stage of a proceeding, whose evidence, he considers essential to the enquiry or trial and ancillary to examine the accused from time to time without previous warning. Section 194 relates to adjournment of inquiries and trials. Sections 190 and 191 correspond approximately to S. 252 though with some significant difference in their respective texts. Section 190 enjoins upon the Magistrate to examine the complainant and

> "of such persons as are stated to have knowledge of the facts which form the subject-matter of accusation and the attendant circumstances."

The next section, in chronological order, is S. 215 and it deals with discharge. Explanation III of the section prohibits such an order until the evidence of witnesses named for the prosecution has been taken. It may be noted that the word 'named' in the explanation refers to the facts of naming of witnesses for the prosecution which must be either by the complainant or by any prosecuting officer. This envisages S. 252 (2) of the Code of 1898 which is but a reproduction of S. 362 of the 1872 Code. Section 216 deals with framing of charge. This more or less corresponds to S. 254 of the Codes of 1882 and 1898 (the present one). It did not, as it stood till the amending S. 16 of Act XI [11] of 1874, indicate at what stage of the taking of prosecution evidence it could be framed. That it could be framed before examining all the prosecution witnesses could not be doubted. The section opens with the words "if the Magistrate finds that the offence is apparently proved" this might happen according to the Magistrate, before the taking of entire prosecution evidence or might not happen at all till after it—in the latter case, the accused had to be discharged under S. 215 of the Code. Explanation III, already referred to, was added to the section in 1874. The framer of the latter Act gave the following explanation of the necessity for the addition:

> "When the complainant has been examined and a *prima facie* case established against the accused, there seems no reason why the Magistrate should not frame the charge without waiting for all the witnesses for the prosecution to be examined." (see commentaries by H. T. Prinsep on the Code of Criminal Procedure Acts, X [10] of 1872 and XI [11] of 1874 Fifth Edition, 1875, page 190.)"

The same notable commentator, in his commentary of 1875 in connexion with its effect on the accused's defence, observes at page 190, in the following words.

> "It is impossible to predict the exact effect of this alteration of the law on trials of warrant cases, to which it alone applies. Under Ss. 217, 218, the accused persons is required to enter up on his defence as soon as the charge has been framed, read and explained to him, it would be obviously unfair to the accused to place him at this disadvantage of exposing his defence before the evidence for the prosecution has been closed or been sent in by the police. The Code nowhere requires that all the witnesses for the prosecution shall be examined, unless the Magistrate contemplates to discharge the accused (S. 215. Expln. III), and S. 362 empowers the Magistrate to summon such of these persons as he thinks necessary."

[6] The clear position under the Code, read with or without the amendment of 1872, already referred to, was that a Magistrate could frame a charge as soon as he thought it was apparently proved or, in the words of later Codes, that the evidence gave grounds for presuming that the accused had committed an offence. At the next stage, the accused was called upon to plead and enter upon defence in course of which he could recall and cross-examine the prosecution witnesses. It is not clear whether he should cross-examine the prosecution witnesses before or after examination of his own witnesses. However, there was no express provision entitling the prosecution to examine his remaining witnesses but the prosecution's right to do so was considered inherent in the scheme of the Act. I shall here quote a passage from an unreported judgment of the Madras High Court (12th September 1864, 18th December 1864).

> "It is unnecessary for Magistrate to examine more witnesses than are sufficient to convince him of the truth of the charge and in that view he is competent under S. 342 to put questions to accused. *The answers given to these questions if any are given will generally have at great effect as to the witnesses necessary to be examined on the part of the prosecution*, and if after the complainant has been examined questions put to the accused elicit answers which leave no doubt as to the commission of the offence, there seems to be no reason why the Magistrate should not then frame the charge and call upon the accused to plead.'

Emphasis is upon the underlined (here italicised) portions of the above quotation. The provision that would, in such cases, empower the Magistrate to summon and examine the "remaining prosecution witnesses" would necessarily be the general provision contained in S. 351 and the specific provision applicable to warrant case trials contained in S. 192 of the Code. But nothing in these provisions could prevent the Magistrate from examining the said remaining prosecution witnesses, after the accused exposed and entered upon his defence altogether.

[7] The Code of 1872 was succeeded by that of 1882. This latter Code was completely redrafted but there was hardly any change in the scheme thereof in the procedure of warrant cases trials Chap. XXI, (Ss. 251 and 259) relates the procedure. Section 252 which reads:

> "When the accused appears or is brought before a Magistrate, such Magistrate shall proceed to hear the complainant (if any), and take all such evidence as may be produced in support of the prosecution.
>
> The Magistrate shall ascertain, from the complainant or otherwise, the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence of the prosecution and shall summon to give evidence before himself such of them as he thinks necessary."

replaces as nearly as may be Ss. 190 and 362 (Para 1) of the preceding Code with slight variation in the language. According to it, the Magistrate shall examine the witnesses produced by the prosecution, such of them as are stated to have knowledge of the facts and circumstances relevant to the prosecution case before the accused. It may be urged that there is room for a contention that under S. 190 the Magistrate was bound to take all evidence either produced or named by the prosecution. But I have already shown that under those sections read with S. 216, the Magistrate could frame a charge before exhausting examination of all the witnesses for the prosecution. In this connexion, S. 254 needs examination. The section reads: (Code of 1882).

> "If when *such evidence* and examination have been taken and made, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this chapter, which such Magistrate is competent to try, and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused."

Emphasis is upon the words such evidence "such evidence" must, in my view, not mean "all the evidence." This appears from the difference in language of the next preceding S. 253. It relates to discharge of accused and it has prescribed therein that if upon taking *all the evidence* referred to in S. 252 and examining, if necessary, the accused, the Magistrate finds no case against the accused, he will discharge him. I will contrast the words "all the evidence" in this section with "such evidence" in S. 254. Such evidence cannot have reference to "evidence" referred to in S. 253. "Such evidence" necessarily, therefore, must mean "such evidence as may be produced in support of the prosecution referred to in S. 252." And in a more extended sense may include

> "the evidence of such of the persons named as persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution as the Magistrate thinks necessary to summon."

The net result is that S. 254 contemplates a case of framing the charge before exhausting examination of all the prosecution witnesses either produced or named. The remaining witnesses as named but not summoned may have to be examined if need be after the accused produces and enters upon his defence. As a part of making out his defence, he could under S. 256 recall and cross-examine the prosecution witnesses. This is the result of the combined operation of Ss. 256 and 257. Here too, the accused is at a disadvantage that after he exposes his defence and enters upon it, the prosecution can examine further witnesses. This could be achieved by invoking the Court's power under S. 540 which consists of two parts first discretionary and the second obligatory with the Magistrate. The point that I am driving at is that in all the previous Codes, the Magistrate's power to frame the charge before examining all the prosecution witnesses and his power and the prosecution's right to examine the rest of the witnesses after the accused enters upon his defence had been provided for. The object of the amendment in the Code of 1898, therefore, was neither to confer any new power upon the Magistrate by inserting the words 'or at any previous stage of the case' in S. 254 nor to give the prosecution any fresh right to examine the remainder of his witnesses by insertion, in the text of S. 256, of "the evidence of any remaining witnesses for the prosecution shall next be taken." If any improvement was either aimed at or achieved by the amendment of S. 254, it was this that unlike under the previous Code, the Magistrate could frame a charge after merely examining the complainant and before examining any of the witnesses either produced or named by him which latter he was bound to do under the Code of 1882. This change, however, does not affect the position that we are considering. Section 256, however, relieves the accused from the most embarrassing and damaging situation of his having had to disclose his defence before the prosecution exhausts examination of all its witnesses. That the prosecution ought to have the right to adduce some evidence after the accused claims to be tried is nothing but a square deal to the prosecution without any corresponding disadvantage to the accused. It has been observed by Munir J. in the Lahore Full Bench case *Heman Ram* v. *Empepor*, A. I. R. (32) 1945 Lah. 101 : (47 Cr. L. J. 143 F.B.) that the accused may be embarrassed to make a statement as to his defence before the close of the prosecution but this does not necessarily arise in all cases and in all eventualities. He is simply either to refuse to plead or not to plead or claim to be tried and to state whether he should cross-examine and if so which of the witnesses for the prosecution whose evidence has been taken. This process would not involve him in any exposure of his defence. The Legislature safeguards his interest by compulsory closure of the prosecution case whether the prosecution wishes it or not before the accused is called upon to enter upon his defence and produce his evidence. The Legislature has also secured for the benefit of the accused that after all the prosecution witnesses are examined and cross-examined he shall be examined under S. 342 of the Code in relation to circumstances that appear against him. For these reasons, with my utmost deference to the decision of the Lahore Full Bench I cannot persuade myself to be in accord with it.

[8] I shall next refer to certain decisions which support the view that I have taken. In the case of *Emperor* v. *Nagindas Narottamdas*, A. I. R. (29) 1942 Bom. 214 : (43 Cr. L. J. 761), Sir John Beaumont C. J. (as he then was) held that the learned Sessions Judge was wrong in thinking

> "that remaining witnesses means (in S. 256) those who were in the list of witnesses who could have been examined by the prosecution in the first instance, but were not actually examined under S. 252. It seems to me that there is no justification for limiting the words in that sense. I think that S. 256 clearly enables the Crown (prosecution) to examine witnesses who had not been examined, or whose names had not been disclosed before the charge was framed."

I am entirely in accord with great respect with this view.

[9] In the case of *Crown Prosesutor, Madras* v. *C. V. Ramanujulu Naidu*, A. I. R. (31) 1944 Mad. 169 : (45 Cr. L J. 401) Horwill J. of Madras High Court having had to interpret S. 256, observes as follows:

> "One cannot presume that because the Magistrate has framed a charge, that all the prosecution evidence has been taken. The expression 'remaining witnesses for the prosecution' in S. 256 (1) presumably means the remaining witnesses that the prosecution wishes to examine."

[10] This is the interpretation given to this expression by Chandavarkar J. in *Emperor* v. *Percy Henery Burn*, 11 Bom. L. R. 1153: (4 I. C. 268:10 Cr. L. J. 530), an opinion with which I respectfully agree. It seems to me the general rule of law and equity is that the accused (prosecution ?) is at liberty to examine whomsoever it pleases until the prosecution case has been closed...the prosecution is not closed until the defence begins.

[11] In the case of *Hansraj Harajiwan* v. *Emperor*, A. I. R. (27) 1940 Nag. 390 : (42 Cr. L. J. 208), Gruer J. held :

> "It seems to me that if witnesses have been accepted by the Court as competent for the prosecution at any stage before the point for further examination under S. 256 arrives, even if that stage is after charge, they come under the category of 'any remaining witnesses.' I, therefore, perfer the Bombay ruling on the point."

[12] In the case of *Emperor* v. *Percy Henery Burn*, 10 Cr L.J. 530:(4 I.C. 268: 11 Bom. L R. 1153), Chandavarkar J. observed at p. 531 :

> "They complained that contrary to law the Magistrate had allowed the prosecution, after the charges had been framed against the accused and they had made statements, to examine fresh witnesses, who had not been named originally and summoned as required by cl. 2 of S 252, Criminal P. C. This procedure, it was contended, was a direct violation of the terms of S. 256 of the Code, which provides that after the charge has been framed and the accused has pleaded not guilty 'the evidence of any remaining witnesses for the prosecution shall next be taken.' According to the learned counsel, 'any remaining witnesses' must refer only to those who as required by S. 252, cl. 2 have been named by the complainant and summoned by the Magistrate before the framing of the charge. I do not think that the expression in question is necessarily limited to those witnesses. It is wide enough to include any witness, who according to the prosecution, is able to support its case, though he has not been summoned provided of course that he is not sprung upon the defence all of a sudden and sufficeint opportunity is given to the latter to prepare for the cross-examination of the witness."

[13] Even assuming that the view adopted by the Full Bench of the Lahore High Court is correct, this rule has to be made absolute. Their Lordships have said that the filing of a list of witnesses either in the charge-sheet filed by the investigating officer (or by the complainant) would not relieve the Magistrate of the duty cast upon him by sub-s. (2) of S. 252, Criminal P. C. It is a duty of the Magistrate which must be performed in all its essentiality. Such a duty, according to the Full Bench decision, he can be relieved of only when either the complainant or the public prosecutor has intimated to the Magistrate that he has closed the prosecution case, the mere filing of a list of witnesses will not. This leads us to consider whether the learned Magistrate, in this case, has discharged the function assigned to him under sub s. (2) of S. 252. On his own showing, the complainant has never told him the names of all persons, acquainted with the facts of the case. He, at that stage, probably in order to enable the Magistrate to frame the charge, might have examined some of his witnesses knowing full well that he could, if he liked, examine further witnesses after their cross-examination after the framing of the charge was over. What the law requires is that it must be brought home to the complainant or whosoever is in charge of the prosecution that he is required to disclose the names of all the persons known to him, to be acquainted with the facts of the case. This ascertainment which is the duty of the Magistrate has never been done in this case. From my experience at the

bar, I know it is seldom performed by Magistrates. They should please take note for the future. Under the circumstances giving the words "any remaining witnesses" the limited meaning which the learned Government Advocate contends for, the prosecution should still be entitled to examine more witnesses. As observed by Chandavarkar J. the Magistrate was simply to see that nothing is sprung as a surprise upon the accused or nothing is done by way of prejudicing him in his defence. I should allow this petition on the limited ground that the Magistrate not having exercised his function under sub-s. (2) of S. 252, nor the complainant having ever been told by the Magistrate to disclose the names of all his witnesses nor having it been intimated by the complainant that he closed the prosecution case, it would be denying justice to the complainant not to allow him to examine further witnesses whom he wants to examine being persons acquainted with the facts of the case. In my opinion, however, if the prosecution discovers a fresh witness or witnesses competent to depose but not cited earlier, it will have the right to examine before the accused enters upon his defence. Mr. Pal, who followed the learned Government Advocate, as representing the private party (the accused) urges that to allow the prosecution an opportunity to examine fresh witnesses will affect him injuriously with regard to his right of cross-examination. What he means to say is that had the new witnesses sought to be examined been examined along with the prosecution witnesses already examined, he should have cross-examined them in the light of the former and should have got an opportunity of confronting them with varying statements of several witnesses on a common topic. This prejudice, however, can be easily avoided by directing the Magistrate to give him every facility in order to relieve him of those disadvantages after he finishes cross-examining the new witnesses examined by the prosecution to recall the prosecution witnesses already cross-examined and discharged for the purpose of further cross-examination. This would remove the only grievance that the accused can make out of it. In consideration of what I have said above, I would hold that the Magistrate is wrong in disallowing the complainant to examine further witnesses. He should now proceed from that stage and summon witnesses named by the complainant and allow them to be examined and cross-examined. He should allow the accused to further cross-examine the former witnesses if they so like.

[14] I should, therefore, allow this petition and make the rule absolute.

V.B.B. *Petition allowed.*

A. I. R. (37) 1950 Orissa 250 *[C. N. 48.]*

JAGANNADHADAS AND PANIGRAHI JJ.

Alli Babi and others—Appellants v. *Krishna Sahu and others—Respondents.*

A. F. O. D. No. 16 of 1944, D/- 27-4-1950, from decision of Sub-J., Berhampur, D/- 13 5-1944.

(a) Tenancy Laws — Madras Estates Land Act (I [1] of 1908), S. 3 (15) and Explanation—Occupation — Meaning of —Tenants executing muchalika denying tenancy — Tenants, if in occupation.

What S. 3 (15) of the Act contemplates is occupation and not mere possession. Occupation should be actual and cannot be constructive or derivative. [Para 5]

Three Mahomedan brothers *A*, *B* and *C* based their title to the land in suit under the Estates Land Act. *B* and *C* who had executed a *muchalika* expressly repudiated their tenancy under the landlord and deposed that they were never in possession of the suit land. The third brother *A* claimed title by reason of adverse possession and never set up in the plaint any title under the Act:

Held, that the brothers never purported to act or claim on behalf of a body of shareholders or on behalf of a joint family and that there was no occupation by them within the section. [Paras 5 and 6]

(b) Tenancy Laws— Madras Estates Land Act (I [1] of 1908), S. 6—"Admitted to possession"—Meaning of — Forcible induction, if admission.

'Admitted to possession' can only mean an induction by consent or contract between the parties. A person cannot be forcibly inducted upon land by a landholder, nor can such an act be characterized as 'admission.' [Para 7]

(c) Limitation Act (1908), Art. 144 — Adverse possession — Mahomadan family — Possession of one member, if on behalf of all.

It cannot be assumed as a matter law or as a matter of fact that possession of one member of a Mahomedan family is the possession of all its members. [Para 14]

Annotation: ('42-Com.) Limitation Act, Arts. 142 and 144, N. 35.

(d) Limitation Act (1908), Art. 144 — Permissive possession — Compromise decree — Admission o plaintiff's title.

Where there has been a compromise decree and admission of title of the plaintiff and acceptance of the character of permissive possession of the defendant, it is obvious that adverseness of possession is terminated and that the continuance of the possession after the decree is *prima facie* only permissive. [Para 15]

Annotation: ('42 Com.) Limitation Act, Arts. 142 and 144, N. 66.

(e) Tenancy Laws — Madras Estates Land Act (I [1] of 1908), S. 6—Applicability — Section, if applies to trespasser in possession.

Section 6 does not apply to a mere trespasser in possession. Where, therefore, a suit against a person is filed by the landlord on the footing that he is a trespasser, the fact that after the decree is passed such person is permitted to continue in possession to realise the crops that he had already raised cannot be construed as an admission to *ryoti* possession. [Para 16]

(f) Tenancy Laws — Madras Estates Land Act (I [1] of 1908), S. 6 — Mustajar, if entitled to benefits of section.

A *Mustajar* is not a person who can by virtue of his *Mustajari* lease as such be treated as entitled to the benefits of S. 6. [Para 17]

(g) Tenancy Laws — Madras Estates Land Act (I [1] of 1908), S. 6 — Demand of rent —Possession denied — Admission as ryot.

A demand for rent can only be used as an element from which implied tenancy can be deduced, but it is not by itself enough to constitute tenancy. [Para 18]

Where out of three persons from whom the rent was demanded, two denied that they ever had any possession and the third repudiated that he was in any way bound by the lease and claimed to have been in independent possession hostilely to the landlord:

***Held*, that the demand of rent did not constitute an admission to possession as a *ryot*. [Para 18]**

D. V. Rao —for Appellants.

B. Das, S. K. Ray and B. K. Pal—for Respondents.

Panigrahi J.—The unsuccessful plaintiffs in the lower Court are the appellants in this appeal. They claimed the suit-lands measuring about 139 *bharanams* in Asinipur, an *inam* village in Attagada Estate, by virtue of their long possession and, in the alternative, claimed to have acquired occupancy right in them under the provisions of the Madras Estates Land Act. It will be enough to state in broad outline the salient facts giving rise to this claim. One Mir Ashraff was admittedly the Jahagirdar of this village of Asinipur, within the limits of which the suit lands are situate. Fateh Mohammad was his sister's son, to whom he gave his daughter, Ali Bibi in marriage. Plaintiff 1 is the widow of Fateh Mohammad, plaintiff 2 is his daughter and plaintiffs 3, 4 and 5 are his sons. Plaintiffs 6, 7 and 8 are the legal representatives of plaintiff 3 who died during the pendency of the suit. The plaintiffs alleged that the lands described in Sch. B of the plaint had been given by the late Jahagirdar, over fifty years ago to his sister, and that they remained in possession of the same for this period. They also alleged that they occupied the suit-lands, described in Sch. C of the plaint, about thirty years prior to the date of the plaint and were in possession thereof till 1936 when they were evicted by an order of the Sub-divisional Magistrate, Chatrapur, in a proceeding under S. 145, Criminal P. C. The plaintiffs further alleged to have been admitted to possession of the suit lands under a registered *muchalika* dated 22nd November 1928 (Ex. J.) executed by plaintiffs 4 and 5 in favour of defendant 1 and thereby to have acquired a right of occupancy under the provisions of the Madras Estates Land Act. The contention of defendant 1 was that he purchased the suit-lands, described in Sch. C from the late Jagirdar Mir Ashraff by a registered sale deed dated 8th July 1911 (Ex. D) and that he had been in possession of these lands through his tenants. He also alleged that he never admitted the plaintiffs into possession of the suit-lands as *raiyats*. Defendant 1 filed a suit in the Court of the Subordinate Judge, Berhampur, in O. S. No. 41 of 1925 against Fateh Mohammad and his sons, viz., the present plaintiffs 3 to 5, for ejectment and obtained a compromise decree on 3rd August 1927 (Ex. E/4) whereby the plaintiffs agreed to surrender possession of the suit lands within 15 days after *Magh Purnima* day of *Fasli* 1337. This decree was not executed, but defendant 1 alleges that the plaintiffs surrendered possession in pursuance of the terms of the compromise. On 22nd November 1928 the plaintiffs 4 and 5 executed Ex. J in favour of defendant 1 agreeing to occupy the suit lands, besides some other lands in the village, for a term of two years. But it is said that the plaintiffs neither paid the stipulated rent nor did they vacate the lands after the expiry of the lease. It is further alleged that when defendant 1 sent registered notices to plaintiffs 3 to 5 demanding rent for the preceding years (Exs. 3, 3/a and 3/b) plaintiff 3 disclaimed all knowledge of the *muchalika* and plaintiffs 4 and 5 replied that the lease deed was a nominal document and that they had not been put in possession of the lands in accordance with the terms of the lease. It is said that the lands were left fallow in 1935 and that in May 1936 defendant 1 leased them out to four different persons under four registered *kabuliyats* (Exs. X, X/1, X/2 and X/3). During the harvest season of that year the plaintiffs cut and carried away the crop pertaining to these lands, which led to the institution of a criminal case of theft by Lakhano Goudo, one of the tenants of defendant 1 (under Ex. X/3) and to the initiation of proceedings under S. 145, Criminal P. C. by the Sub-divisional Magistrate, Chatrapur, as there was likelihood of a breach of the peace, who directed the eviction of the plaintiffs from the lands as already stated above.

[2] The learned Subordinate Judge who tried the suit found that the plaintiffs had failed to prove their title either by way of a grant or through long possession. He also found that plaintiffs 3 to 5 entered upon the lands as tenants in 1921 (relying upon Ex. C, dated 19th July 1921 executed by plaintiff 5 in favour of defendant 1) and that they were evicted in the year 1928 in pursuance of the terms of the compromise decree dated 3rd September 1927 in O. S. No. 41 of 1925 (Ex. E/4). The learned Subordinate Judge has further found that at the end of the period stipulated in the compromise the plaintiffs did surrender possession of the lands and again entered upon the lands under a fresh registered *muchalika* in the year 1928, viz., Ex. J. He accordingly dismissed the plaintiffs' suit.

[3] Two points have been pressed by Mr. D. V. Rao, learned counsel appearing for the plaintiff-appellants:

(1) firstly that as the plaintiffs have been found to have been in possession since 1922 upto 1935, they are entitled to claim the suit-lands by

reason of adverse possession and (2) secondly that since plaintiffs 4 and 5 are alleged to have been admitted into possession and have in fact been in possession for over 12 years all the plaintiffs have acquired a right of occupancy in the lands under the provisions of the Madras Estates Land Act as they all belong to one joint family.

[4] It is but fair to state at the outset that Mr. Rao very soon realized in the course of his arguments that his first contention, based on adverse possession could not be substantiated. Whatever might be the nature of the possession prior to the compromise decree, it cannot be said that possession of the plaintiffs remained adverse after the passing of the compromise decree. In the compromise the plaintiffs distinctly admitted defendant's title and agreed to give up possession of the suit lands, but they were allowed to retain the lands as defendant's tenants till *Magh Purnima* day of *Fasli* 1337; and it is admitted by the defendant himself **that the** plaintiffs did surrender possession. Even if it is assumed that the plaintiffs did not actully surrender possession, there is still a clear break in the nature of the plaintiffs' possession by reason of their admission of the defendant's title and the agreement to deliver up possession. Adverse possession, in order to confer a title, must be continuous for the full period of 12 years. This contention must therefore fail and has been rightly abandoned by the learned counsel appearing for the plaintiffs.

[5] The second point debated by Mr. Rao is more subtle and attractive. The plaintiffs' argument is that the *mustajari* lease, Ex. J dated 22nd November 1928, executed by plaintiffs 4 and 5 expressly declared that they were put in possession of the suit lands; and if it be found that prior to that date the plaintiffs did not, as a fact, relinquish possession, they would be entitled to rely upon their possession from the year 1921—under Ex. C the lease deed executed by plaintiff 5 on 19th July 1921—right up to the year 1936 when they were dispossessed by the Receiver appointed by the Sub-divisional Magistrate. Even if we were to accept the contention of the plaintiffs that defendant 1 never, in fact, took possession of the suit-lands at any time prior to the order passed by the Sub-divisional Magistrate in the proceeding under S. 145, Criminal P. C., the plaintiffs have still to establish actual occupation of the lands as a physical fact in order to support their claim to occupancy right under the Madras Estates Land Act. What S. 3 (15) of the Act contemplates is occupation and not mere possession. Occupation should be actual and cannot be constructive or derivative. Having regard to the pleadings and the evidence in the case, it is difficult to hold that the plaintiffs ever purported to act or claim on behalf of a body of shareholders or on behalf of a joint family. The registered *muchalika* of the year 1928 was executed by plaintiffs 4 and 5 but defendant 1 regarded plaintiff 3, Abdul Ahad, as one of his tenants and demanded rent in his registered letter dated 15th November 1935 (Ex. 3/b) addressed to plaintiff 3. Plaintiff 3 in his reply (Ex. 4) dated 6th December 1935, expressly repudiated the alleged tenancy and said: "No land of yours was ever under my cultivation" and further added that he has been in possession of the lands "only since the death of my father", which admittedly was in 1927. Plaintiff 3, therefore, cannot claim any title under the provisions of the Madras Estates Land Act, nor was such a title set up in the plaint itself. In para. 7 of the plaint it is expressly alleged that:

> "Plaintiff 3 was no party to the *muchalika* and the Sub-divisional Magistrate was wrong in the view that plaintiff 3 was a tenant."

Plaintiff 3 claimed title by reason of adverse possession and he never set up in the plaint any title under the Estates Land Act. He cannot therefore now turn round and claim title through plaintiffs 4 and 5 particularly in view of his express statement in his registered reply to defendant 1 (Ex. K dated 6th December 1935) that he had no joint family business with plaintiffs 4 and 5 and that their act was not binding upon him. Plaintiffs 4 and 5 also stated in their reply to defendant 1 (Ex. K-1 dated 6th December 1935) that they were not looking after their joint family properties nor did they have any joint family business. They further stated that they did not take possession of the lands under the *muchalika* and that they were not liable to pay any rent. In their evidence before the Court they repeated these statements. Plaintiff 5 who was examined as P. W. 1, deposed that he had been driven out of the family by his father and that he had no possession of any land belonging to his father. Plaintiff 4 was examined as P. W. 2 and he deposed that the *muchalika* which he had executed in 1928 was not carried into effect as he and his brother plaintiff 5, could not take possession "because our brother Ahad did not give up those lands and the tenants did not give up their lands". P. Ws. 6 to 9 were examined to prove the possession of the plaintiffs but, as has been observed by the learned Subordinate Judge, their evidence is absolutely worthless and can be of no help to the plaintiffs.

[6] The position thus is that plaintiffs 4 and 5 who executed the *muchalika* in 1928 and may be deemed to have been admitted to possession expressly repudiated their tenancy under defen-

dant 1 and deposed that they were never in possession of the suit lands. Section 3 (15), Madras Estates Land Act defines a *ryot* as meaning "a person who holds *ryoti* land on condition of paying rent due upon it". The explanation which was added to this definition section in 1934 reads as follows:

> "A person who was occupying ryoti land for a continuous period of 12 years shall be deemed to be a ryot for all the purposes of this Act."

On their own showing plaintiffs 4 and 5 never occupied these lands at any time and it would therefore be an extraordinary interpretation of the section to hold—notwithstanding their express denial—that they were in occupation.

[7] Reference was also made to S. 6 of the Act which prescribes that a ryot admitted by a landholder to possession of ryoti land shall have a right of occupancy in his holding. In view of the attitude taken by plaintiffs 4 and 5, it is difficult to hold that they were admitted into possession of the lands in this case. 'Admitted to possession' can only mean an induction by consent or contract between the parties. A person cannot be forcibly inducted upon land by a landholder, nor can such an act be characterized as 'admission'. We have, therefore, no difficulty in rejecting this contention as untenable. The recitals made in the *muchilika* cannot avail the plaintiffs.

[8] In view of our finding that plaintiff 3 has failed to prove occupation in his own right and plaintiffs 4 and 5 have expressly disclaimed title through occupation, we have no option but to accept the finding of the learned Subordinate Judge and hold that the plaintiffs' suit has been rightly dismissed. Plaintiffs 1 and 2 neither alleged, nor proved any independent title. In the result none of the plaintiffs has made out any claim to the suit-lands.

[9] This appeal fails and is dismissed with costs.

[10] **Jagannadhadas J.**—I agree with my learned brother as to the result of this appeal.

[11] The two questions that have been raised before us are (1) that the plaintiffs have acquired title to the suit lands by adverse possession, (2) that in any view they have acquired occupancy rights under the Madras Estates Land Act. In order to decide about the validity of either of these contentions, it is necessary to determine in the first instance the facts relating to the possession of the suit lands. It is not in dispute that the suit lands originally belonged to one Mir Ashroff and that defendant 1 purchased the same under Ex. D dated 9th July 1911. The earliest reliable material showing the connection of any member of the plaintiffs' family with the suit-lands is a registered *muchalika*, Ex. C, dated 19th July 1921, executed by plaintiff 5 in favour of defendant 1 for one year. On 24th July 1925 defendant 1 filed a suit O. S. No. 41/25 for ejectment of plaintiffs 3, 4 and 5 and their father, Fate Mohammad, from the suit-lands on the allegation that they unlawfully and unauthorisedly trespassed upon the same in July 1922, that is, presumably on the expiry of the term in Ex. C. On 3rd August 1927 this suit was compromised under Ex. 2 by plaintiffs 3, 4 and 5 who agreed to give up possession to defendant 1 within 15 days of *magh* fullmoon day of *Fasli* 1337, which may be taken to correspond to about the end of February 1928. We find next that plaintiffs 4 and 5 executed a *muchilika* Ex. J in favour of defendant 1 relating to the suit-lands and quite a number of other lands in the village. We have then in November and December 1935, exchange of letters between defendant 1 and plaintiffs, where it is asserted by defendant 1 that plaintiffs 3, 4 and 5 are in possession of the suit-lands and a demand for payment of *bhag* rent is made on that footing, but plaintiffs 4 and 5 repudiate that they had possession of the suit-lands at any time, while plaintiff 3 asserts that he was under no liability to pay any rent since he was not a party to the *muchilika*, Ex. J. This is followed by a period of serious dispute about the possession culminating in proceedings under S. 145 in which a preliminary order was made on 1st December 1936 and the property was attached and taken over by the receiver. The facts above narrated show that one or other of the members of the plaintiffs' family has had occupation or possession of the lands from July 1921 to till about the end of 1935, with a possible break between March 1928 and November 1928. The plaintiffs maintain that there was no such break while defendant 1 maintains that in pursuance of the compromise decree, Ex. 2, he obtained delivery of possession and then leased it out under Ex. J to plaintiffs 4 and 5. The learned Subordinate Judge has accepted defendant 1's case that there was such a delivery. In accepting the case of defendant 1 in this behalf, the learned Subordinate Judge was considerably influenced by the fact that as a part of the compromise of the suit, O. S No. 41/25, by Ex. 2, there was the compromise of another litigation then pending between the parties. That related to the dispute of another 61 *Bharanams* of *inam* lands in the suit-village which were then in possession of plaintiffs 3, 4 and 5 and their father and which was the subject-matter of O. S. No. 523/1923.

That suit was decreed in favour of the present defendant 1 and was pending in appeal in A. S. No. 66/27 at the time of the compromise, Ex. 2. It was also stipulated by the said compromise that defendant 1 was to give up his rights under the decree in O. S. 523/1923. It is not admitted that there has been any execution in pursuance of the compromise decree in O. S. 41/25, nor any restitution in the decree obtained in O. S. 523/23. The learned Subordinate Judge thinks that this was so, because both the parties observed the terms of the reciprocal compromise and that therefore no steps through Court on either side became necessary, that is to say, that defendant 1 obtained possession under O. S. 41/25 without having to apply for possession through Court. But the learned Subordinate Judge has overlooked that in respect of O. S. 523/23, though defendant 1 had obtained a decree for possession in his favour there is nothing to show that plaintiffs 3 to 5 did not continue in possession pending the appeal and by the date of the compromise. They, therefore, may not have required the assistance of the Court to maintain the possession which they probably had while defendant 1 would have to obtain possession from plaintiffs 3, 4 and 5 whether amicably or through Court. By the compromise plaintiffs 3, 4 and 5 no doubt agreed to deliver possession, but within eight months of the time stipulated for delivery, that is, by the time of the harvesting season, defendant 1 obtained the *muchilika*, Ex. J, for the suit-lands amongst others from plaintiffs 4 and 5. There is no positive evidence on the side of defendant 1 to show that in between during that period of eight months, he had actual possession of the suit-lands. No doubt there are usual recitals in Ex. J that by its date, the lands covered thereby were in the prior possession of the defendant, but these are the usual kind of recitals in such a document and are not by themselves proof of the truth of the same. Defendant 1 has not examined himself to show that he did obtain actual delivery of possession and that he carried on cultivation operations during the cultivation season of 1928 in respect of the suit-lands. I am, therefore, unable to agree with the finding of the learned Subordinate Judge that defendant 1 obtained delivery of possession in 1928 in pursuance of the compromise, Ex. 2.

[12] I have therefore no doubt that defendant 1 was not in actual cultivating possession of the suit-lands at any time between 19-7-21, the date of Ex. C and 1-12-36, the date when the suit-lands were attached by the Sub-divisional Magistrate in proceedings under S. 145 in M. C. 23/36, Ex. H.

[13] This, however, does not amount to saying that all the plaintiffs as a group were in possession of the suit lands right through. So far as plaintiffs 1 and 2 are concerned, they have not been shown to have had any kind of connection with the possession of the suit-lands at any time. Plaintiff 1 is the wife of Fate Mohammad and plaintiff 2 is the daughter. They were not parties to the suit O. S. 41/25, Ex. E, which proceeds on the assertion that it was only plaintiffs 3, 4 and 5 and their father that trespassed on the suit-lands in 1922. Fate Mohammad died pending that suit and the compromise, Ex. 2, was subsequent to his death. They were not on the record at the stage of the compromise decree as legal representatives of deceased Fate Mohammad and there is nothing to show that they ever obtained any possession as such legal representatives after Fate Mohammad's death. Plaintiffs 1 and 2 had therefore no sustainable claim arising out of the possession of the suit lands at any time.

[14] As regards plaintiffs 3, 4 and 5, the earliest *muchilika* of 1921, Ex. C, shows possession in plaintiff 5 alone. The plaint, Ex. B in O. S. 41/25, shows that plaintiffs 3, 4 and 5 were in possession of the suit-lands along with their father and that may be taken to have continued until their father's death. It may be assumed that by the date of the compromise, Ex. 2-A, all the three of them were in joint possession, but it is with reference to the possession subsequent to the compromise, Ex. 2, dated 3-8-27, that the difficulty as to who out of plaintiffs 3, 4 and 5 remained in possession, arises. As to this the plaintiffs have no clear and consistent case. It must be remembered that plaintiffs 3, 4 and 5 belonged to a Mahomedan family and it cannot be assumed either as a matter of law or as a matter of fact that possession of one is the possession of all. With reference to this period, that is, from March 1928, to December 1936, there is no specific case in the plaint, but only the general allegation that all the plaintiffs have been in possession of the suit-lands continuously for about thirty years. Plaintiffs 4 and 5 alone executed the *muchilika*, Ex. J, in November 1928, and if at all, it may be said that they were in possession of the suit-lands by virtue of that *muchilika*. When however defendant 1 gave notice under Ex. 3 to the three brothers on the footing that all of them were in possession, plaintiffs 4 and 5 by their reply, Ex. 4-A, repudiated that they were in possession of the suit-lands or obtained possession by virtue of Ex. J and maintained that their brother, plaintiff 3, was in possession from prior to Ex. J. Plaintiff 3 by his reply, Ex. 4, accepted that position. Even in evidence given in the suit that is also the position taken up by them. Plaintiff 3 having

died pending the suit, has not been examined, but plaintiff 4 has examined himself as P. W. 2. He says that the *muchilika*, Ex. J, was not carried into effect and that he and his brother plaintiff 5 could not get possession because the other brother, plaintiff 3, did not give up the lands. Therefore he maintains even in the evidence in the suit that by the date of the *muchilika*, Ex. J, and thereafter, it was plaintiff 3 and not either of plaintiffs 4 and 5, who was in possession of the suit-lands. He no doubt says that plaintiff 3 was joint with them, that plaintiff 3 was cultivating the lands and that he and his brother plaintiff 5 used to get their share of the land from plaintiff 3. But as already stated these parties are not members of a Hindu joint family and in absence of any specific case put forward in the plaint that this family had adopted the Hindu usages in respect of their holding of properties, it cannot be assumed that the possession of plaintiff 3, if any, was the possession of the three brothers. The learned Subordinate Judge was inclined to hold that plaintiffs 4 and 5 when they executed the *muchilika*, Ex. J, did so on behalf of the entire family of plaintiffs and that such possession as they had under Ex. J was on behalf of the family as a group. I see, however, no justification for any such assumption. When the plaintiffs themselves in the notices exchanged with defendant 1 and also at the trial maintain that plaintiff 3 alone had possession since 1928, and when there is no allegation that Ex. J was executed by plaintiffs 4 and 5 on behalf of the family, I do not think it is justifiable to find a case that the three brothers formed one legal entity as a group and that the possession of one must be deemed to be possession of all. On the evidence therefore the only finding relating to possession one can arrive at is that from 1922 to 1928 all the three brothers and their father were in possession of the suit-land, but since 1928 to 1936 it was plaintiff 3 alone that was in possession. But there is nothing to show how the possession of plaintiff 3 for the latter period was in any way derived from the possession of the father and three brothers during the earlier period so as to enable the possession of the two periods to be tacked on.

[15] On this finding clearly no question as to any extinction of title of defendant 1 by adverse prossession can arise. Apart from it, however, even if for argument's sake the possession of plaintiff 3 since 1928 is to be treated as possession on behalf of the family, it does not follow that the plaintiffs have acquired any title by adverse possession. The argument of the learned counsel for the appellant is that as a fact the possession was continuous from 1922 to 1936 and the mere existence of the compromise decree, Ex 2, does not interrupt that adverse possession. This might have been the correct position, if Ex. 2 were not a compromise decree. As stated by the Privy Council in *Subbayya Pandaram* v. *Mahomed Mustafa*, A.I.R. (10) 1923 P.C. 175 : (46 Mad 751), a mere declaration about the title of the plaintiff in a decree against the defendant who was in actual adverse possession by the date of the suit and who continued in possession in spite of the declaration, does not interrupt adverse possession, but on the other hand it emphasizes the fact that possession was adverse. This principle, however, can have no application where the defendant himself by the compromise in the decree admits the title of the plaintiff and undertakes to give up possession treating himself as a person holding permissive possession. In the Privy Council case above cited, the declaration was on contest and therefore there was no change in the animus of the possessing party. But where there has been a compromise and admission of title of the plaintiff and acceptance of the character of permissive possession of the defendant, it is obvious that adverseness of possession has been terminated and that the continuance of the possession after the decree is *prima facie* only permissive. The recitals in Ex. 2 make it clear that plaintiffs 3, 4 and 5 who were parties thereto, accepted the title of defendant 1 and of their continuing in possession on a permissive footing. The case of the acquisition of the plaintiffs' title by adverse possession is therefore unsustainable.

[16] Learned counsel for the appellant, however, has therefore mainly concentrated his arguments on the case of acquisition of occupancy rights under the Madras Estates Land Act. There can be no doubt that defendant 1 who is the purchaser of Darmilla Inam lands from the Jagirdar, Mir Ashraf, is a land-holder under the Madras Estates Land Act. Plaintiffs' counsel accordingly relies both on S. 6 as well as S. 3, sub-s. (15), Explanation. Under S. 6 a persen admitted by a land-holder into possession of a *ryoti* land as a *ryot* acquires occupancy rights in respect of those lands. It is argued that there has been such an admission to possession as a *ryot* of one or other members of the family either under Ex. 2 or Ex. J, or by virtue of the demand for payment of rent under Ex. 3. This argument proceeds on the assumption that the possession of one or other members of the family is to be treated as possession of the group, an argument which I have held to be untenable. I am also inclined

to think that none of the transactions indicated in Exs. 2-J and 3 can be treated as amounting to admission to possession as a *ryot*. Under Ex. 2 no doubt it is recited that the present plaintiffs 3, 4 and 5 will retain the suit lands as defendant 1's tenant until *Magh* full moon day of *Fasli* 1337 and deliver 1/2 share of the produce of the suit-lands to defendant 1 and then deliver up possession to defendant 1 within 15 days thereafter. It is hardly right to construe this as amounting to an admission to possession as a *ryot*, merely from the lax use of the word "tenant". It has been held in the case in *Venkatachala Naidu* v. *Ethirajammal*, A. I. R. (8) 1921 Mad. 65 : (44 Mad. 220), that S. 6 does not apply to a mere trespasser in possession of the suit lands. The suit against the plaintiffs by defendant 1 which ended in compromise was filed on the footing that they were trespassers. The fact that they were permitted to continue in possession to realise the crops that they had already raised, cannot be construed as an admission to *ryoti* possession.

[17] As regards Ex. J there are no doubt various recitals therein which entitle the lessee to cultivate the lands comprised therein, but the lease itself is in respect of a very large extent covering about 1400 *Bharanams* of land, while the suit lands are only 215 *Bharanams*. It would appear from the reply notices given by plaintiffs 4 and 5 themselves that most of the lands covered in Ex. J were in possession of the tenants. It is, therefore, somewhat debatable whether Ex. J was not in the nature of a *Mustajari* lease where the *Mustajar* had the right to bring unoccupied and waste lands into cultivation. Such a person is not one that can by virtue of that lease as such be treated as entitled to the benefits of S. 6 (see *Suri Satti Butchayya* v. *Parthasarthy Appa Rao*, A. I. R. (9) 1922 P. C. 243 : (44 Mad. 856) and *Subba Rao* v. *Narayanaswami Naidu*, A. I. R. (4) 1917 Mad. 399 : (36 I. C. 727)).

[18] As regards the argument that the demand for rent under Ex. 3 would itself constitute an admission to possession as a *ryot*, that might have been so, if the persons so demanded accepted their liability under the demand. Such a demand can only be used as an element from which implied tenancy can be deduced, but it is not by itself enough to constitute tenancy. (See *Deo Nundan Pershad* v. *Meghu Mahton*, 34 Cal. 57: (5 C. L. J. 181)). In the present case out of the three persons from whom the rent was demanded, two, that is, plaintiffs 4 and 5 deny that they ever had any possession and plaintiff 3 repudiates that he was in any way bound by the lease, Ex. J, and claims to have been in independent possession hostilely to defendant 1. It is, therefore, impossible to treat this demand Ex. 3 as in any way helping the plaintiffs.

[19] The next argument on which the claim for occupancy rights is pressed on behalf of the plaintiffs is that apart from any question of admission to possession as *ryots*, the plaintiffs have been in continuous occupation of the lands from 1922 to 1936. It is, therefore, urged that on account of the definition of the word "*ryot*" under S. 3, sub-s. (15), Explanation, taken with S. 6, Madras Estates Land Act, the plaintiffs are entitled to occupancy right. Section 3, sub-s. (15) defines the word "*ryot*" as follows :

> "'*Ryot*' means a person who holds for the purpose of agriculture *ryoti* land in an estate on condition of paying to the land-holder the rent which is legally due upon it.
>
> *Explanation*.— A person who has occupied *ryoti* land for a continuous period of twelve years shall be deemed to be a *ryot* for all the purposes of this Act."

[20] Plaintiffs' counsel strongly relies on this explanation. But the difficulty in the way of the plaintiffs is that on the facts, as found, there is no continuity of occupation by any one single person or a single unit. It is only on the assumption that the possession of one, out of plaintiffs 3, 4 and 5 is the possession of all, that there is room for this contention of the plaintiffs' counsel. This, however, I have found against as a fact. This contention therefore is equally unsustainable.

[21] The real difficulty of the plaintiffs in this case on the question of occupancy rights is the shifting cases that they have put forward at various stages with reference to possession and the specific claims that they have made in their plaint of occupancy rights in plaintiffs 4 and 5 only. In para. 7 of their plaint they have stated that plaintiffs 4 and 5 are to be considered as occupancy *ryots* of the suit lands by virtue of the provisions of the Madras Estates Land Act. On the findings it is plaintiff 3 that was in possession by the date the suit-lands were attached in proceedings under S. 145. On their own showing their possession, if any, which may have been joint with plaintiff 3 had ceased to exist long ago.

[22] As the learned Subordinate Judge has pointed out, the question of occupancy right of the plaintiffs, though raised in the pleadings, does not appear to have been seriously fought out at the stage of the trial, apparently on account of the difficulties that have been pointed out with reference to their shifting cases as regards possession. There is also the difficulty that there is no clear proof whether the suit-lands are *ryoti* lands or private lands, but if that was the only difficulty, we might have considered on its merits the request of the plaintiffs' counsel for a further opportunity to be given to clarify

the question as to whether these lands are private lands or *ryoti* lands. It is unnecessary to deal with that request in view of the conclusion that we have come to.

[23] In the result, therefore, I agree that the appeal fails and must be dismissed with costs.

[24] After conclusion of the hearing reference has been handed up to us on behalf of the appellants to two cases in *Ramaswami Aiyar* v. *Ramayya*, A. I. R. (28) 1941 Mad. 571: (200 I. C. 333) and *Doraiswami Naidu* v. *Hussain Saheb*, A. I. R. (13) 1926 Mad. 975 : (97 I. C. 767). They do not touch any of the questions discussed above.

V.R.B. *Appeal dismissed.*

A. I. R. (37) 1950 Orissa 257 [*C. N. 49.*]

JAGANNADHADAS J.

Harihar Mahapatra and others—Plaintiffs — Appellants v. *Hari Otha and others — Defendants—Respondents.*

Second Appeal No. 67 of 1946, D/- 11th October 1949, from decision Sub-J., Berhampur, D/- 21st November 1945.

(a) Inam—Inam register — Evidentiary value — Evidence Act (1872), S. 35.

Entries in the Inam register are not conclusive, but are strong piece of evidence not to be lightly disregarded, excepting for solid and substantial reasons or on account of other rebutting or contrary evidence. [Para 9]

Annotation : ('46-Man.) Evidence Act, S. 35 N. 19.

(b) Riparian rights — Right of irrigation from stream or channel—Right to put up dam.

Once the right of irrigation from a stream or a channel is made out it is one of the ordinary modes of the exercise of such a right to put up a bund or a dam across it for the purpose of exercising that irrigation right. What, however, requires to be proved is not the right to put up a dam, but the nature, extent and duration of the dam so as not to interfere with the rights of the other persons lower down the stream. The proof of that will depend upon the established user in relation to the above matter. But, though a right to put up a dam is established, it does not follow that there is necessarily a right to put up a particular dam like a masonry dam at a particular place. That is a matter to be established by positive evidence. [Paras 10 and 11]

(c) Civil P. C. (1908), S. 80 — Notice given by father—Father dying prior to filing of suit—Notice cannot be availed of by son. [Para 13]

Annotation: ('50-Com.) Civil P. C, S. 80 N 20 Pt. 1.

(d) Civil P. C. (1908), S. 80 and O. 1, R. 10 (2) — Necessary party — Government — No notice to Government—Dismissal of suit as whole.

Where in a suit to establish the plaintiff's right to irrigate his lands from the waters of a channel the plaint in categorical terms mentioned the cause of action which involved a Government Officer, the relief in the plaint was, in terms, asked as against all the defendants including the Government and a specific issue was also raised relating to the question of the rights of the Government in the channel, but no notice was given to the Government under S. 80 :

Held, that the Government could not be dismissed out of the suit as an unnecessary party and the suit treated as against the other defendants but that the plaint as a whole should be rejected and not merely a part. [Para 16]

Annotation : ('50-Com.) Civil P. C., S. 80 N. 2 Pt. 7 ; O. 1 R. 10 N. 25.

S. K. Ray — for Appellants.

M. S. Rao and Advocate-General—for Respondents.

Judgment.—Plaintiffs are the appellants in this second appeal. They own only about 1/3rd of the lands in *Inam* village called Agulpada. Defendants 1 to 4 are owners of lands in the neighbouring village of Gopinathpur which also is an *Inam* village. They have been sued as representing all the *Inamdars* of that village. Defendant 5 is the Government of Orissa represented by the Collector of Ganjam. The rest of the lands admittedly belong to the Dharakote Estate. The dispute relates to the right of the plaintiffs to irrigate their lands from the waters of a channel known as Kochianala by raising a cross dam on it. This *Nala* runs through the two villages of Gopinathpur and Agulpada. According to the evidence of one of the plaintiffs' witnesses, P. W. 3, Kochianala starts in Government villages and goes to Government villages, but passes through these two *Inam* villages. The case of the plaintiffs is that this Kochianala is the irrigation source of the wet lands in the *Inam* village of Agulpada; that the irrigation rights were being exercised by putting up a cross dam and that there used to be a pucca masonry dam at a specified place in the channel for diverting water to their village; that the masonry dam was constructed at their cost; and that the water was being taken through a branch supply channel which is locally known as Jhala. The pucca masonry dam is not admittedly now in existence having broken down some years ago and it is the plaintiffs' case that since then they had been putting up a temporary earthen dam lower down the site of the pucca dam whenever water was required for them. It is their case that in 1940 when as per their previous practice, they put an earthen dam defendants 1 and 4 and others interefered and that at their instance, the Revenue Inspector purporting to act on behalf of the Government, got the dam destroyed. They allege that the Government have no manner of right to restrict or regulate the water supply from this channel and the Revenue Inspector on behalf of the Government had no right to interfere with their putting up the cross dam for enjoying the rights of irrigation. The defendants deny that Kochianala is the irrigation source for Agulpada. They deny further that the plaintiffs have any right to put up a dam across the *Nala*. While they admit the existence of the old pucca masonry dam some years ago and the existence of the *Jhala* taking off from the channel towards the plaintiffs' land, they allege that the dam was for the purpose of storing water for the use of men and cattle of Gopinathpur village and that the *Jhala* was only a surplus channel to drain off the excess water that may be flowing in the *Nala* and not a supply channel to Agulpada and that neither the dam nor the *Jhala* were ever used for irrigating the lands of Agulpada. In addition to this common defence, an objection was taken on behalf of the Government, defendant 5, that there was no proper notice for the present suit under S. 80, Criminal P. C. and that accordingly the suit was not maintainable.

[2] Both the Courts below have dismissed the plaintiffs' suit and hence the second appeal by the plaintiffs.

[3] The questions that arose on the respective contentions of the parties were: (1) Whether the suit is not maintainable on account of want of proper notice to the Government; (2) Whether the plaintiffs as owning *Inam* lands in Agulpada village were entitled to irrigate their lands from Kochianala; (3) Whether they have a right to put up a cross dam in the *Nala* for the purpose; (4) Whether the plaintiffs have established the right to take water by putting up the particular dam pleaded, *viz.*, a pucca masonry dam at the site of the old dam.

[4] On the first point, both the Courts below have agreed in holding that there was no proper notice and that the suit is not maintainable. On the second point, which was covered by issue No. 1, the learned Munsif gave a finding in favour of the plaintiffs; but when answering the third point covered by issue No. 3, had negatived the right to irrigate the lands by erecting a cross dam. As regards the fourth point covered by issue No. 2, he held that the plaintiffs have not established that they at any time constructed the old masonry dam as claimed by them and must be taken to have impliedly found that they had no right to irrigate by means of the particular masonry dam. The learned Subordinate Judge has concurred with the trial Court on all these points excepting that on point No. 2, he was inclined to think in disagreement with the Munsif that the plaintiffs have not made out that Kochianala was the irrigation source for wet lands of Agulpada.

[5] In the consideration of the merits of the case covered by points Nos. 2, 3 and 4 formulated above, both the Courts below have been greatly influenced by certain physical features of the situation. The lands in Agulpada are on a higher level than the bed of Kochianala. It would therefore appear that a considerably high dam impounding water to a high level would be required in order that the Agulpada lands may be served. It appears further that if the waters of the dam are impounded by a dam to that extent, some lands in Gopinathpur are submerged for some days in the year and also certain pathway and cart track leading from Gopinathpur village across the *Jhala* would remain submerged and practically unfordable for some days in the year. The liability to submersion as above stated is admitted on both sides, but the parties are at variance as to the extent and duration of the submerion.

[6] The findings of both the Courts below on point numbers 2, 3 and 4 formulated above are, however, vitiated by two serious errors: (1) They have not correctly understood the nature of *Inam* proceedings and the value to be given to an entry like that in Ex. 5, an extract from the *Inam* register of Agulpada which mentions Gopinathpur stream as irrigating the wet lands of Agulpada. (2) They have not correctly appreciated the law relating to the right to put up a dam across an irrigation channel.

[7] Exhibit 5, as already stated, is an extract from the *Inam* register of Agulpada village. It distinctly mentions that Gopinathpur stream irrigates the wet lands of Agulpada. It is not disputed that the "Gopinathpur stream" referred to therein is the suit-Kochianala. That is what has been stated by the plaintiffs in their plaint and it has not been controverted. The third plaintiff as P. W. 2 has also referred to Kochianala as Gopinathpur *Nala* and his evidence in this behalf has not been challenged in cross-examination. The statement in Ex. 5 referring to Agulpada village is as follows:

> "Wet lands are irrigated by a hill stream known by the name of Gopinathpur stream. The soil is of a medium character generally. Dry lands are of a superior quality. The lands are cultivated annually. No scarcity of water is felt generally."

This statement is very clear and cogent evidence that at least as on that date, the wet lands of Agulpada were entitled to irrigation rights from the Gopinathpur stream *alias* Kohcianala.

[8] The learned Munsif has indeed taken this into consideration and has found on issue No. 1 in favour of the plaintiffs on the strength of this. But he has not appreciated the full effect to be given to it. The appellate Court on the other hand has totally disregarded this. In paragraph 10 of his judgment he says as follows:

> "As to the document Ex. 5, it simply recites that the hill stream Kochianala is the irrigation source for Agulpada lands. This in one way supports the plaintiffs' right as claimed in this suit. Apart from the question as to whether noting the irrigation sources was or was not one of the points to be dealt with by the *Inam* Commission, it will be seen that this note itself does not show that the plaintiffs had a right to

divert the water of this Kochianala to their lands far away therefrom to the west by raising any dam across it. It is both parties' contention that this masonry dam, the remains whereof are still existing on the spot, was constructed long long ago namely more than a century ago. If as a matter of fact this dam was constructed for purposes of irrigation, as contended on behalf of the plaintiffs, one would naturally expect this to have been specifically mentioned in the *Inam* register instead of noting only that the *nala* is the irrigation source for Agulpada lands."

[9] This betrays a misconception of the nature of *Inam* proceedings and the effect to be given to such entries in the *Inam* register. The *Inam* proceedings are primarily concerned with the fixation of the quit-rent of the *Inam* lands with a view to offer to the *Inamdar* the enfranchisement thereof on condition of paying the quit-rent in perpetuity. The quit-rent is an annual payment to be made by the *Inamdar* to the Government for the release of its reversionary right in the unenfranchised *Inam*. To arrive at the figure of quit rent to be imposed what is usually done is to calculate, in the first instance, the revenue that the Government would have derived from the village in case the entire *Inam* lands were converted to *raiyatwari* and this is done by noting down the actual extent of the cultivated lands at the time and assessing them notionally to the appropriate rates payable thereon in comparison with the prevailing rates of assessment in neighbouring *raiyatwari* village or villages. For the purpose of that comparison, the nature of the soil, the sources of irrigation and the nature of the crop and another essential items of information have to be gathered and noted. Having once notionally assessed the lands with reference to the information so gathered, the quit-rent is fixed at a certain proportion of the assessment so made, the proportion varying with reference to the nature of the reversionary right of the Government as determined by various rules made in this behalf. It will thus be seen that the mention of irrigation source is one of the essential features of the entries in an *Inam* register, but the method and the manner by which that irrigation right is exercised, that is, whether it is by the construction of a dam or not is not ordinarily necessary; because it does not enter into the calculations regarding assessment. That the above is the normal procedure adopted in such matters can be seen from the elaborate note in Ex. 5 itself and particularly in para. 3 thereof. From the above explanation of the nature of *Inam* proceedings and the entries thereunder, it would be clear that the note as to the irrigation source of the wet lands of the *Inam* village at the time is a very cogent and relevant piece of evidence and that the non-mention of a dam is not in any way indicative of the non-existence of the right to take the water from the irrigation source by means of a dam. These *Inam* proceedings are referred to in *Arunachallam Chetty* v. *Venkatachalapathi*, 43 Mad. 253 at p. 263: (A.I.R. (6) 1919 P. C. 62), as a great act of State by the Privy Council and the value to be attached to such entries in the *Inam* register has been emphasised in various cases and it is unnecessary to elaborate this well-established position. Of course, they are not conclusive, but are strong pieces of evidence not to be lightly disregarded, excepting for solid and substantial reasons or on account of other rebutting or contrary evidence.

[10] As regards the second point, namely, the right to take water from a recognised irrigation source by putting up a dam across it, the Courts below seem to have thought that the right is one which has to be substantiated by specific evidence, while, however, the correct position is that once the right of irrigation from a stream of a channel is made out, it is one of the ordinary modes of the exercise of such a right to put up a bund or a dam across it for the purpose of exercising that irrigation right. What, however, requires to be proved is not the right to put up a dam, but the nature, extent and duration of the dam so as not to interfere with the rights of the other persons lower down the stream. The proof of that will depend upon the established user in relation to the above matter. The law relating to this matter has been pointed out in *Secretary of State* v. *Ambalavana Pandara Sannadhi*, 37 Mad. 369 (n): (A. I. R. (1) 1914 Mad. 552). The law is stated as follows:

> 'It is next urged by the learned Advocate-General that the plaintiff's claim to erect a bund or dam up a river is unreasonable. The plaintiff is a riparian proprietor; he has a natural right to use the water of the stream for irrigating the lands of his village, provided he does not thereby cause any material injury to the other riparian proprietors. What quantity of water he is entitled to take and how he is to take it for irrigating the lands must depend upon the circumstances of each case. Erecting a dam or bund across the bed of the river when it is low to raise the water to a sufficient height to divert it into an artificial channel for irrigation is one of the common methods in this Presidency of using the water of a stream by a riparian proprietor. That a dam may be erected when it is reasonably required for the use of stream water is recognised by the Judicial Committee (See *Miner* v. *Gilmour*, (12 Moore P. C. 131: 7 W. R. 328) and *Debi Prashad Singh* v. *Joynath Singh*, (24 Cal. 865: 24 I. A. 60 P. C.).''

[11] It must, however, be noted that while the right to put up a dam for the purpose of taking water from the irrigation source in a reasonable way to a reasonable extent to be measured with reference to the accustomed user is inherent in the right to get water from an irrigation source, once that is established it does not follow that there is necessarily a right to put up a particular dam like a masonry dam at a particular

place. That is a matter to be established by positive evidence.

[12] From the above statement of the legal position relating to the two important matters formulated at the outset, it would appear clearly that the entire appreciation of the case relating to points 2, 3 and 4 has been misconceived in so far as the physical features, circumstances and the inconveniences arising therefrom have been treated as almost the sole determining factors instead of being treated as considerations which must be taken and read along with the other important circumstances of the case as pointed out above. In that view, therefore, I should have been inclined to set aside the findings of both the Courts below on points 2, 3 and 4 and remand the case for fresh disposal. A consideration of point No. 1, however, renders this course futile and makes it unnecessary for me to adopt that course.

[13] On the question raised in point 1 and covered by issues 9 & 10 in the suit, whether notice under S. 80, Civil P. C., given to the Government is sufficient in this case and whether the suit is maintainable, if it is found not sufficient and valid, both the Courts below have held against the plaintiffs and have said that the suit is not maintainable on that ground. Admittedly, the suit notice given in this case, has been given not by the present plaintiffs, but by their father, who died prior to the filing of the suit. That such a notice cannot be availed of by the present plaintiffs has been laid down in various cases and it is enough to refer to *Bachchu Singh* v. *Secy. of State*, 25 ALL. 187 and *Mahadeo* v. *Secy. of State*, A. I. R. (17) 1930 Bom. 367 : (124 I. C. 814).

[14] No argument has been addressed to me why these decisions should not be followed. But an attempt has been made to get over the effect of the decisions by suggesting that the Government was not a necessary party to this case and that the appellants would be prepared to give up the Government and to confine the suit to reliefs against the other defendants. The case in *Kanailal* v. *Governor General for India in Council*, A. I. R. (35) 1948 Pat. 164 has been cited to show that the defect is one relating to the form of the plaint and that the result of that defect is for the Court to proceed under Ors. 7 and 11, Civil P. C., and that in such a contingency, it will be open to the plaintiffs to give up the Government as an unnecessary party. Reference may also be made in this connection to *Secy. of State* v. *Amarnath*, A. I. R. (23) 1936 Pat. 339 : (15 Pat 353), where it was found that the Secretary of State was only a *pro forma* party and that no notice was at all served on him but the course adopted was merely to expunge the name of the Secretary of State from the action. It is, therefore, argued that the Courts below were wrong in the view that they have taken that the suit is not at all maintainable and that it is open to the plaintiffs to give up the Government and that they are prepared to do so at this stage and to confine their relief to other defendants.

[15] Apart, however, from the fact that this suggestion to give up the Government from the array of defendants comes at a very later stage in second appeal, I have come to the conclusion that this is not a case to which the cases cited above apply and that in this case, on the pleadings in the plaint and on the evidence on record, the Government cannot be dismissed out of the suit off-hand as being an unnecessary party. The plaint in categorical terms mentions the cause of action which involves a Government officer, namely, the Revenue Inspector. In plaint para. 1, an assertion is made that the Kochianala

> "flowing as it does through the whole *Inam* Villages on both sides of the channel, does not belong to nor come under the purview of the Madras Irrigation Cess Act and the Government have no manner of right to levy cess or otherwise restrict or regulate the water supply from the said channel."

and the relief in the plaint is, in terms, asked as against all the defendants including the Government. A specific issue has also been raised, namely, issue 8 relating to the question of the rights of the Government in the channel. As appears from the evidence of one of the plaintiffs witnesses, namely, P. W. 3, the *Nala* starts in Government villages and goes to Government villages, passing through the two suit villages Gopinathpur and Agulpada. In these circumstances, it is not possible to say without further investigation that any relief given in favour of the plaintiffs as against the other defendants in the suit would not affect the interests of the Government. I cannot therefore accede to the suggestion that the Government may be simply dismissed out of the suit and the suit is to be treated as one against the other four defendants and that the maintainability of the suit is to be upheld on that footing. The case in *Noor Mohammad* v. *Abdul Fateh*, A. I. R. (28) 1941 Pat. 461 : (194 I. C. 263) show that in such circumstances the plaint as a whole is to be rejected and not merely in part on the authority of the Privy Council in *Bhagchand Dagadusa* v. *Secy. of State*, 51 Bom. 725 : (A. I. R. (14) 1927 P. C. 176).

[16] It appears to me therefore that the proper course to adopt in the circumstances of this case is to set aside all the findings of the Courts below against the plaintiffs and to reject the plaint as a whole and to dismiss the suit on the ground that the suit is not maintain-

able by virtue of the provisions of S. 80, Civil P. C. I may add that this course is also the one most in the interest of all the parties concerned. As stated at the outset, the plaintiffs are not the persons solely interested in the village of Agulpada and in the irrigation rights to the wet lands therein. The Rajah of Dharakote is entitled to the major interest therein. Irrespective of any question whether the Rajah of Dharakote was or was not a necessary party to the suit of present nature it is obviously undesirable that the rights relating to the use of Kochianala as the irragation source for the wet lands of Agulpada should be decided in the absence of the Rajah of Dharkote and that the defendants should be exposed to the possibility of a fresh suit at his instance re-agitating the same matter.

[17] For the reasons above stated, I set aside the findings of the Courts below on issues other than issues 9 and 10 and affirm the dismissal of the plaintiffs' suit on the ground of proper notice.

[18] The appeal is accordingly dismissed with costs.

V.R.B. *Appeal dismissed.*

A. I. R. (37) 1950 Orissa 261 *[C. N. 50.]*

JAGANNADHADAS AND PANIGRAHI JJ.

Ulla Mahapatra — Accused—Appellant v. *The King.*

Criminal Appeal No. 94 of 1949, D/-24th April 1950, from order of 2nd A. S. J., Ganjam Nayagarh, Berhampur, D/-20th September 1949.

(a) Evidence Act (1872), S. 118 — Evidence of children—Admissibility.

Children of tender age, generally speaking, are not to be regarded as trustworthy witnesses since they can easily repeat glibly a story put into their mind and do not possess the discretion to distinguish between what they have seen and what they have heard. As a matter of prudence, therefore, Courts are generally chary of putting absolute reliance on the evidence of a solitary child witness and look for corroboration of the same from other circumstances in the case. [Para 7]

Annotation : ('46-Man.) Evidence Act, S. 118, N. 2.

(b) Penal Code (1860), S. 83 —Applicability.

What S. 83, Penal Code, contemplates is that the child should not know the natural and physical consequences of his conduct.

When, however, the accused picked up his knife and advanced towards the deceased with a threatening gesture, saying that he would cut him to bits, and did actually cut him, his entire action can only lead to one inference, namely, that he did what he intended to do and that he knew all the time that a blow inflicted with a kathi would effectuate his intention, and, therefore, the accused would be guilty under S. 302, Penal Code. [Para 8]

Annotation : ('46-Man.) Penal Code, S. 83, N. 1.

(c) Penal (1860), S. 300, Exception I — Provocation—Test — Verbal provocation and provocation caused by physical attack.

Whether or not there is provocation in a particular case is essentially a question of fact. There can be no universal rule as to what may amount to provocation. Words alone can never, in law, amount to sufficient provocation so as to reduce the offence of murder into one of culpable homicide when the act is done with intent to kill. The test, in all such cases, is firstly whether the accused was subjected to such provocation as to cause reasonable man to do what he did, and secondly whether the provocation was such that it influenced him so to act. But mere verbal provocation, even if it be by threat or gestures or by the use of abusive and insulting language, cannot induce a reasonable person to commit an act of violence. The case of provocation caused by physical attack is, on the other hand, different as the instinct of self-defence will be both grave and sudden. In such a case the question is one of degree rather than of kind. But hard words never break bones and the law expects a reasonable person to endure abuse without resorting to fatal violence. There may be circumstances which may merely pre-dispose to a violent act but these are not enough to bring the offender within the exception. The provocation must be an act or series of acts which, by their very nature, would induce sudden and temporary loss of self-control in a reasonable man, so that it can be said that he is no longer master of his mind. But mere threat, which may induce a desire for revenge, cannot constitute provocation. [Para 9]

Annotation : ('46-Man.) Penal Code, S. 300, N. 9, 10, 13.

(d) Reformatory Schools Act (1897), S. 8 — "Youthful offender" — Youthful offender guilty under S. 302, Penal Code.

A boy of 12 convicted under S. 302 and sentenced to transportation for life is a youthful offender, though S. 302 is also punishable with death. It is enough to satisfy the definition of "youthful offender" in the Act if the offence of which he is convicted is also punishable with transportation. [Para 14]

Annotation : ('46-Man.) Reformatory Schools Act, S. 8, N 1.

P. V. B. Rao and S. C. Patnaik—for Appellant.
Governmet. Advocate—for the King.

Panigrahi J. — The **appellant**, Ulla Mahapatra, is a boy of about twelve years of age. He has been convicted of an offence under S. 302, Penal Code for causing the death of a Dandasi boy named Ranka Naik and has been sentenced to transportation for life.

[2] The case for the prosecution is that on the afternoon of 20th April 1949, the appellant Ulla was getting palm-fruits plucked from a tree standing on his land. Another boy named Khallia had been engaged to cut the fruits. The appellant was gathering the fruits from the ground and carrying them to his cow-shed in a basket and he was being assisted in this work by two other boys, Bhagawan and Prahlad. It is said that Khallia got down from the tree after cutting down all the fruits from it and was eating a fruit that had fallen on the ground. At that time the deceased boy, Ranka, arrived at the spot, on his way home after a bath, accompanied by another boy friend named Nakula of the village. Ranka picked up a fruit from the ground whereupon the appellant protested and demanded its price. Ranka thereafter threw the

fruit and is said to have remarked that he would cut the appellant to pieces if ever he went to the Tope for plucking palm-fruits. At this the appellant got excited and told the deceased that he would not allow him to do so, as he himself would cut Ranka to bits then and there. So saying, the appellant, true to his word, struck Ranka with a kathi on the left side of his chest, just below the collar bone. The deceased fell down and died on the spot. Khallia immediately went to the village and gave out what had happened and the Karji took down a statement from him. The Sub-Inspector of Police who happened to be in the adjoining village arrived on the spot at 5 p. m., on hearing about the occurrence, on the same day. The post-mortem was held on the body of the deceased at about 8 p. m. and the corpse was sent to the hospital at Purushottampur. A vigorous search was made for the appellant and the kathi with which he is alleged to have killed Ranka (M. O. II) but the appellant could not be traced nor could the weapon be recovered. The appellant, however, surrendered himself at the Police Station the next day.

[3] The plea of the appellant was that the death of Ranka was brought about by an accident. According to his defence, Khallia dropped his knife (with which he had been cutting fruits) from the tree just as he was about to get down and as Ranka was looking up, the knife of Khallia fell on his collar bone and caused the fatal injury.

[4] The prosecution examined five eye-witnesses, all children, said to have been present at the occurrence, and they all unanimously support the prosecution version regarding how the death of Ranka was caused. [After stating the evidence of these witnesses his Lordship proceeded :]

[5] Learned counsel for the appellant has very severely criticised the evidence of these witnesses and asks us to reject their testimony as they are all children and can be easily made to repeat a story put into their minds. The learned Sessions Judge was satisfied that P. W. 1 the youngest of them was intelligent enough to understand the nature of the evidence she was giving and was impressed with her evidence as being true. P. Ws. 3, 4 and 5 are over 12 years of age and they have been examined and cross-examined at great lengh. We have ourselves gone through the evidence carefully and we are left with the impression that they are not speaking to a made-up story, as has been suggested against them, on behalf of the appellant.

[6] But by far the strongest corroboration of the evidence of these witnesses comes from the evidence of P. W. 6 the doctor. [After stating the evidence of the doctor, his Lordship proceeded :] The wound according to him, therefore, must be the result of a violent blow with the weapon and not merely the result of its fall from a height. Having regard to this opinion of the doctor, I am satisfied that the version given by the witnesses P. Ws. 1 to 5 appears to be the correct one and that Ranka died as a result of a blow given by the appellant with a kathi like M. O. II.

[7] Another circumstance that corroborates the evidence of these witnesses is the fact that the dead body of the deceased Ranka was found at a distance of about 40 feet from the tree. The deceased received the injury when he was at a distance of about 36 feet from the foot of the tree; after receiving the injury, it is said, he moved to a distance of 12 feet. The spot where the dead body was lying is marked '3' in the spot map and measures 48 feet from the tree. This accords with the evidence of P. Ws. 1 to 5 regarding the manner in which the deceased was assaulted and later fell down, after moving back a little distance. It is true that children of tender age, generally speaking, are not to be regarded as trustworthy witnesses since they can easily repeat glibly a story put into their mind and do not possess the discretion to distinguish between what they have seen and what they have heard. As a matter of prudence, therefore, Courts are generally chary of putting absolute reliance on the evidence of a solitary child witness and look for corroboration of the same from other circumstances in the case. The circumstances of this case, however, are such that no reasonable doubt can be entertained regarding the trustworthiness of these witnesses. The occurrence took place in broad daylight, and immediately after the occurrence the children gave out in the village what had happened. They were examined by the Sub-Inspector of Police (P. W. 17) that very evening before any story could be fabricated. These witnesses are all drawn from different classes and come from different streets of the village, and all of then happened to be at or near the scene of occurrence by accident. And it has not even been suggested that anybody was particularly interested in bringing the appellant to trouble by falsely implicating him and by putting a made-up story into the mouths of these witnesses. We have, accordingly, no hesitation in accepting the prosecution version as an unvarnished representation of the true facts.

[8] Mr. P. V. B. Rao, learned counsel for the appellant, strenuously urged that even if the prosecution version were to be accepted. the offence would be one of culpable homicide not amounting to murder as the appellant did not know

the nature and the consequences of what he was doing, owing to his tender age and immaturity of understanding. Reliance was placed on the rule of law enunciated in S. 83, Penal Code which lays down that nothing is an offence which is done by a child above seven years of age and under twelve who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion. We are satisfied from the medical evidence that the appellant is over eleven and below twelve years of age. But that is all that can be said in favour of the appellant. The manner in which he has answered questions put to him by the Court in what appears to be a fairly lengthy examination leaves the impression on my mind that the appellant is an extraordinarily precocious child. He gave out his age as 14 years and pleaded that as the village was divided into two factions he had been falsely implicated in this case. He gives very minute details of what he did after his return from his padar lands, prior to the occurrence, how he went to Sanya Parida and later to Khallia, and how he bargained for wages. He also tries to explain away every little detail of the evidence against him and says that his kathi had been taken away by his father and that the basket was in the cow-shed and that he had asked Bhagawan to fetch it for him. He denies that Ranka was returning from his bath and says that Ranka accompanied him (the appellant) while he was returning from Khallia's house and that, at Khallia's invitation, Ranka came to the spot to help pick up the fruits. The appellant, however, admits that after the occurrence he went away to his padar and returned home late in the night. The answers that he gave to the questions put to him by the learned Sessions Judge appear to disclose an acute and intelligent mind and he can by no means be regarded as suffering from any immaturity of understanding. The words alleged to have been uttered by him to the effect: 'I shall cut you to bits now' show that he realized the nature and consequences of what he was going to do. What S. 83, Penal Code contemplates is that the child should know the natural and physical consequences of his conduct. When the appellant picked up his knife and advanced towards the deceased with a treatening gesture, saying that he would cut him to bits, and did actually cut him, his entire action can only lead to one inference, namely, that he did what he intended to do and that he knew all the time that a blow inflicted with a kathi would effectuate his intention.

[9] Another argument that was argued at some length on behalf of the appellant is that the offence, even if proved, is one of culpable homicide not amounting to murder as the Act of the appellant falls within either Exception 1 or Exception 4 to S. 300, Penal Code. Under Exception 1, culpable homicide is not murder if the offender, while deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation. All that has been proved in this case is that the deceased orally threatened the appellant that he would cut him to pieces if ever he went to the tope sometime in the future to cut palm fruits. According to the evidence, the deceased did no more than pick up a fruit. Can it be said, in the circumstances, that his words alone would amount to sufficient provocation within the meaning of Exception 1 to S. 300, Penal Code so as to reduce offence of murder to one of culpable homicide? Whether or not there is provocation in a particular case is essentially a question of fact. There can be no universal rule as to what may amount to provocation. It has been repeatedly held in England that words alone can never, in law, amount to sufficient provocation so as to reduce the offence of murder into one of culpable homicide when the act is done with intent to kill. The test, in all such cases, is firstly whether the accused was subjected to such provocation as to cause a reasonable man to do what he did, and secondly whether the provocation was such that it influenced him so to act. If, on the facts, it appears that a reasonable man might be so rendered subject to passion as to lead him to violence, with fatal results, and that he was, in fact, under the stress of such provocation, it will then be a question of law whether the doctrine will not apply. But mere verbal provocation, even if it be threats or gestures or by the use of abusive and insulting language, cannot induce a reasonable person to commit an act of violence. The case of provocation caused by physical attack is, on the other hand, different as the instinct of self defence will be roused and the provocation may be both grave and sudden. In such a case the question is one of degree rather than of kind. Whether the physical attack was of such a degree as to deprive the victim of it of his power of self-control will depend upon the nature of the injury, the nature of the weapon used, and the actual injury caused. But hard words never break bones and the law expects a reasonable person to endure abuse without resorting to fatal violence. As has been observed by Viscount Simon in *Holmes* v. *Director of Public Prosecutions*, 1946 A. C. 588: (1946-2 ALL E. R. 124),

> "the law has to reconcile respect for the sanctity of human life with recognition of the effect of provocation on human frailty."

There may be circumstances which may merely predispose to a violent act but these are not enough to bring the offender within the Exception referred to above. The provocation must be an act or series of acts which, by their very nature, would induce sudden and temporary loss of self-control in a reasonable man, so that it can be said that he is no longer master of his mind. But mere threat, which may induce a desire for revenge, cannot constitute provocation. Moreover the mode of resentment must bear some proper and reasonable relation to the provocation given. Words may be met by words and fists by fists. But the law will certainly not give any protection to a person who whips out a revolver and shoots because he is abused, even if it be in the foulest language. The explanation to Exception 1 leaves no room for doubt and it is always a question of fact whether the provocation in a particular case was grave and sudden enough to prevent the offence from amounting to murder.

[10] We were also considerably impressed by the able argument addressed by Mr. Rao, based on Exception 4 to S. 300, Penal Code. This exception reduces the offence of murder to culpable homicide if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel. It emerges from the evidence in this case that the deceased was returning from his bath with a kathi in hand. That kathi was removed from the spot by the deceased's sister and was later removed by the Sub-Inspector of Police. I was therefore inclined during arguments to accept the view of the learned counsel for the appellant that the appellant did not take any undue advantage over the deceased when he used his knife. Unfortunately, however, there is an entire lacuna in the evidence as to whether the deceased made any use of his knife before he was assaulted by the appellant. It may be that the appellant was not bold enough to put the question straight to the child witnesses as to whether the deceased did not brandish his knife before the appellant or make any threatening gesture with it. On the evidence, therefore, as it stands, we are led to hold that the deceased made no use of his weapon though he was carrying it; and accordingly we find it difficult to accede to the contention that there was any fight between the deceased and the appellant prior to the occurrence, such as would bring the appellant's act within Exception 4 to S. 300, Penal Code.

[11] Having regard to all the circumstances and the evidence in this case, we accept the findings of the learned Sessions Judge who has very carefully analysed the evidence and assessed it and come to the conclusion that the appellant is guilty under S. 302, Penal Code. We uphold the conviction and maintain the sentence passed on him. In view, however, of the tender age of the appellant, we do not think it proper that he should serve the sentence of transportation for life in a jail which will only make him a hardened criminal and mar his future life. We have, therefore, arrived at the conclusion that the proper action to be taken in this case would be to recommend the detention of the appellant in a reformatory school, under S. 8, Reformatory Schools Act (Act VIII [8] of 1897).

[12] The order of the Court shall, therefore, be that the appellant, instead of undergoing the sentence of transportation for life, shall be sent to a reformatory school and be there detained for a period of five years. The Registrar shall accordingly report this case to the Provincial Government for necessary action.

[13] **Jagannadhadas J.**—I agree that in the circumstances of this case and on the evidence the appellant must be held guilty under S. 302, Penal Code and that the conviction and sentence by the Sessions Judge must be upheld.

[14] I agree also that this is a case in which in exercise of our powers under S. 8, Reformatory Schools Act, the appellant, instead of having to undergo the sentence of transportation should be sent to a reformatory school for a period of five years. It is not disputed before us that the appellant is a "youthful offender" as defined. He is none the less so, though S. 302, Penal Code is also punishable with death. It is enough to satisfy the definition of "youthful offender" in the Act if the offence of which he is convicted is also punishable with transportation The age of the boy has been certified on expert examination, and we accept it as between 11 and 12 by 4th June 1949, the date on which the expert, P. W. 6, gave the certificate, Ex. 4.

G.M.J. *Order accordingly.*

END

THE
ALL INDIA REPORTER

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PATNA SECTION

WITH PARALLEL REFERENCES TO

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CITATION : A. I. R. (37) 1950 PATNA

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PUBLISHERS
THE ALL INDIA REPORTER LTD.,
NAGPUR, M. P.
1950

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Printed by L. MELA RAM, at the All India Reporter Press, Nagpur and Published by
D. V. CHITALEY, B.A., LL.B., Advocate, for the All India Reporter Ltd.,
at Congress Nagar, Nagpur.

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PATNA HIGH COURT

1950

CHIEF JUSTICES :

The Hon'ble Sir Herbert Ribton Meredith, Kt., I.C.S.
„ Shri Lakshmikanta Jha, B.A., B.L.

PUISNE JUDGES :

The Hon'ble Shri James Grieg Shearer, I.C.S., Barrister-at-law.
„ „ Bhuvaneshvar Prashad Sinha.
„ „ David Ezra Reuben, I.C.S., Barrister-at-law.
„ „ Sayid Jafar Imam, Barrister-at-law.
„ „ Sudhanshu Kumar Das, I.C.S.
„ „ V. Ramaswami, I.C.S., Barrister-at-law.
„ „ Jugal Kishore Narayan, M.A., B.L.
„ „ Brahmadev Prasad Jamuar, Barrister-at-law.
„ „ Sarjoo Prosad.
„ „ Bashisth Narayan Rai.
„ „ Chandreshwar Prasad Sinha.

APPOINTED UNDER SECTION 224 OF THE CONSTITUTION OF INDIA :

The Hon'ble Sir Clifford Monmohan Agarwala, Kt., Barrister-at-law.
„ Shri Subodh Chandra Chatterji.

ADVOCATES-GENERAL :

Shri Lakshmikanta Jha, B.A., B.L.
„ Mahabir Prasad, Bar-at-law.

GOVERNMENT ADVOCATE :

Shri S. K. Mitra, Bar-at-law.

GOVERNMENT PLEADER :

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———o———

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NOTE

As most of the Indian Law Reports and other Official Reports have yet to complete their year, it has been decided not to delay issuing of these Indexes but to give the reference Table of Other Journals = All India Reporter in the next year's Index.

LIST OF CASES OVERRULED OR REVERSED IN A. I. R. (37) 1950 PATNA

('45) A. I. R. (32) 1945 Pat. 92=10 Cut. L. T. 8=11 B. R. 428=219 I. C. 460, Ranglal v. Lakshmi-dhar Misra	Reversed in A. I. R. (37) 1950 P. C. (C. N. 23) 56.
('47) A. I. R. (34) 1947 Pat. 418=25 Pat. 779, Surendra v. Nagarchand.	Overruled in A. I. R. (37) 1950 F. C. (C. N. 16) 140.

THE
ALL INDIA REPORTER
1950
Patna High Court

*** A. I. R. (37) 1950 Patna 1** *[C. N. 1.]*

MANOHAR LALL AND RAMASWAMI JJ.

Bhairab Prasad Singh and others —Appellants v. *Birendra Pratap Singh and others—Respondents.*

A. F. O. D. No. 236 of 1945, Decided on 21st January 1949, from decision of Sub-Judge, Darbhanga, D/- 23rd July 1945.

* (a) **Hindu law — Inheritance—Grandson gets unobstructed right by birth to grandfather's property — Partition does not annul such right — *K* partitioning his property with his sons *B* and *S* — *P*, *B*'s son, becoming separate from his father and brothers —*K* dying — *P* held was entitled to share of inheritance left by *K*.**

The principle of Mitakshara is that the son and grandson get "unobstructed" right (*apratibandh daya*) by mere birth to the separate property of the grandfather. Partition does not annul the grandson's right or convert it into an obstructed right; and the existence of a son or united brothers would not defeat it, although both the son and the grandson are separate from their ancestor and also from one another. Partition merely adjusts or resolves joint right into several rights, it frees the father's share from any present proprietary right, but it cannot annul the filial relation nor the right of succession incidental to that relation: *Case law and original texts discussed.* [Paras 9 and 13]

Where, therefore, one *K* partitioned his properties with his sons *B* and *S* and subsequently *P*, one of the sons of *B*, became separate from his father and brothers who continued to remain joint and then *K* died :

Held, that *P* was entitled to a share of the inheritance left by *K*. [Para 24]

(b) **Hindu law—Schools of law — Mithila school — Law of, is law of Mitakshara except in few matters.**

The law of the Mithila school is the law of the Mitakshara except in a few matters in respect of which the law of the Mithila school has departed from the Mitakshara: A. I. R. (12) 1925 P. C. 280, *Foll.*; 12 Cal. 348; A. I. R. (21) 1934 Pat. 398 and 12 M. I. A. 397 (P. C.), *Ref.* [Paras 23 and 44]

(c) **Civil P. C. (1908), O. 1, R. 10 (2)—Necessary party — Suit by Hindu against his father and brothers —Allegation that he was entitled to share in property of his deceased grandfather—Partition claimed—Plaintiff's mother held was not necessary party.**

Where a Hindu brought a suit against his father and brothers on the allegation that he was entitled to a share in the property of his deceased grandfather and asked for a partition thereof :

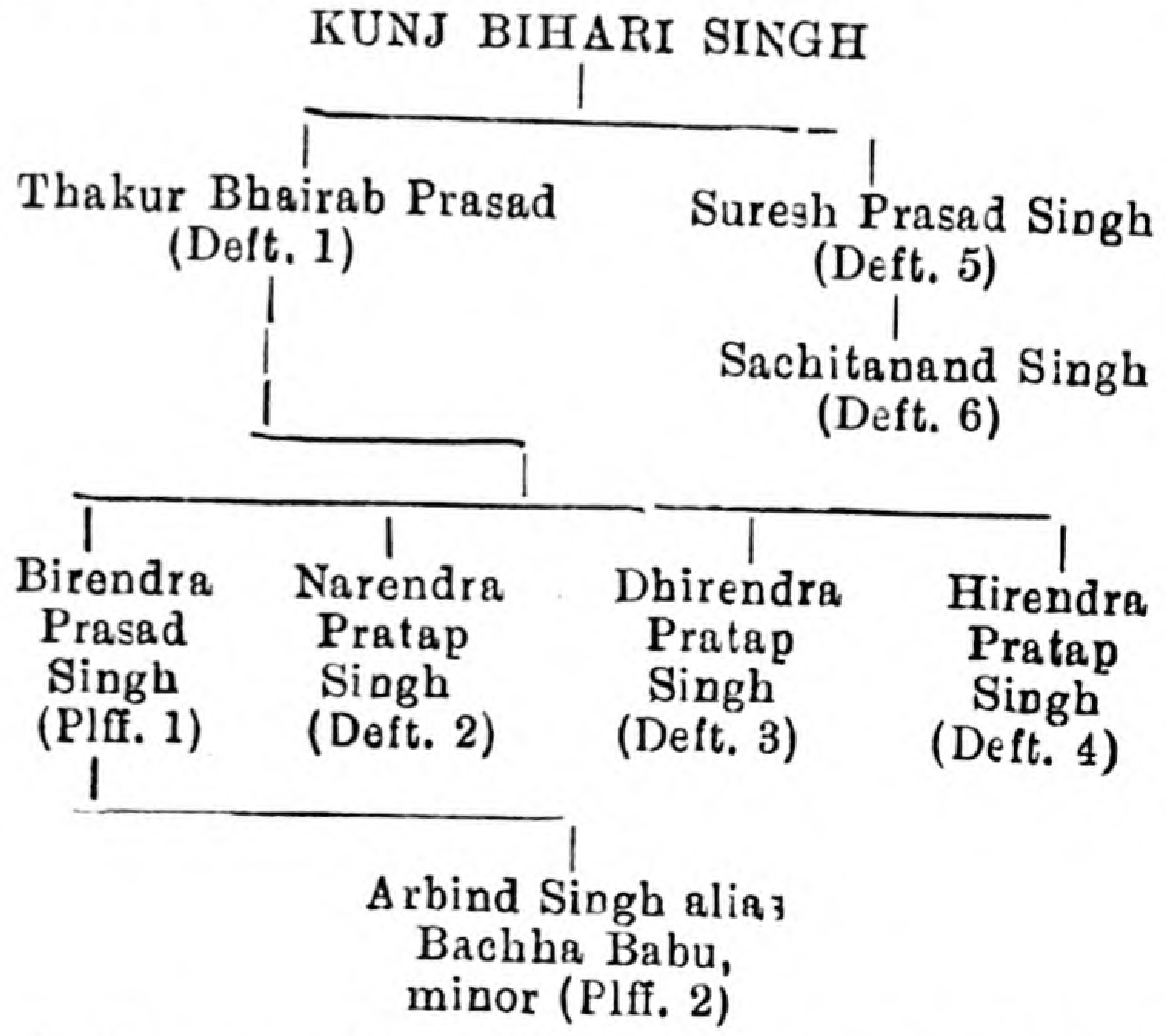
Held, that the plaintiff's mother was not a necessary party to the suit as she had no share in the inheritance. [Para 25]

Annotation : ('44-Com.) C. P. C., O. 1, R. 10 N. 27.

L. K. Jha, S. Kumar, Shambhu Prasad Singh and Rameshwar Prasad Sinha — for Appellants.

B. C. De, M. N. Pal, B. B. Saran, R. Chaudhary and T. K. Prasad — for Respondents.

Ramaswami J.—This appeal raises an important question in the Hindu law of inheritance. The plaintiffs brought the suit alleging that they were entitled to one tenth share in the properties of their deceased grandfather Kunj Bihari Singh and asking for a partition thereof. The relationship of the parties will appear from the following pedigree :


KUNJ BIHARI SINGH
Thakur Bhairab Prasad (Deft. 1)
Suresh Prasad Singh (Deft. 5)
Sachitanand Singh (Deft. 6)
Birendra Prasad Singh (Plff. 1)
Narendra Pratap Singh (Deft. 2)
Dhirendra Pratap Singh (Deft. 3)
Hirendra Pratap Singh (Deft. 4)
Arbind Singh alias Bachha Babu, minor (Plff. 2)

It is the agreed case that in 1940 Kunj Bihari Singh partitioned his properties with his sons, Bhairab Prasad and Suresh Prasad Singh; that in 1942 the plaintiffs became separate from defendants 1 to 4, who continued to remain joint. Kunj

Bihari died in March 1944. The plaintiffs claimed that they were entitled to one-tenth share of his inheritance. Defendant 1, Thakur Bhairab Prasad, resisted the claim on the ground that only he and defendant 5 were the heirs of Kunj Bihari. It was alleged that the plaintiffs could not claim any share in the inheritance since they were no longer coparceners having separated from defendants 1 to 4. On these rival contentions the Subordinate Judge granted a preliminary decree to the plaintiff for partition of one-tenth share of the property of Kunj Bihari Singh.

[2] Against this decree defendants 1 to 4 have preferred this appeal.

[3] The important question to be determined is whether the plaintiffs are entitled to a share in the inheritance left by Kunj Bihari Singh in spite of the fact that the plaintiffs have already separated from their coparceners.

[4] The cardinal principle of Mitakshara is that property in the father's or paternal grandfather's estate is by birth *(Janmasvatvavada)*. In the Mitakshara I. 1. 2., Vijnanesvara declares that "the term heritage *(daya)* signifies the wealth which becomes the property of another *solely by reason of relation to the owner*."

"तत्र दायशब्देन यद्धनं स्वामिसंबन्धादेव निमित्तादन्यस्य स्वं भवति तदुच्यते ।"

(Mitakshara I. 1. 2.)

[5] This text is the key to the theory of inheritance propounded by Vijnanesvara. In I, 1, 3 he proceeds to explain:

"स च द्विविध:—अप्रतिबन्ध: सप्रतिबन्धश्च; तत्र पुत्राणां पौत्राणां च पुत्रत्वेन पौत्रत्वेन च पितृधनं पितामहधनं च स्वं भवतीत्यप्रतिबन्धोदाय:। पितृव्यभ्रात्रादीनां तु पुत्राभावे स्वाम्यभावे च स्वं भवतीति पुत्रसद्भाव: स्वामिसद्भावश्च प्रतिबन्ध: तदभावे पितृव्यत्वेन भ्रातृत्वेन च स्वं भवतीति सप्रतिबन्धो दाय: । एवं तत्पुत्रादिष्वप्यूहनीय: ।

"The wealth of the father, or of the paternal grandfather, becomes the property of his sons or of his grandsons, in right of their being his sons or grandsons, and that is an inheritance not liable to obstruction. But property devolves on parents (or uncles), brothers and the rest, upon the demise of the owner, if there be no male issue: and thus the actual existence of a son and the survival of the owner are impediments to the succession; and, on their ceasing, the property devolves on the successor *in right of his being uncle or brother*. This is an inheritance subject to obstruction. The same holds good in respect of their sons and other (descendants)."

[6] In other words, the kinsmen are entitled to succeed to the deceased owner's property solely by reason of their consanguinity with the latter. This is confirmed by Visveswara Bhatta in Sobodhini, his commentary on the Mitakshara:

"धनस्वामिना पित्रादिना सह सह य: सम्बन्धोजन्यजनकत्वादि: तस्मात् सम्बन्धरूपानिमित्तात । अन्यस्य सम्बन्ध प्रतियेागिन: पुत्रादे: स्वँ यद्धनं भवति तद् दायशब्देनोच्यत इति ।"

"Wealth which becomes the property of another (as a son or other person bearing relation) in right of the relation of offspring and parent and the like, which he bears to his father or other relative who is owner of that wealth, is signified by the term heritage. A son and a grandson have property in the wealth of a father and of a paternal grandfather, without supposition of any other cause but themselves."

Balam Bhatta also states that by the word "solely" Vijnanesvara meant to

"exclude any other cause such as purchase and the like. *Relation* or the relative condition of parent and offspring, and so forth. must be understood of that other person, a son or kinsman, with reference to the owner of the wealth."

"स्वेन लोकप्रसिद्ध क्रयादिरूप निमित्तान्त व्यव च्छेद सम्वन्धश्च जन्यजनकभावादिर्धनस्वामिना सहे| अन्यस्य पुत्रादेर्बोध्य: । एतेन पूर्वद्रव्यस्वामिसंबन्धिनां तत्स्वाम्योपरमे यत्र द्रव्ये स्वत्वं, तत्र निरूढो दायशब्द इति प्राच्याक्तमपास्तम् ।"

In Chap. I, 27, Vijnanesvara concludes as follows:

"तस्मातपैतृके पैतामहे च द्रव्ये जन्मनैव स्वत्वम्; तथाऽपि पितुरावश्यकेषु धर्मकृत्येषु वाचनिकेषु प्रसाददानकुटुम्बभावापद्विमोक्षादिषु च स्थावरव्यतिरिक्तद्रव्यविनियेागे स्वातन्त्र्यमिति स्थितम्। स्थावरे तु स्वार्जिते पित्रादिप्राप्ते च पुत्रादिपारतंत्र्यमेव"

"Therefore it is a settled point that property in the paternal or paternal grandfather's estate is by birth although the father have independent power in the disposal of effects other than immovables for indispensable acts of duty and for purposes prescribed by law and so forth; but he is subject to the control of his sons and the rest in regard to the immovable estate, whether acquired by himself or inherited from his father and others".

[7] The opinion of Vijnanesvara that sons have by birth an equal ownership with the father in respect of ancestral immovable property is followed by Mithila authorities. Vivada Chintamani, P. C. Tagore's edition, p. 309: Vivada Ratnakara, II, 2-5 Madana Parijata, 8th stabaka, p. 660, Bibliotheca Indica.

[8] On behalf of the appellants it was conceded that had the plaintiffs been joint, they would be entitled to their share of the grandfather's inheritance. But the argument was addressed that since the plaintiffs had separated from the joint family, their right was defeated, and the grandfather's estate devolved on defendant 1 and defendants 2, 3 and 4 who continued joint.

[9] This argument, though plausible, must be rejected in view of the undisputed autho-

rities. The principle of Mitakshara is that the son and grandson get "unobstructed" right (*apratibandha daya)* by mere birth to the separate property of the grandfather. If the text of Mitakshara Chap. I, S. 5, is closely examined, it will be apparent that partition does not annul the grandson's right or convert it into an obstructed right, that the existence of a son or united brothers would not defeat it, although both the son and grandson are separate from their ancestor and also from one another.

[9a] In Chap. 1, S. 5, Vijnanesvara discusses the text of Vajnavalkya (ii 122).

" भूर्या पितामहोपात्ता निबन्धो द्रव्यमेव वा ।
तत्र स्यात्सदृशं स्वाम्यं पितुः पुत्रस्य चैव हि ॥१२१॥ "

In placitum 3 Vijnanesvara sets forth certain doubts that arise in consequence of the rules laid down in placita 1 and 2:

" अधुना विभक्ते पितर्यविद्यमानभ्रातृके वा पौत्रस्य पैतामहे द्रव्ये विभागो नास्ति । अध्रियमाणे पितरि पितृतो भागकल्पनेत्युक्तत्वात्। भवतु वा स्वार्जितवत् पितुरिच्छयैवेत्याशंकित आह—"

[10] Dr. Jolly translates this placitum follows (Tagore Lectures 1883, p. 125):

"*Supposing the father to be divided (from his coparceners)* or to have no brothers, shall the estate which has been inherited from the grandfather not be divided at all from the grandson in that case because it has been directed that fathers shall be allotted in the right of the father if he is deceased (and not otherwise); or admitting partition to take place (in that case) shall it be instituted by the choice of the father alone?"

[11] In placitum 5 Vijnanesvara explains the text and categorically answers the doubt.

"In such a property which was acquired by the paternal grandfather *the ownership of father and son is notorious and, therefore partition does take place*".

In Subodhini placitum 3 is explained in greater detail.

" [तथा च सति यदा पिता जीवति, विभक्तस्य, अथवैकपुत्रत्वेन भ्रात्रन्तराभावात् स्वपितुः सकाशाद विभक्त एव जीवन्नास्ते तथा प्रथम पक्षेविभक्तत्वादेव-पैतामहद्रव्यप्राप्त्यभावे स्वपितुः । तस्मादध्रियसाणत्वाच्च पौत्रस्य-पैतामहद्रव्य प्रप्त्यभावी ह्यस्य निरुद्धत्वात । द्वितयि पक्षे यद्यपि स्वपितुधने प्राप्तहस्ति अविभक्तत्वात तथाऽपि पितुर्विद्यामानत्वादेव पौत्रस्य पितामहधने प्राप्तभावः । अत एव पैतामहेधन पौत्रस्य जीवत्पितृकस्य-विभाग एव नास्ति। भवत वाविभाग जन्मनैव स्वत्वात । तथाऽविवितारिदिष्टगते पितृदारवांशविद्यानात जीवति तस्मिन सतरामिति पितुः प्रधान्य पुतीतैः पितुरिच्छवैव विभागः । तत्रापि " द्वावंशो पुतियेश्वत] " विभेजन्नात्मनः पिता] "

"If the father be alive, and separated from his own father, or if being an only son with no brothers to participate with him, he be alive and not separated from his own father, then, since in the *first mentioned case he is separate, no participation of the grandson's own father, in the grandfather's estate, can be supposed*, and therefore, as well as because he is surviving, the grandson cannot be supposed entitled to share the grandfather's property since the intermediate person obstructs his title: and in the second case, although the grandson's own father has pretensions to the property since he is not separated, still the participation of the grandson in the grandfather's estate cannot be supposed, for his own father is living: hence no partition of the grandfather's effects, with the grandson whose father is living, can take place in any circumstances: or, admitting that such partition may be made, because he has a right by birth, still, as the father's superiority is apparent (since a distribution by allotment to him is directed, when he is deceased, and that is more assuredly requisite, if he be living), it follows that partition takes place by the father's choice, and that a double share belongs to him".

Having thus stated the difficulty, the author proceeds:

"To obviate the doubt the author says: 'for the ownership of father and son is the same in land;' and in verse 5 he concludes: 'In such property which was acquired by the paternal grandfather, &c., *the ownership of father and son is notorious*: the right is equal or alike; therefore partition is not restricted to be made by the father's choice, nor has he a double share'. "

[12] That partition cannot annul or destroy the right of the grandson to the gradfather's estate is also supported by the Viramitrodaya:

"Wherefore should it be restricted to the case of grandsons whose father is dead? Nor, can it agreeably, to what is maintained by Dharesvara, be said, that the text is intended to prevent only unequal distribution by the choice of the father, and not the determination of the time for partition by the father's choice, nor his double share, which are without distinction applicable to this case. Because there is no ground of discrimination (as to what is the intention). Moreover, the causality of the father's desire, is literal, being expressed by the instrumental case in the text, 'may separate *by his choice*;' but the determination, by the father's desire, of the time for partition, is only inferential: it is very strange that when the literal causality is prevented by this text, it does not prevent the determination (by the father's choice) of the time for partition—which is inferential. And if the ownership be admitted to be co-equal, as you have taken upon yourself the difficulty of admitting it, then the *causality of the son's desire and* the determination by it, *of the time*, cannot be opposed."

From Chap. 5 of Mitakshara and Sobidhini's commentary thereon it is patent that Vijnanesvara considered that even in the case of a father who was separate from his coparceners, the grandson was entitled to partition, the reason being that

"the ownership of the father and son is notorious: the right is equal or alike; therefore partition is not restricted to be made by the father's choice".

[13] The conclusion, therefore, emerges that partition merely adjusts or resolves joint right into several rights, that it frees the father's

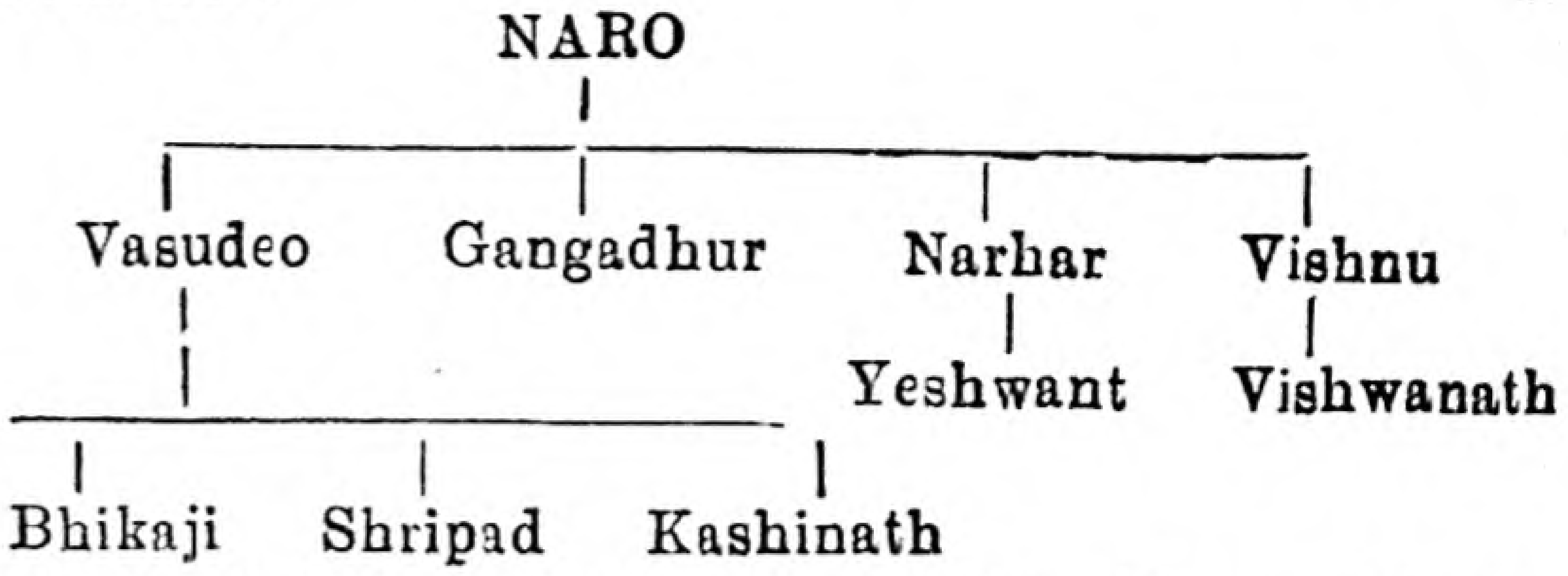
share from any present proprietary right on the part of the divided son but it could not annul the filial relation nor the right of succession incidential to that relation. In *Marudayi* v. *Loraisami Karambian*, 30 Mad. 348 : (17 M. L. J. 275), the plaintiff and his three deceased brothers partitioned the family properties with their father who took one share. After the father's death the plaintiff sued for possession of his share to the exclusion of his nephews, defendants 2 to 4, who were the sons of the predeceased brothers. Plaintiff claimed the whole of his father's share on the ground that he being the sole surviving son excluded the nephews. The argument was that the plaintiff and his nephews being divided, there was no coparcenary and where there was no coparcenary, there was no right of representation and the plaintiff took the whole of the father's estate as the nearest *sapinda*. This argument was negatived by the Madras High Court, who held that even in a separated family the rule of succession *per stirpes* applied, and that partition did not extinguish the grandson's right to succession of the estate.

> "To allow a rule of succession *per stirpes* in a separated family is to admit an exception to the rule of Hindu law by which the inheritance devolves on the nearest *sapinda* ; but the exception is one which in our opinion necessarily follows from the exposition given in the Mitakshara of the rights of sons and grandsons in the estate of the grandfather".

The exception did not extend to cognate relations because they took an "obstructed" inheritance, where as the sons and grandsons took an "unobstructed" inheritance. In *Muttuvaduganatha Tevar* v. *Periasami*, 16 Mad. 11 : (2 M. L. J. 265), Sir T. Muthusami Iyer explains the matter :

> "The distinction is material only to the extent that, in the one case the nearer male heir excludes the more remote, while in the other the doctrine of representation excludes this rule of preference. It is founded upon the theory that the spiritual benefit derivable from the three lineal male descendants is the same, though among collateral male heirs the quantum of such benefit varies in proportion to the remoteness of the male heir from the deceased male owner. The rule that to the nearest *sapinda* the inheritance belongs applies alike whether the inheritance is 'obstructed' or 'unobstructed' with this difference, viz., that, where the last full owner leaves sons, grandsons, and great grandsons, their *sapinda* relationship confers equal spiritual benefit on him though their blood relationship is not the same, and they are all coheirs within the meaning of the rule."

[14] In *Gangadhar Narayan* v. *Ibrahim*, 47 Bom. 556 : (A. I. R. (10) 1923 Bom. 265), the Bombay High Court also held that the right of divided sons, grandsons and great-grandsons of the last male owner to succeed to his divided property, was the same as in the case of undivided family property. In that case the plaintiff was son of one Naro, who had a four annas share in a certain *milkiat*. The pedigree was as follows :



Naro died leaving him surviving his son Gangadhur and grandsons *(sic)* who had predeceased Naro. In 1916 the plaintiff Gangadhur sued to recover two-fifths share in the *milkiat* alleging that there had been a partition during the lifetime of Naro between Naro and his sons and, therefore, on Naro's death, his one-fifth share devolved on the plaintiff. Naro's grandsons also claimed rateably in Naro's one-fifth share and filed different suits for their shares. The High Court held that the grandsons were entitled to their share in Naro's one-fifth and that Gangadhur had no exclusive title.

[15] In my opinion the principle of ownership by birth which is the corner stone of Mitakshara inheritance is of such a character that in the development of law we are bound to carry it to its logical consequence except only so far any other principle of greater or equal authority may prevent our doing so. No such principle can be pointed out in this case. The position of son or grandson in the Mitakshara is similar to that of *sui heredes* (in the Roman law) who are regarded as having a sort of dormant ownership in the estate of their father even during his lifetime and at his death succeed without the need of any express acceptance. Their succession was in fact not so much a succession as coming into the enjoyment of what in a sense had already partly belonged to them (Digest 28-2. 11—Paulus).

[16] In an address characterised by much painstaking research learned Advocate-General sought to convince us that in the Mithila school succession to the grandfather's inheritance was different from Mithakshara, that the son and grandson do not simultaneously succeed, but in preference to grandson the son succeeds. In support of this argument he cited Vivada Chintamoni stanza 283 (page 269, Setlur Vol. II) :

> "Therefore the summary is this; first, the son; on failure of him, the grandson ; in his absence, the grandson's son; on failure of him, a chaste wife, in her default the daughter, in her default the mother, in her default the father, in his default the brother".

[17] But the summary in the first part does not appear authentic, for it is not supported by the discussion which precedes. Indeed, the whole chapter deals with the succession to the estate of one "who leaves no son", and there was no occasion for Vachaspati Misra to discuss the

order in which the son and grandson was to inherit.

[18] That the summary is not authentic is also apparent from para. 245 where Vachaspati Misra puts his own gloss on Vishnu's text :

'The wealth of one dying without issue goes to the wife.........Dying without issue (means) without son, grandson or great-grandson.

अनपत्यस्य पुत्र पौत्र प्रपौत्र हीनस्य

(Mr. Jha's edition Page 232)

The right to perform *sraddha* being established in the order laid down in the text. '*The son, the grandson the great-grandson*', the right to succeed to the *wealth which is similar to it is* also settled" (page 265, Setlur).

[19] In Vivada Ratnakara Chandesvar Thakur does not state that grandson is postponed to the grandson in succession to ancestral estate. On the contrary, Chandesvar Thakur quotes the complete text of Baudhayana :

" प्रपितामह पितामह पिता स्वयं सोदय्यी भ्रातर सवरातियाः पुत्र पौत्र प्रपौत्र एतानविभक्तदायादानम् सपिन्डाना चक्षते-विभक्तदाया दान सकुल्या नाचक्षते । असत्‌वङ्गजषु तृक्ष ॥ मी ह्यर्थों भवति सपिण्डाभावे सकुल्यस्तृदभावेऽप्याचाप्योऽन्तेवासी त्रत्विग्वा हरते तदभाव राजा ।" (Vivada Ratnakara, Biblotheca Indica, 602.)

[20] Baudhayana's text speaks of the three ascendants of a man, of himself, of his full brother and of his son, grandson and great-grandson from a *savarna wife as one group* called *avibhaktadaya sapindas*, and in the absence of these only the wealth of a man goes to his *Sakulyas*. Further the texts of Manu, (IX. 137 and 186, Vasista (17.5), Vishnu (15.46) and Yagnavalkya (1.78) all suggest that son, grandson and great-grandson equally confer spiritual benefit and hence simultaneously take the ancestral estate.

[21] In Viramitrodaya, Mitra Misra places the matter beyond all doubt. He emphatically states that the three descendants, son, grandson, great-grandson, *simultaneously* succeed to the grandfather's estate :

अयं च पुत्राणां विभागः पुत्रपौत्रप्रपौत्रपर्यन्तं समो नात्रोत्पतितः प्रत्यासत्तिक्रमेणाधिकारक्रम : । पुत्रादीनांत्रयाणामपि पार्वणे पिंडदानाधिकारात् । अत एव देवलः

पिता पितामहश्चैव तथैव प्रपितामह : ।
उपासते सुतं जातं शकुन्ता इव पिप्पलम् ॥
मधुमांसैश्च शाकैश्च पयसा पायसेन च ।
एष नो दास्यति श्राद्धं वर्षासु च मघासु च ॥

इति । तथाच श्लोकशंखलिखितगौतमाः —

पिता पितामहश्चैव तथैव प्रपितामह : ।
जातं पुत्रं प्रशसन्ति पिप्पलं शकुना इव
मधुमांसेन खड्गेन पयसा पायसेन च ।
एष दास्यति नस्तृप्तिं वर्षासुच मघासुच ॥ इति ।

एवं तुल्याधिकारात् जन्मना स्वत्वस्यापि तुल्यत्वातुल्यभागभागिता प्रसक्तापि " अनेकपितृकाणांतु" इति वचनेन निवर्त्तते । " जीवत्पित्रकयोः पौत्रप्रपौत्रयोः पार्वणानधिकारेण पिण्डदातृत्वाभावात्पितामह प्रपितामहधनेऽनधिकारः । यदा चैकस्य पुत्रस्य पुत्रः सन्त्येकश्च पुत्र एवास्ति । तदा पुत्रस्यैको भागोऽपरश्चैकः सर्वेषां पौत्राणाम् । स्वपित्रधीनजन्ममूलत्वात् पितामहधन संबधस्य यावत्येवधने तस्य स्वामित्वं तावत्येव तेषामपि " इति जीमूतवाहनोक्तं त्वनादेयम् । जन्मना पौत्राणामपि पितामहधने स्वत्वव्यवस्थापनात् । तस्मात् पौत्राणां पितामहधने वाचानिकमेव विभाग वैषम्यं न त्वौपपत्तिकम् । (Chap. II Part 1 S. 23 a.)

"23a. This distribution among sons extends equally to them and to grandsons and great grandsons in the male line. *There is not here an order of succession following the order of proximity according to birth.* For the three descendants, namely, the son, the grandson and the great grandson are competent to offer oblations in the *parva* occasions . . . Thus the competency being equal and the right by birth also being equal, equal participation would have followed but is prevented by the text, 'among grandsons by different fathers the allotment of shares is according to the fathers'.

Jimutavahana says : 'The grandsons and the great grandsons whose fathers are alive cannot confer oblations in the *parva* occasions, they are not therefore entitled to the estate of their grandfather and great-grandfather respectively. If there be one son, and sons of another son (who is dead), then one share appertains to the surviving son, and the other share goes to all the grandsons ; for their interest in the grandfather's wealth is founded on their relation by birth to their own father, consequently they have a right to just so much as should have been their father's share.'

This, however, is not acceptable ; because, it has been established that in the grandfather's property the grandsons also acquire ownership by birth ; hence the equality of the grandsons' share (with a son's share) in the grandfather's property is based upon the authority of the texts, and not founded upon any equitable principle." (Dr. Sarkar Sastri's Translation.)

[22] Even if Vachaspati's summary is authentic, his incidental dictum that son is preferred to grandson cannot prevail over the doctrine held by Mitakshara and Vivada Ratnakara and the tests of Manu, Baudhayana and Yagnavalkya, the last of whom it is important to remember was himself a Smriti writer from Mithila. In *Surja Kumari* v. *Gandhrup Singh*, (1837) 6 Sadar Diwani Rep. 150, a Mithila case, Sadar Diwani Adalat stated that even is Vachaspati Misra intended the exclusion of the daughter's son, his opinion was inconsistent and ambiguous, and could not avail against the many strong texts of Munis, decisive of the daughte r' son's right and the concurring

opinions of expounders including writers of Mithila.

[23] As the Judicial Committee observed in *Sourendra Mohan Sinha* v. *Hari Prasad*, 52 I. A. 418 : (A. I. R. (12) 1925 P. C. 280) the law of the Mithila school is the law of the Mitakshara except in a few matters in respect of which the law of the Mithila school has departed from the Mitakshara. In *Bacha Jha* v. *Jugmohan Jha*, 12 Cal. 348, the succession to widow's *stridhan* was held to go to the husband's brother's son in preference to her sister's son. The learned Judges decided the case in accordance with Mitakshara on the ground that the meaning and effect of a text of Brihaspati quoted by Ratnakara (a Mithila authority) was too ambiguous to control the plain meaning of that work. In *Kamla Pd.* v. *Murli Manohar*, 13 Pat. 550 : (A. I. R (21) 1934 Pat. 398), a Division Bench of this Court held that the sister's son could not be preferred to the husband's *sapindas* in succession to *stridhan* of a childless widow The learned Judges pointed out that the sister's son was a special heir mentioned in Brihaspati's text which was quoted in Kalpataru and Ratnakara and Vivada Chandra but not in Vivada Chintamani or Madana Parijata. Since the former authorities did not attempt to indicate whether the special heirs mentioned in that text do or do not come before the husband mentioned in Manu Smriti which too they quoted, the learned Judges held that Mitakshara applied and the sister's son should not be preferred to the husband's *sapindas*. In this context, it is of great importance to remember the observation of the Judicial Committee in, *Collector of Madura* v. *Mootoo Ramalinga*, 12 M. I. A. 397 : (1 Beng. L. R. 1 P. C.).

> "The Mitakshara is universally accepted by all the schools, except that of Bengal, as of the highest authority and in Bengal is received also as of high authority, yielding only to the Dayabhaga on those points where they differ."

[24] In the present case, therefore, I hold that the plaintiffs are entitled to one-tenth share of the inheritance left by Kunj Bihari Singh.

[25] For the appellants it was next contended that the plaintiffs' mother was necessary party and was entitled to a share. But from the previous discussion it will be apparent that the mother had no share in the inheritance of Kunj Bihari and was not a necessary party to the present suit.

[26] In my opinion, the decree of the Subordinate Judge is correct and this appeal must be dismissed with costs.

[27] **Manohar Lall J.** —I have taken time to consider the elaborate and exhaustive judgment prepared by my learned brother. Mr. L. K. Jha advanced an attractive argument, but upon a careful consideration I take the same view as my learned brother that this argument is not entitled to succeed. I wish to indicate briefly why I agree entirely with my learned brother.

[28] The relevant texts are to be found in Chap. I, S. V, Mitakshara. This deals with the equal rights of father and son in property ancestral.

[29] Clause 2—Although grandsons have by birth a right in the grandfather's estate, equally with sons, still the distribution of the grandfather's property must be adjusted through their father, and not with reference to themselves, and then an explanation is given as to how such a distribution is to be made.

[30] Clause 3—Obviates the doubt by stating : "For the ownership of father and son is the same in land, which was acquired by the grandfather, ...

[31] Clause 5—In such property, which was acquired by the parental grandfather, through acceptance of gifts, or by conquest or other means (as commerce, agriculture, or service), the ownership of father and son is notorious : and therefore partition does take place. For, or because, the right is equal, or alike, therefore, partition is not restricted to be made by the father's choice: nor has he a double share.

[32] Clause 6—Emphasises that it is ordained by the preceding text, that "the allotment of shares shall be according to the fathers, (para. 1) although the right be equal.

[33] Clause 9—So likewise, the grandson has a right of prohibition, if his unseparated father is making a donation, or a sale, of effects inherited from the grandfather, but he has no right of interference, if the effects were acquired by the father. On the contrary, he must acquiesce, because he is dependent.

[34] Clause 10—Consequently the difference is this : although he have a right by birth in his father's and his grandfather's property, still, since, he is dependent on his father in regard to the parental estate and since the father has a predominant interest as it was acquired by himself, the son must acquiesce in the father's disposal of his own acquired property, but, since both have indiscriminately a right in the grandfather's estate, the son has a power of interdiction (if the father be dissipating the property.) (This is from Subodhini).

[35] Clause 11—Manu likewise shows, that the father, however, reluctant, must divide with his sons, at their pleasure, the effects acquired by the paternal grandfathers, declaring, as he does: ("If the father recover paternal wealth not recovered by his coheirs, he shall not, unless willing, share it with his sons, for in fact it was

acquired by him,") from Manu, 9.209,—that, if the father recover property, which had been acquired by an ancestor, and taken away by a stranger, but not redeemed by the grandfather, he need not himself share it against his inclination, with his sons, any more than he need give up his own acquisitions.

[36] These clauses are so clear and distinct that it is difficult to understand how it can be argued that the grandson has no interest in the property which descends from the grandfather. I draw attention here to the observations of Sir Shadi Lal when delivering the judgment of the Privy Council in the case of *Muhammad Husain Khan* v. *Kishva Nandan*, 64 I. A. 250 : at. p. 266 : (A. I. R. (24) 1937 P. C. 233) :

> "The rule of Hindu law is well settled that the property which a man inherits from any of his three immediate paternal ancestors, namely, his father, father's father and father's father's father is ancestral property as regards his male issue, and his son acquires jointly with him an interest in it by birth. Such property is held by him in coparcenary with his male issue, and the doctrine of survivorship applies to it."

He also refers to 27th *sloka* in Chap. I which is translated by Colebrooke, "Therefore it is a settled point, that property in the paternal or ancestral estate is by birth." At the bottom of the page Sir Shadi Lal observed :

> "Indeed, there are other passages in the Mitakshasa which show that it is the property of the paternal grandfather in which the son acquires by birth an interest jointly with, and equal to that of his father. For instance, in 5th *sloka* of Section 5 of Chapter I, it is laid down that in the property 'which was acquired by the paternal grandfather . . . . the ownership of the father and son is notorious, and therefore, partition does take place. etc. etc.' "

I am aware of the observation of the Privy Council in *Balwant Singh* v. *Rani Kishori*, 25 I. A. 54 : (20 ALL. 267) that the statement in cl. 27 is no more than a moral precept. whereas cls. (8) and (9) of S. 5 lay down the positive law. I may also add that cls. (3), (5) and (11) of S. 5 make it clear that even in the self acquired property of the grandfather, the father and son have equal rights, but only when the property comes by inheritance to the father on the death of the grandfather.

[37] A somewhat similar question arose for decision in the Full Bench case of *Bhagwat Shukul* v. *Mt. Kaporni*, 23 Pat. 599 : (A. I. R. (31) 1944 Pat. 298). Chatterji J. who delivered the judgment of the Full Bench considered the various sections of the Mitakshara and came to the conclusion at p. 609 :

> "The effect of cls. (1) and (9) of S. 4, read with cls. (3), (5) and 11 of S. 5, seems to be that when a grandfather's self-acquired property is taken by the father by gift from him he takes it subject to the right of his own son, unless, of course, the grandfather expresses a clear intention in the deed of gift that the property should be taken by the donee exclusively. In my view, therefore, the decision in *Muddun Gopal* v. *Ram Buksh*. 6 W. R. 71 is supported by the text of the Mitakshara."

Earlier at p. 608, Chatterji, J. took the same view as I have expressed as to the right of the son in the estate of the grandfather when inherited by the father. Reference may also be made to the Privy Council case of *Ulagalum Perumal Sethurayar* v. *Subbulakshmi Nachiar*, 66 I. A. 134 : (A. I. R. (26) 1939 P. C. 95), where Sir George Rankin appears to indicate that the interest given to Minakshi Sundara should be regarded as joint family property and not his self acquired.

[38] A serious argument was advanced by the learned Advocate-General before us that here the position of the plaintiff is entirely different because he is separate from his father. It is, therefore, suggested that the separation of the plaintiff from his father deprives him from the rule so authoritatively and clearly laid down by Mitakshara in the clauses referred to above. He suggests that in such a case, at least the property vests in the father and the separated son can have no right to claim a partition. This argument is not sound and conflicts with the clear meaning of the authoritative texts. The learned Advocate General was forced to submit that it is unnecessary for us to consider the rights of the unseparated sons of the father with regard to the property which has descended from the grandfather. It is true that it is not necessary to consider here the rights of the unseparated sons of the father, but we are bound to decide the nature of the interest which the father obtains in the property of the grandfather when it descends on his death as ancestral.

[39] My learned brother has shown the right of the grandson to share in the property of the grandfather by birth and not by reason of his being undivided with his father.

[40] The learned Advocate General relies upon the text in his book at p. 240 to the effect that the succession is firstly to the son, after him, to the grandson, and then to the great grandson etc. Even if this text is assumed to be genuine, the explanation is quite simple. The term *putra*, or son in the Mitakshara and its commentary, the Sabodhini, is frequently used as a generic term for male issue or a male descendant and must be so construed in several parts of the Mitakshara, otherwise the grandson, as well as the great-grandson, would be excluded from the immediate succession, though acknowledged in every system to represent their deceased father and grandfather, and entitled with the sons to share the estate of a person leaving sons, grandsons, and great grandsons, the father of the grandson and father and grandfather of the grandson being previously dead.

[41] This view is supported by the elaborate decision pronounced by Sir Ameer Ali in delivering the judgment of the Board in *Buddha Singh* v. *Laltu Singh*, 42 I. A. 208 : (A. I. R. (2) 1915 P. C. 70). In that case there was a competition between the great grandson of the grandfather and the grandson of the great grandfather to succeed to the estate of the deceased. It is pointed out at p. 220 after examining various texts that Vijnaneswara has used the word 'putra' in the sense of lineal male descendants in a comprehensive and generic sense. Dr. Sarvadhikari also in his Tagore Law Lectures gives emphatic expression to the view that the word 'son' includes three degrees of descendants. Sir Ameer Ali approves of this opinion at p. 224 in these words:

> "Dr. Rajkumar Sarvadhikari's construction appears to them to rest on a logical foundation, and his views seem to be consistent and clear. In effect he says that the Mitakshara propounds a definite scheme of succession; lineal male descendants of the deceased owner down to and including the third degree, who constitute the first class of propinquous relations (the nearest sapindas), inherit in succession in the first instance,"

etc. etc. and then it is observed that

> "two recent Hindu writers of repute (Dr. Bhattacharyya and Mr. Ghosh) and also Dr. Jolly, who was at one time Tagore Law Professor in the Calcutta University, and is one of the translators of the Books of the East, are in substantial agreement with Dr. Sarvadhikari".

Sir Ameer Ali then examined the conflict of decisions in the Indian Courts. At p. 227 it is observed:

> "It is admitted that the defendant confers greater benefit on the deceased by the offerings he makes to the manes of the common ancestor. Now, it is absolutely clear that under the Mitakshara, whilst the right of inheritance arises from *Sapinda*-relationship, or community of blood, in judging of the nearness of blood-relationship or propinquity among the *Gotraja*, the test to be applied to discover the preferential heir is the capacity to offer oblations".

[42] For these reasons it is clear to me that the words "son or male issue" are not intended to exclude the grandsons. It may be that the text relied upon by the Advocate General intends to mean that the property will go to the son if he is alive, otherwise to the grandson and great grandson, etc.

[43] Our attention has been drawn to the various passages of the commentaries in Setlur's books; but having read the passages over and over again I am unable to come to any other conclusion than that which I have indicated above.

[44] It was also argued by the learned Advocate General that this is a case governed by the Mithila School of Hindu Law, and therefore, the text of Mitakshara will not be of any great assistance in deciding the question in controversy. I do not agree with this argument either. It is now well settled that the law of the Mithila School is the law of Mitakshara except in a few matters in respect of which the law of the Mithila School has departed from the law of Mitakshara. *See* the Pivy Council case of *Sourendra Mohan Sinha* v. *Hari Prasad*, 52 I. A. 418 at p. 457 (*sic*) : (A. I. R. (12) 1925 P. C. 280). It has not been shown to us that there is any clear law of the Mithila School on this question different from the law of Mitakshara.

[45] These are some of the reasons which have induced me to unhesitatingly reject the argument advanced by the learned Advocate General, and to agree with the view of my learned brother. I entirely agree with him in his exposition of the various texts which he has examined so patiently and exhaustively.

V.R.B. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 8 [*C. N. 2.*]

IMAM AND RAMASWAMI JJ.

Commissioner of Buxar Municipality—Appellant v. *Bhagwan Das and another — Respondents.*

A. F. A. D. No. 719 of 1947, Decided on 25th January 1949, from decision of Sub-Judge, Arrah, D/- 20th January 1947.

Bihar and Orissa Municipal Act (VII [7] of 1922), S. 377 — "Act" — Word refers to tortious act — Suit for declaration and injunction — Suit is not barred by section.

The word "act" in S. 377 refers to tortious acts and not to any act arising out of a contractual or quasi-contractual basis. Thus, where a suit is brought, not for damages for a tortious act, but for a declaration that the assessment was illegal and for an injunction restraining the municipality from realising the tax, the suit is not barred by the section: 2 C. W. N. 689 and 22 Bom. 637, *Rel. on.* [Para 3]

B. N. Mitter and A. B. N. Sinha — for Appellant.
D. N. Verma and Kanhaiyaji — for Respondents.

Ramaswami J. — The plaintiff brought the suit for a declaration that the assessment of tax made by the defendant, that is, the Buxar Municipal Commissioners with respect to his rice and oil mills was illegal and *ultra vires*. The plaintiff also asked for a permanent injunction restraining the defendant from realising the tax. The plaintiff alleged that the oil mill and the rice mill were situated outside the municipal limits and for that reason the defendant could not legally assess him to personal or latrine tax. The defendant resisted the suit on the grounds that the tax was validly assessed and the suit was barred under S. 377, Municipal Act. Both the lower Courts have rejected the defence case and decreed the suit of the plaintiff.

[2] On behalf of the defendant, who has preferred this appeal, it was maintained in the first place that the lower Courts ought to have found

on the evidence that the mills in question were situated in Ward No. 7, Buxar Municipality. For the appellant reference was made to the Government notification, Ex. E, in which the boundaries of Ward No. 7, are specified. It should be observed that the notification is under S. 18 (2) Bihar and Orissa Municipal Act, which empowers the Local Government to divide the municipality into wards. No attempt was made on behalf of the appellant to produce the notification made under S. 6, constituting the municipality and specifying its limits. Even if Ex. E be assumed to correctly define the municipal limits, it does not assist the case of the appellant to any appreciable extent. In Ex. E the southern boundary of Ward No. 7 is stated to be "a line drawn from Block No. 11 to the south-east corner of the railway area, southern boundary of the railway area up to Pandey Patti railway crossing". In presence of the learned advocate we endeavoured to locate the southern boundary line on the survey map and thereby discovered that the southern boundary line did not include the plot No. 308 where the mills are situated. In this context it is significant to observe that the defendant did not produce the municipal map in order to indicate over what area the municipal authorities had jurisdiction. The municipal clerk, D W. 1, stated in the evidence that the Vice-Chairman made an inspection of the locality and prepared a sketch map. But this sketch map too was not produced on behalf of the appellant. It is not unreasonable to draw the inference that if the maps had been produced in Court, they would not have supported the case of the appellant. In any case, we are not prepared to hold that the lower Courts have misconstrued any evidence in deciding the question of fact whether the two mills fell within the municipal limits.

[3] In the next place, it was argued on behalf of the appellant that the suit was barred by S. 377, Bihar and Orissa Municipal Act. In my opinion, this contention is untenable. The word 'act' used in the section refers to tortious acts and not to any act arising out of a contractual or quasi-contractual basis. In the present case the plaintiff has brought a suit not for damages for a tortious act but for a declaration that the assessment was illegal and for an injunction restraining the defendant from realising the tax. Such a suit is obviously not barred by S. 377 of the Act. In *Ambika Churn* v. *Satish Chunder*, 2 C. W. N. 689, the learned Judges held that the right to obtain a declaration that the plaintiffs were not liable to assessment under the Bengal Municipal Act would be maintainable even if brought more than three months after the assessment. In *Municipality of Faizpur* v. *Manak Dulab Shet*, 22 Bom. 637, the same view was taken and it was decided that S. 48, Bombay Municipal Act (corresponding to S. 377, Bihar and Orissa Act) did not apply to a suit for specific performance of a contract or for damages for breach thereof.

[4] Lastly, it was urged for the appellant that the case may be remanded and a pleader commissioner may be appointed at his cost to investigate whether the mills are situated within the municipal limits or not. But the prayer is obviously too late and cannot be entertained at this stage.

[5] Upon these grounds, I would affirm the decree of the lower Court and dismiss the appeal with costs.

Imam J.—I agree.

V.R.B. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 9 [*C. N. 3.*]

SINHA AND NARAYAN JJ.

Sheo Narayan Gir — Plaintiff — Appellant v. *Jugeshwar Kuer and others — Defendants — Respondents.*

A. F. O. D. No. 105 of 1945, Decided on 2nd May 1949, from decision of Addl. Sub-Judge, Muzaffarpur, D/- 13th March 1945.

Evidence Act (1872), S. 115 — Mahanth of asthal executing mukarrari istamarari patta in favour of defendant — Successor of mahanth accepting rent from defendant — Successor held estopped from saying that lease was not binding on him — Recognition of defendant's tenancy, however, would not preclude successor from seeking enhancement of rent.

The mahanth of an asthal executed a mukarrari istamarari patta of the land belonging to the asthal in favour of the defendant. The plaintiff who succeeded as the mahanth after the death of his predecessor accepted rent from the defendant:

Held that it was quite unnecessary in order to create estoppel that the person whose acts or declarations induced another to act must have been under no mistake himself or must have acted with an intention to mislead or deceive. As the plaintiff accepted rent from the defendant after having known all the facts and without any fraud, deception or misrepresentation having been practised on him he was estopped from saying that the lease was not binding on him. Of course, the covenant that the rent will be fixed for ever would not be binding on the plaintiff and the recognition of the defendant's tenancy right would be no bar to the plaintiff's seeking an enhancement of the rent that had been fixed by the mukarrari deed : 20 Cal. 296 (P. C) and 36 Cal. 1003 (P. C.), *Foll.* ; A. I. R. (13) 1926 All. 324, *Disting.*; A. I. R. (5) 1918 P. C. 196, *Ref.* [Paras 6, 7]

Annotation : ('46-Man.) Evidence Act, S. 115, N. 21, 35, 54.

L. K. Jha, Rameshwar Misra and Jadubans Sahay — for Appellant.

R. K. Chaudhury and S. N. Banerji — for Respondents.

Narayan J.— This is a plaintiff's appeal arising out of a suit for recovery of possession of 15 bighas 5 kathas 9 dhurs of land.

[2] The plaintiff claims to be the *mahanth* of an *asthal* situate at Goldenganj in the district of Saran, and the land in suit is said to be a property attached to that *asthal*. The predecessor of the plaintiff was one Mahanth Deo Narayan Gir who, on 9th October 1914, executed a *mukarrari istamrari patta* with regard to this land in favour of the defendants, and the contention of the plaintiff is that this document was without any consideration, and that the property that was given in lease by virtue of the document being a *shivottar lakhraj* property belonging to the *asthal*, is inalienable, and could not be transferred by the *mahanth*. The plaintiff succeeded Mahanth Deo Narayan Gir as the *mahanth* after his death, and accepted rent with regard to the lands in suit from the defendants, but his allegation is that, when he accepted the rent, he was ignorant of the real state of things and the real character of the lands. The present suit was instituted on 27th August 1943, and the plaintiff has prayed for recovery of possession with mesne profits.

[3] The defendants pleaded in defence that the suit was barred according to the rules of estoppel and acquiescence, and that the lease, having been executed for consideration and legal necessity was binding on the *asthal* and the present plaintiff. It was further contended that the disputed land had been the personal property of the *mahanth*.

[4] The learned Subordinate Judge dismissed the plaintiff's claim only on the ground that he had accepted rent for the lands in question from the defendants. The other points were decided in the plaintiff's favour, and against the findings of the learned Subordinate Judge on those points, the respondents have preferred a cross-objection.

[5] It is admitted that the plaintiff has realised rent for these lands from the defendants. In para. 9 of the plaint, the plaintiff has stated that, in ignorance of the real state of things, he accepted rent for the suit lands from the defendants. This statement in the plaint conclusively shows that the plaintiff accepted rent from the defendants with regard to these lands and with regard to no other land. The defendants have produced two rent receipts (Exs. A and B), one money order receipt (Ex. C) and a letter (Ex. J) in the signature of the plaintiff for proving that the plaintiff has recognised them as the tenants of the lands. The letter (Ex. J) is an important document in this case, because through this letter the plaintiff enquired from the defendants, after a certain payment had been made, in respect of what years those payments had been made, and he further asked them to have the account adjusted. It appears that, after Rs. 44 had been paid as rent, this letter was sent by the plaintiff to the defendants. The contents of this letter militate against the version of the plaintiff that he did not know for which lands the rent had been paid. Apart from the statement made in para. 9 of the plaint, to which I have already referred, this letter further shows that the plaintiff was not at all in doubt as to the lands in respect of which rent had been paid to him. If the plaintiff did not know for what lands the rent had been paid, he would not have demanded an adjustment of account, and the first question which he would have put to the defendants was for what lands the payment had been made. The plaintiff is a man sufficiently advanced in age, and, though he may not have received much of education, he must be deemed to be a man possessing ordinary common sense. He would not have blindly signed the letter nor would he have received the rent unless he was sure that there was some land for which the defendants were to pay him rent. In the money order form, Ex. C. the Khata numbers of the lands in question are mentioned, and, though the learned Advocate General has made a point out of the manner in which the khatas have been described in the money order form, I think it was easy for the plaintiff to understand that the payment had been made to him with regard to Khatas Nos. 341 and 324. The lands in suit are situate in villages Jagdishpur Baruari and Keotsa, and, while 11 bighas 19 kathas lie in village Jagdispur Baruari, about 3 bighas 6 kathas 9 dhurs lie in village Keotsa. The Baruari lands are recorded in Khata No. 324, and the Keotsa lands are recorded in Khata No. 341 and, if, in the money order receipt the two khatas were mentioned, the plaintiff was able to know that the rent for these lands has been paid to him. But in the money order receipt, instead of mentioning the numbers of the two khatas separately, the writer has described them as follows. "Khatian 341/324 raiyati". Between the printed words "khatian" and "raiyati", there was very little space left, and it is apparent that, instead of writing the two khata numbers separately, the writer mentioned the two khatas in the manner indicated above. According to neither party's case, there was any khata known as khata No. 341/324, and, because the statement in the plaint shows that neither party was in doubt as to the identity of the land, it is obvious that, when the plaintiff received the money, he clearly understood that the rent for khatas Nos. 341 and 324 had been paid to him. Not only from the plaint but also from the plaintiff's evidence it is clear that he knew these lands from before. He admits that the disputed property is the only property of the *math* in the

two villages Jagdishpur Baruari and Keotsa, and that, when Rain Gir was the *mahanth*, he used to go with him to the two villages for taking the produce. It is fully established by his evidence that he was well acquainted with these lands, because he says that he knows the lands "since he accompanied Rain Gir". Evidently because he knew the lands, he did not enquire when the first payment was made to him in respect of which lands the payment had been made. It appears that one year after the defendants had made the first payment they made the second payment, and even on the second occasion he did not enquire from the defendants in respect of which lands they had made the payment. The third payment, according to him, was made about two years later, and even then, he says, he did not enquire in respect of which lands the payment had been made. He could not pocket the money without caring to know on what account the payments were being made. The learned Advocate-General argued that, because the description of the lands as given in the money order receipt is incorrect and because the lands have not been described in the other receipts, the plaintiff must be deemed to be ignorant of the real state of things when the payment was made to him. This argument has got no substance. I have already said that the description given in the money order receipt was sufficient to enable the plaintiff to know that rent of khatas 341 and 324 was being paid to him. Moreover in para. 9 of the plaint, it is stated that

> "since the year 1938, when the plaintiff on enquiry learnt of the nature of the lands in suit and of the unauthorised alienations by the said Mahanth Deo Narayan Gir, he declined to receive rent from the defendants, and demanded of the defendants to give up possession of the suit lands."

From this statement in the plaint it is clear that in 1938, if not earlier than that, the plaintiff had come to know about the nature of the lands in suit. The receipt Ex. B, however, shows that the account up to 9th Jeth 1346 corresponding to 12th May 1939, was adjusted, and then a payment of Rs. 100 was made to the plaintiff. The receipt Ex. C. shows that the account up to 10th Baisakh 1347 corresponding to 2nd May 1940, was settled, and then a payment of Rs. 140 was made to the plaintiff. These payments were, therefore, made after the plaintiff had come to know about the nature of the lands. Certainly, when these payments were made, the plaintiff was fully aware about the character and the nature of the lands. It cannot, therefore, be said that he accepted the payments under a mistaken belief. The learned Advocate-General's argument that the principle of estoppel or acquiescence cannot be applied in this case because the *mahanth* did not know that this property was a *debottar* property cannot, in the circumstances, be accepted. The further argument of the learned Advocate-General was that a man must not be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up these rights. This contention also must be overruled. The plaintiff is a disciple of Rain Gir who, it appears from the entry in Register D, was *mahanth* up till the year 1904, and I have already referred to the plaintiff's statement in his deposition which shows that during the time of Rain Gir he used to go to these lands for realising their produce. It is no doubt true that the plaintiff was away from the *math* for about three or four decades, and had to go from place to place during this period. He, however, says that at Basukinath in the Santal Pargannas of this province he stayed for more than ten years. But, wherever he might have been, he had not lost ordinary common sense, nor is it possible to hold that he had complete loss of memory. The plaintiff himself does not say that he was so much engrossed in high religious practices that he had forgotten all about worldly matters, and we cannot make out a case for him which he himself has not made out. The learned Advocate-General relied on certain observations of the Chancery Court in *Willmott* v. *Barber*, (1880) 15 Ch. D. 96: 43 L. T. 95) which had been cited by the Allahabad High Court in *Jai Narayan* v. *Jafar Beg*, 48 ALL. 353: (A. I. R. (13) 1926 ALL. 324). But the facts of those two cases bear no resemblance to the facts of this present case before us, and, in answer to the general observation in *Willmott* v. *Barber*, (1880- 15 Ch. D. 96: 43 L. T. 95) that the statement that the acquiescence which will deprive a man of his legal rights must amount to fraud is an abbreviated statement of a very true proposition, and that a man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights, I would quote the following passage from the judgment of their Lordships of the Judicial Committee in *Sarat Chander Dey* v. *Gopal Chunder Laha*, 19 I. A. 203: (20 Cal. 296 P. C.) :

> "the section of the Evidence Act by which the question must be determined does not make it a condition of estoppel resulting that the person who by his declaration or act has induced the belief on which another has acted was either committing or seeking to commit a fraud, or that he was acting with a full knowledge of the circumstances, and under no mistake or misapprehension. The Court is not warranted or entitled to add any such qualifying conditions to the language of the Act, but even if they had the power of thus virtually interpolating words in the statute which are not to be found there, their Lordships are clearly of opinion that there is neither principle nor authority for any such legal doctrine as would warrant this. The learned counsel who argued the present case on either side were agreed that the terms of the Evidence Act did not enact as law in India anything different from the law

of England on the subject of estoppel, and their Lordships entirely adopt that view. The law of this country gives no countenance to the doctrine that in order to create estoppel the person whose acts or declarations induced another to act in a particular way must have been under no mistake himself, or must have acted with an intention to mislead or deceive. What the law and the Indian statute mainly regard is the position of the person who was induced to act, and the principle on which the law and the statute rest is, that it would be most inequitable and unjust to him that if another, by a representation made, or by conduct amounting to a representation, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it. If the person who made the statement did so without full knowledge, or under error, *sibi imputet*, it may, in the result, be unfortunate for him, but it would be unjust, even though he acted under error, to throw the consequence on the person who believed his statement and acted on it as it was intended he should do. The general principle is thus stated by the Lord Chancellor (Campbell), with the full concurrence of Lord Kingsdown, in the case of *Cairneross* v. *Lorimer*, (1860) 3 Macq. 829) :

'The doctrine will apply, which is to be found, I believe, in the laws of all civilised nations, that if a man, either by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct, ... I am of opinion that, generally speaking, if a party having an interest to prevent an act being done has full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license.' "

[6] This case is a direct authority in support of the proposition that it is quite unnecessary in order to create estoppel that the person whose acts or declarations induced another to act must have been under no mistake himself, or must have acted with an intention to mislead or deceive. In this particular case, the defendants are vehemently asserting that the property was the personal property of the *mahanth* who had made the settlement with them. Even if, however, the property is a secular property, the question remains whether it appertains to a private trust or a public trust. The line of distinction between a private and a public trust has been a fine one, and recently in an unreported decision of this Court : First Appeal No. 274 of 1945 with First Appeal No. 275 of 1945 *(Khub Narain Missir* v. *Ramchandra Narain Das)*, we had to discuss in what circumstances a trust can be regarded as a public trust. It was not easy for the defendants to understand that the property that was leased out to them was a public trust property, and that the *mahanth* could not grant a settlement which could endure beyond his life-time. Even if they had realised that the settlement could not endure beyond the life-time of the settlor, they might have thought that their position would be secure if the successor of the settlor recognised them as tenants. Therefore, if and when the present plaintiff granted them the receipt, the defendants were induced to believe that they had been recognised as tenants. The defendants would not have made payment of rent to the plaintiff if the latter would not have assured them that as the successor of the settlor he was going to recognise them as tenants. The plaintiff, therefore, by his declaration or act induced a belief on which the defendants acted, and the principle of estoppel, acquiescence, ratification or waiver has got full application in this case. For the purposes of this case, the fine distinction between estoppel, acquiescence, ratification and waiver need not be pointed out. As Bigelow says in his book on Estoppel :

> "It is common enough at present to speak of acquiescence and ratification as an estoppel. Neither the one nor the other, however, can be more than part of an estoppel, at best. An estoppel is certain, being a legal inference or conclusion arising from acts or conduct, while acquiescence and ratification, like waiver, are but matters of fact might have been found otherwise. Besides, the most that acquiescence or ratification can do, and this either may under certain circumstances do, is to supply an element necessary to the estoppel and otherwise wanting, as e. g. knowledge of the facts at the time of making a misrepresentation. But each stands upon its own grounds, and must be made out in its own way, not in the way required by the ordinary estoppel by conduct."

In this connection, I may quote the following passage from the decision of their Lordships of the Judicial Committee in *Rangasami Goundan* v. *Nachiappa Goundan*, 46 I. A. 72 : (A. I. R. (5) 1918 P. C 196):

> "No doubt there is another view which is not estoppel but is expressed by one learned Judge as ratification. It is scarcely that, though it might be hyper-criticism, to object to the use of the word. What it is based on is this. An alienation by a widow is not a void contract, it is only voidable (In this case we are concerned with an alienation by a mahanth.) Now, in all cases of voidable contracts there is a general equitable doctrine common to all systems, that he who has the right to complain must do so when the right of action is properly open to him and he knows the facts. If he did something which showed that he treated the alienation as good he would lose his right of complaint. In some cases it has been expressed as an election to hold the deed good."

[7] The plaintiff, therefore, had the option to adopt or elect after the death of his predecessor Deo Narain Gir, and in this case it is manifest that he elected to treat these defendants as tenants with regard to the lands. Of course, the covenant that the rent will be fixed for ever will not be binding on the plaintiff. It has been pointed out in several cases that

"to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time, would be a breach of duty in the *mahanth*." (*See Abhiram Goswami* v. *Shyama Charan Nandi*, 36 I. A. 148 : (36 Cal. 1003 P. C.))

The recognition of the defendants' tenancy right in the lands would, therefore, be no bar to the plaintiff's seeking an enhancement of the rent that has been fixed by the *mukarrari* deed. The learned Advocate-General referred to another Privy Council decision in *Mitra Sen Singh* v. *Janki Kuar*, 51 I. A. 326 : (A. I. R. (11) 1924 P. C. 213); but, in my opinion, the facts of that case are clearly distinguishable from the facts of this present case. That was a case in which a person without title had obtained mutation of her name with regard to an under-proprietary right in a share in a village in Oudh. The decision proceeded upon the assumption that the lady had absolutely no title to the property. She remained in possession for about eight years, paying rent to the taluqdars, who gave her receipts but without enquiring whether she was entitled. In the circumstances, it was held that under S. 115, Evidence Act, 1872, the taluqdars, although estopped from claiming mesne profits for the years in respect of which they had received rent, were not estopped from denying that the defendant had an under-proprietary right, nor were they to be taken to have waived their own rights; and that they were entitled to eject the defendant. It is obvious that in that case nobody could be in doubt on the question of title. The position is not so very easy in this present case. Here, there could be a legitimate doubt whether the property was a trust property or the personal property of the *mahanth* and, even if it was a trust property, whether the trust was a private trust or a public trust. In my opinion, there is no substance in the plaintiff's claim, because it is well established in this case that, after having known all the facts and without any fraud, deception or misrepresentation having been practised on him, he accepted rent from the defendants, and granted them receipts. This appeal, therefore, fails. The cross-objection preferred by the respondents is not maintainable; but they could urge in this appeal that the findings on the other points should also have been in their favour. The cross-objection has, however, not been pressed, and would be dismissed as such.

[8] The appeal as well as the cross-objection are dismissed but, in the circumstances of the case, without costs.

Sinha J.— I agree.

D.H. *Appeal and cross-objection dismissed.*

✠ A. I. R. (37) 1950 Patna 13 [*C. N. 4.*]

SINHA AND IMAM JJ.

Jagdeo Singh and others — Defendants — Appellants v. *Rambilash Singh and others — Plaintiffs and others, Defendants — Respondents.*

A. F. A D. No. 641 of 1946, Decided on 3rd May 1949, from decision of Sub-Judge, Muzaffarpur, D/- 20th December 1945.

✠ (a) T. P. Act (1882), S. 98 —Anomalous mortgagee paying prior mortgage-debt can claim subrogation where there is no contract to contrary.

In the case of an anomalous mortgage the rights and liabilities of the parties are governed by S. 98. But that section does not altogether exclude the operation of the relevant provisions of the Act in so far as they are not inconsistent with the contract embodied in the deed. Thus, where a mortgagee, in whose favour an anomalous mortgage is executed, is compelled to pay a previous mortgage-debt in order to obtain possession of the mortgaged property, he is entitled to the right of legal subrogation under para. 1 of S. 92 where such a right is not excluded from the terms of the contract between the parties: A. I. R. (9) 1922 P. C. 17, *Rel. on.* [Paras 6, 7]

Annotation: ('45-Com.) T. P. Act, S. 98 N 3.

✠ (b) T. P. Act (1882), S. 98—Anomalous mortgagee paying mortgage-decree in favour of prior mortgagee — Payment made in order to preserve mortgaged property from sale — Payment made is not one by volunteer— Such mortgagee is entitled to subrogation under S. 92—T. P. Act (1882), S. 92.

The doctrine of subrogation is not applied to the case of a mere stranger or volunteer. Where, however an anomalous mortgagee, in order to preserve the mortgaged property from sale, pays a mortgage decree passed in favour of a previous mortgagee, and he is not precluded from exercising this statutory right under S. 72 by the terms of the mortgage deed executed in his favour, the payment made by him cannot be said to be a payment made by a volunteer, even if it happens to be made during the pendency of the suit for redemption brought against him. Further, such an anomalous mortgagee can claim the right of subrogation under S. 92 : 15 Beng. L. R. 208 (P. C.) and 36 Cal. 193, *Ref.* [Para 8]

Annotation: ('45-Com.) T. P. Act, S. 98 N. 3; S. 92 N. 16.

(c) T. P. Act (1882), S. 92— Paragraph 1 of S. 92 deals with legal subrogation while para. 3 of that section provides for conventional or contractual subrogation.

Paragraph 1 of S. 92 deals with the case of what is generally known as 'legal' subrogation. This kind of subrogation rests upon the doctrine of equity and principles of natural justice and not on privity of contract. Paragraph 3 of that section provides that a right of subrogation can be claimed only where there is a specific agreement that such a right may be claimed. This paragraph applies to cases where the money, with which the previous mortgage is redeemed, is advanced to the mortgagor by the person who seeks to be subrogated to the rights of the prior mortgagee, that is to say, in the case of what is generally known as 'conventional' or 'contractual' subrogation. [Para 6]

Annotation: ('45-Com.) T. P. Act, S. 92 N. 1 and 19.

B. C. De and S. N. Banerjee—for Appellants.
Prem Lall and J. C. Sinha— for Respondents.

Sinha J. — This appeal on behalf of the defendants-first party is directed against the judgment and decree, dated 20th December 1945, passed by the learned Subordinate Judge of Muzaffarpur confirming those of the Munsif of Sitamarhi in a suit for redemption.

[2] It appears that, by virtue of a usufructuary mortgage bond dated, 25th October 1933 (Ex. A-5), the defendants-second party mortgaged portions of the land in dispute to the defendants-first-party, securing a sum of Rs. 1,250. Out of that sum, Rs. 520 was paid in cash to the mortgagors, and Rs. 730 was left in deposit with the mortgagees to redeem two previous mortgage bonds of one Aklu Sahu, one for Rs. 250 and the other for Rs. 67, as also to pay Rs. 413 to a third party in respect of a decretal debt. The document provided further that the money will become payable in the month of baisakh 1346 Fasli on the expiry of the term of six years, for which the mortgagees were put in possession of the property. The *rehan* deed contained the further stipulations in these terms:

> "It may be noted that whenever necessity arises the *rehandars* shall demand the principal *rehan* money at any time from us, the executants, and we, the executants, shall repay the same without any consideration to the term of this deed. In case of non-payment of the principal *rehan* money, the *rehandars* are and shall be competent to realise the principal *rehan* money besides the costs in Court by means of the mortgaged property or from the person, assets and other properties. We, the executants, or our heirs shall pay the same without any objection."

The document contained the following recital as regards the mortgage bond in favour of one Madho Missir, which is one of the subject matters of dispute between the parties:

> "The registrered *rehan* deed dated 13th June 1930, which is possessed by us, the executants, was executed by way of *farzi* transaction which has been made over to, and shall remain with, the said mahajans."

It will be noticed that this so-called *rehan* deed does not contain any reference to a previous mortgage bond (Ex. A 1), dated 18th November 1931 for Rs. 800 executed by the defendants-second party in favour of the said Aklu Sahu. That is another transaction which has been the subject-matter of controversy between the parties to this deed, as will presently appear.

[3] The plaintiffs-respondents are the purchasers from the defendants-second party of portions of the mortgaged property by virtue of two sale-deeds of the year 1943. The plaintiffs deposited Rs. 1,250 the principal sum secured by the mortgage bond of the year 1933 aforesaid, in Court under S. 83, T. P. Act. They have instituted the suit for redemption of the portion of the mortgaged property purchased by them, and for mesne profits for 1350 Fasli, the year previous to the date of the institution of the suit (24th August 1943) as also for future mesne profits.

[4] The first party defendants contested the suit, chiefly on the ground that the deposit of Rs. 1,250 was not sufficient to liquidate the dues of the defendants-first party, inasmuch as, apart from the one thousand two hundred fifty rupees covered by the mortgage deed of 1933, they had redeemed the previous mortgage bond for Rs. 800 in favour of Aklu Sahu, which covered a portion of the property mortgaged to them; and had further redeemed the mortgage bond in favour of Madho Missir, referred to above. These defendants stated that, though the mortgagors, the plaintiffs' predecessors-in-interest, had characterized the mortgage of Madho Missir as a *farzi* transaction, Madho Missir instituted a suit on that mortgage, and obtained a decree for sale. Hence, in order to avoid the sale of a portion of the mortgaged property, these defendants deposited the decretal amount in Court on 6th May 1944, that is, during the pendency of the present suit. Hence, the plaintiffs' right to redeem the mortgage in question has not been seriously challenged: what has been contended is that the plaintiffs are not entitled to redeem on payment only of Rs. 1,250 but that they are liable to pay the eight hundred rupees, which the defendants-first party paid to Aklu Sahu as aforesaid, as also the sum of Rs. 603 odd deposited by them to the credit of Madho Missir in respect of his mortgage decree aforesaid.

[5] Both the Courts below have taken the view that, though the defendants-first party paid those sums of money, as claimed by them, to Aklu Sahu and to Madho Missir, they are not entitled, under the terms of the mortgage bond of 1933, to be reimbursed in respect of those payments, as the transaction in favour of the contesting defendants was in the nature of an anomalous mortgage. The Courts below, therefore, took the view that S. 98, T. P. Act, excluded the operation of Ss. 72 and 92, T. P. Act. The plaintiffs' suit, therefore, has been decreed for redemption on the finding that the deposit of Rs. 1,250 was a proper deposit. There has also been a decree for mesne profits. Hence this second appeal by the defendants-first party.

[6] It has been contended by learned counsel for the appellants that the decree for redemption and mesne profits passed by the Courts below on payment of Rs. 1,250 only is not only unjust to the appellants but is in defiance of the provisions of Ss. 72 and 92, T. P. Act. In other words, it is contended on behalf of the appellants that they paid Rs. 800 to Aklu Sahu in respect of the usufructuary mortgage bond of 1931, as, without that payment, they could not obtain possession of a portion of the mortgaged property, and that, if they had not paid up the mortgage decree of Madho Missir in respect of the mortgage bond of 1930, the mortgaged property would have been sold, and the defendants de-

prived of their security. To this, learned counsel for the respondents replies by contending that, the mortgage in favour of the appellants being in the nature of an anomalous one, the parties are governed by the provisions of the deed itself, and that, therefore, the provisions of Ss. 72 and 92, T. P. Act, are out of the way. Hence, it is necessary first to consider whether the provisions of those sections of the Transfer of Property Act are excluded in the case of an anomalous mortgage. It is true that, in the case of an anomalous mortgage, under the provisions of S. 98, T. P. Act, the rights and liabilities of the parties are governed by their contract as evidenced in the deed itself, and by local usage in the absence of a contract. But the question naturally arises—does S. 98 exclude the operation of other provisions of the Transfer of Property Act in so far as they may be applicable to the transaction in question on matters not covered by the contract between the parties as evidenced in the mortgage deed ? Counsel for the respondents has gone the entire length of contending for that proposition. On the other hand, it has been contended on behalf of the appellants that S. 98 does not altogether exclude the operation of the other relevant provisions of the Act in so far as they are not inconsistent with the contract embodied in the deed. Reliance has been placed upon the decision of their Lordships of the Judicial Committee in the case of *Mohammad Sher Khan* v. *Swami Dayal*, 49 I. A. 60 : (A. I. R. (9) 1922 P. C. 17). In that case, their Lordships of the Judicial Committee made the following observations with reference to the provisions of S. 60, T. P. Act :

> "The section is unqualified in its terms, and contains no saving provision as other sections do in favour of contracts to the contrary. Their Lordships therefore see no sufficient reason for withholding from the words of the section their full force and effect. In this view the mortgagor's right to redeem must be affirmed. . . ."

In that case, one of the points in controversy between the parties was whether or not the mortgage then under discussion was an anomalous one. For the purposes of their decision, their Lordships assumed without deciding that question that the mortgage was an anomalous one. The *ratio decidendi* in that case was that, even though there may have been a contract to the contrary in the bond in question, if a term in that contract offended against the statutory right of redemption conferred by S. 60, the statutory right must prevail over the stipulations in the deed. The present case is stronger than the case before their Lordships of the Judicial Committee in the sense that in the mortgage deed there is no stipulation curtailing the rights given by Ss. 72 and 92, T. P. Act. In S. 72, the provisions are subject to a contract to the contrary. There is no contract to the contrary in the present case. In S. 92, T. P. Act, there is no saving clause like that in S. 72, though Para. 3 of S. 92, with which we are not concerned here, provides that a right of subrogation can be claimed only where there is a specific agreement that such a right may be claimed. But Para. 3 applies to cases where the money, with which the previous mortgage is redeemed, is advanced to the mortgagor by the person who seeks to be subrogated to the rights of the prior mortgagee, that is to say, in the case of what is generally known as "conventional" or "contractual" subrogation. In the present case, we are concerned with the provisions of Para. 1 of S. 92 which deals with the case of what is generally known as "legal" subrogation. The latter kind of subrogation rests upon the doctrines of equity and principles of natural justice, and not on privity of contract. The mortgage bond in question in the present case is completely silent about the mortgage of the year 1931 in favour of Aklu Sahu, which was redeemed by the appellants.

[7] It is true that covenant excludes subrogation, that is to say, conventional subrogation must be by special agreement between the parties. In the absence of such an agreement in cases covered by the provisions of Para. 3 of S. 92, T. P. Act, there can be no subrogation. It may also be that the parties to an anomalous mortgage bond may agree to exclude the right of subrogation dealt with in the Para. 1 of S. 92, though, by parity of reasons, it may be doubted whether this proposition is absolutely correct, in view of the observations of their Lordships of the Judicial Committee quoted above. But that question does not arise for decision before us. In the present case there is no stipulation one way or the other as regards the right of subrogation. If the case came within the purview of Para. 3 of S. 92, the appellants would be out of Court. But, putting the case in favour of the appellants at not the highest, there appears to be no reason why the provisions of Para. 1 of S. 92, T. P. Act, should not be prayed in aid of the appellants. There is no direct authority of this Court, or of any other Court, exactly in point one way or the other. Hence, we have to decide this controversy as a case of first impression, so far as we have been able to know from the Bar. A single Judge of this Court is reported to have decided in the case of *Ganga Prasad* v. *Dulari Saran*, A. I. R. (24) 1937 Pat. 345 : (170 I. C. 134) that the principle of substituted security, being a general principle of law not provided for by the Transfer of Property Act, is not affected by the provisions of S. 98, T. P. Act. As already indicated, legal subrogation is based on equitable considerations and principles of natural justice,

and, unless it is excluded from the terms of the contract between the parties, I see no reason to refuse such a right to persons in the position of the appellants who were compelled to pay the previous bond of Aklu Sahu in order to obtain possession of the property. It has been contended on behalf of the respondents that there is a stipulation in the deed that

> "if any damage and loss whatsoever be caused to the mortgaged property, as a result of which dispossession be made, the rehandars shall be competent to realize the principal rehan money besides interest at the rate of 2 per cent per mensem from the date of dispossession till the day of realization and besides the costs in Court from the person, assets and other properties of us, the executants, or our heirs."

But that stipulation relates to dispossession of the mortgagees from the mortgaged property. In the present case, the existence of this particular mortgage in favour of Aklu Sahu for Rs. 800 had never been disclosed to the mortgagees, and they found that they could not take possession of the entire mortgaged property without redeeming the pre-existing mortgage of Aklu Sahu Such a case was not within the contemplation of the parties. Hence, it cannot be said that there was any stipulation against redemption of a prior mortgage, and consequently against enforcing the right of subrogation on the prior mortgage being redeemed. In my opinion, there is neither principle nor precedent in favour of the contention raised on behalf of the respondents. I would, therefore, hold that the appellants are entitled to be subrogated in respect of the prior mortgage bond of Aklu Sahu, which they redeemed.

[8] The next question that arises for consideration is whether the appellants are entitled to be subrogated to the rights of Madho Missir to pay up his mortgage decree. The considerations which apply to the case of the redemption of Aklu Sahu's bond also apply to this transaction with this difference that the mortgage-money was paid during the pendency of the present litigation sometime in May 1944. It has been argued on behalf of the respondents that the plaintiffs voluntarily paid the mortgage decree of Madho Missir, hence, it is contended, they are not entitled to be subrogated. It has been observed by their Lordships of the Privy Council in the case of *Ram Tuhul Singh* v. *Biseswar Lall*, 2 I. A. 131 at p. 143 : (15 Beng. L. R. 208 P.C.) that :

> ". . . . . it is not in every case in which a man has benefited by the money of another, that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation, express or implied, to repay. It is well settled that there is no such obligation in the case of a voluntary payment by *A* of *B*'s debt."

But are the appellants in the position of mere volunteers ? The following observations of Mookerjee J., in the case of *Gurdeo Singh* v. *Chandrika Singh*, 36 Cal. 193 : (1 I. C. 913) are relevant to the present controversy :

> "The doctrine of subrogation is not applied for the mere stranger or volunteer, who has paid the debt of another, without any assignment or agreement for subrogation, being under no legal obligation to make the payment, and not being compelled to do so for the preservation of any rights or properties of his own . . . . that subrogation as a matter of right is never applied in aid of a mere volunteer. Legal substitution into the rights of a creditor for the benefit of a third person takes place only for his benefit, who being himself a creditor, satisfies the lien of a prior creditor or for the benefit of a purchaser, who extinguishes the encumbrances upon his estate, or of a co-obliger or surety, who discharges the debt . . . . Any one, who is under no obligation or liability to pay the debt, is a stranger, and, if he pays the debt, he is a mere volunteer."

These observations Mookerjee J. made with reference to a large number of decisions of the English Courts and authorities on the law of mortgages. In the present case, the appellants paid the mortgage-debt of Madho Missir, it is true, during the pendency of this suit, but they contend that they paid the money for preserving the property from sale within the meaning of S. 72, T. P. Act. It is further contended that they had their own interest to conserve in doing so. If the plaintiffs, or the mortgagors, did not pay up the mortgage decretal debt, it was in the interest of the appellants to pay the same, so as to avoid complications in their title to a portion of the mortgaged property. As already indicated, this section makes a saving in favour of a contract to the contrary. But there is no such contract in the present mortgage bond. Hence, by the terms of the mortgage deed, the appellants were not precluded from exercising a statutory right, which they had, to save the property from sale, and thus making good their own title thereto. That being so, in my opinion, the appellants are entitled to claim that, before, redemption of their mortgage, they must be paid, in addition to Rs. 1,250 already deposited in Court, the sum of Rs. 800 in respect of the mortgage bond of Aklu Sahu and the amount paid in respect of the mortgage decree of Madho Missir with interest at nine per cent. per annum up to the date of redemption. In this view of the matter, it must be held that the tender of Rs. 1,250 was not sufficient in law to compel the mortgagees-appellants to surrender possession of the property to the mortgagors or their successors-in-interest. It is manifest, therefore, that the decision of the Courts below is erroneous in law. The decree for mesne profits, therefore, must be set aside.

[9] In view of these considerations, a fresh decree for redemption will be made in favour of

the plaintiffs-respondents conditional on their depositing in Court the additional sums referred to above within three months from the date of the decree of this Court, failing which their suit will stand dismissed with costs.

[10] The appeal is accordingly allowed in part to the extent indicated above with costs in this Court and in the lower appellate Court the costs of the Court of first instance to be borne by each party, as success was divided between them in that Court.

Imam J.—I agree.

V.S.B. *Appeal allowed in part.*

A. I. R. (37) 1950 Patna 17 *[C. N. 5.]*

MANOHAR LALL AND MAHABIR PRASAD JJ.

Abdul Majid — Appellant v. *Province of Bihar — Respondent.*

A. F. A. D. No. 2091 of 1946, Decided on 5th May 1949, from decision of Addl. District Judge, Patna, D/- 24th June 1946.

Government of India Act (1935), S. 240 — Sub-Inspector of Police dismissed from service on 23rd July 1940—Order communicated on 29th July 1940 — Suit by Sub-Inspector on 21st July 1943 for declaration that order of dismissal was ultra vires and for arrears of pay from 30th July 1940 to date of suit—During pendency of suit plaintiff reinstated —Plaintiff held was entitled to decree for arrears of pay from 30th July 1940 up to date of suit.

The plaintiff who was a Sub-Inspector of Police was dismissed from service on 23rd July 1940 by Deputy Inspector-General of Police as he was found guilty of cowardice. The order was communicated on 29th July 1940. The plaintiff instituted the suit on 21st July 1943 for declaration that the order of dismissal was *ultra vires* and further that the defendant should be directed to pay to the plaintiff his arrears of pay from 30th July 1940 till the date of the institution of the suit. During the pendency of the suit on 9th December 1943, the Chief Secretary to Government wrote to the Inspector-General of Police that the order of dismissal was null and void and the plaintiff was reinstated:

Held that the plaintiff was entitled to maintain the suit for recovery of arrears of pay which became due to him and he was entitled to a decree for arrears from 30th July 1940 up to the date of the institution of the suit. The contention that a servant of the Crown had no right to maintain such a suit as the payment depended upon the bounty of the Government was not tenable : A. I. R. (34) 1947 F. C. 23, *Foll.*; A.I R (35) 1948 P. C. 121 and A. I. R. (36) 1949 P. C. 112, *Disting.* [Paras 9, 12]

Annotation : ('46-Man.) Government of India Act, S. 240 N. 1.

K. C. Sanyal, A. H. Quadri and S. A. Hassain — for Appellant.

Government Advocate — for Respondent.

Manohar Lall J.—This is an appeal by the plaintiff whose suit for realisation of the salary due to him for the period during which he was in service of the defendant, the Province of Bihar has been dismissed concurrently by the Courts below on the ground that the plaintiff's only remedy was to approach the defendant by a petition for payment of such amount as they may deem fit and proper.

[2] The admitted and proved facts are that the plaintiff was appointed a Sub Inspector of Police by the Inspector-General of Bihar and Orissa in January 1920, and owing to disapproval of his conduct while he was in charge of the Bukhtearpur police station in 1937, departmental proceedings were drawn up against him and he was found guilty of cowardice and for not preparing a searchlist and was punished by being degraded to the lowest grade for 10 years; on appeal, the Deputy Inspector-General of Police found the plaintiff guilty of cowardice only and dismissed him from service by the order dated 23rd July 1940 which was communicated to the plaintiff on 29th July. Further appeals by the plaintiff to the Inspector-General of Police and to His Excellency the Governor of Bihar were rejected.

[3] On these facts the plaintiff instituted the suit giving rise to this appeal on 21st July 1943, for a declaration that the order of dismissal on 23rd July 1940 by the Deputy Inspector-General of Police was *ultra vires*, and he should be still regarded as continuing in office, and further that the defendant should be directed to pay to the plaintiff his arrears of pay from 30th July 1940 till the date of the institution of the suit, or in the alternative, the compensation for wrongful dismissal from service.

[4] The suit was instituted after giving a notice under S. 80, Civil P. C. to the defendant which contained *inter alia* the allegation that as the plaintiff was appointed by the Inspector-General of Police, his dismissal by the Deputy Inspector-General of Police was *ultra vires*. This contention appealed to the defendant's advisor, because on 9th December 1943, the Chief Secretary to the Government of Bihar wrote to the Inspector-General of Police that the order of dismissal of the plaintiff should be treated as null and void and he should be reinstated, but fresh proceedings should be drawn up forthwith on the old materials giving him another opportunity to show cause—this was really a device to get round the illegal order of dismissal which was passed by the Deputy Inspector-General of Police. In pursuance of this order, the Superintendent of Police sent a telegram to the plaintiff, dated 30th December 1943, in these words : "Reinstated. Join Patna at once." A copy of this telegram was also sent to the plaintiff in confirmation of the telegram despatched. The plaintiff was thus reinstated during the pendency of the suit. We were informed that immediately after his reinstatement he was again suspended.

In his evidence dated 29th January 1945, the plaintiff states that he is still in service of the Government but under order of suspension. On these facts the trial Court gave his decision on 2nd February 1945, that the plaintiff has no cause of action because he is still in service of the Government though under suspension. The Court also thought that the remedy of the plaintiff was, as stated already, to move the defendant, his employer, for the past salary, and attention was drawn to Chap. IV, S. 4, R. 95 of the Bihar and Orissa Service Code. The same view was adopted by the Additional District Judge in appeal. Hence, the second appeal to this Court.

[5] In my opinion, the plaintiff had a cause of action for the salary which was due to him up to the date of the suit, and on the admitted facts, up to 31st December 1943, which may conveniently be taken as the date when the plaintiff was put under suspension, after the defendant had treated the first dismissal of the plaintiff as null and void.

[6] The learned Government Advocate relied upon R. 95 of the Service Code, but in my opinion, that rule has no application because the plaintiff has never been dismissed within the meaning of this rule—the letter of the Chief Secretary says that the order of the plaintiff's dismissal was null and void; it does not state that the dismissal was wrong on facts, nor was the dismissal set aside by any revising or appellate authority. On the other hand, as I have stated above, the revising and the appellate authority refused to interfere and rejected the plaintiff's applications for setting aside the order of his dismissal.

[7] The learned Government Advocate, then drew attention to Rr. 829 and 841 of the Police Manual. But I fail to understand what relevance these rules have to the matter under consideration.

[8] The learned Government Advocate referred to S. 243, Government of India Act. But that section merely states that the conditions of service of the Subordinate ranks of the various police forces in India shall be such as may be determined by or under the Acts relating to those forces respectively. That is to say, the case of the plaintiff will be governed by the rules in the Bihar Service Code or Police Manual. No question of construction of any section of the Government of India Act is, therefore, involved.

[9] In my opinion, upon the facts established the plaintiff is entitled to maintain the suit for recovery of arrears of pay which became due to him. The learned Government Advocate contended that a servant of the Crown in India has no right to maintain such a suit because the payment to him depends upon the bounty of the Government and that it is in the sweet will of the Government to pay or refuse to pay the salary which is payable to him for having performed the service during a particular period. The novel contention has been authoritatively rejected by their Lordships of the Federal Court in the case of *the Punjab Province* v. *Tara Chand*, 1947-10 F. L. J. 56 : (A. I. R. (34) 1947 F. C. 23). A large number of English cases were examined by Zafrulla Khan J., and Kania J., (as he then was), and their Lordships came to the conclusion adverse to the Crown. The learned Government Advocate submitted that this decision of the Federal Court has been overruled by the observations made by their Lordships of the Judicial Committee in the cases of *High Commr. for India and Pakistan* v. *I. M. Lall*, 75 I. A. 225 : (A. I. R. (35) 1948 P. C. 121) and *N. W. F. Province* v. *Suraj Narain Anand*, 75 I. A. 343 : (A. I. R. (36) 1949 P. C. 112). In my opinion, this argument is not entitled to succeed, because in *I. M. Lall's case*, 75 I. A. 225: (A.I.R. (35) 1948 P. C. 121), the declaration given by their Lordships was that

> "the purported dismissal of the respondent on 10th August 1940, was void and inoperative, and that the respondent remained a member of the Indian Civil Service at the date of the institution of the present suit on 20th July 1942. Any further action by the Crown that may have occurred since the raising of the action is not covered by the present suit."

It is true that their Lordships made these observations at page 244 that

> "it has been settled ever since *Gibson* v. *E. I. Co.*, (1839) 5 Bing. N. C. 262 : (8 L. J. (N. S.) C. P. 193), that pay could not be recovered by action against the Company, but only by petition, memorial or remonstrance."

But those observations were considered by the Federal Court in the case, referred to above, as not being applicable to a case like the present plaintiff.

[10] With regard to *Suraj Narain Anand's case*, (75 I. A. 343 : A. I. R. (36) 1949 P. C. 112), reliance is placed by the Government Advocate on these observations at page 358 :

> "Their Lordships must not be understood, however, as expressing an opinion that the respondent was entitled as of right to recover the sum of Rs. 2,283 which was awarded to him, or that he has any claim to a further sum in respect of arrears of pay. It is necessary, owing to the very proper attitude of the appellant, to express any view as to the former question, and the latter question does not arise in this appeal, which is from the decision of the Federal Court."

This decision, in my opinion, does not overrule the Federal Court decision, and so long as that decision is not overruled this Court is bound to follow that decision.

[11] The learned Government Advocate has not contended that the Court should not take notice of the events that happened after the

institution of the suit, because the whole defence of the Government is based upon what happened after the institution of the suit, namely, the communication to the plaintiff of the order of the Government that his dismissal was null and void.

[12] For these reasons, I am of the opinion that the plaintiff is entitled to a decree for arrears of salary from 30th July 1940, up to the date of the institution of the suit. In the circumstances, I would allow the plaintiff costs in all the Courts, but would not grant him any interest on the decretal amount except from the expiry of two months from the date of the preparation of the decree of this Court till the date of realisation at six per cent. per annum, both on the principal sum and costs.

[13] The result is that the appeal is allowed, the decisions of the Courts below are set aside and the plaintiff will be granted a decree for the arrears of salary and costs, as pointed out above.

[14] We were asked by the learned Government Advocate to grant a certificate under S. 205, Government of India Act on the ground that this case involves a substantial question of law as to the interpretation of S. 243, Government of India Act. But as already observed, I fail to see any question of the interpretation of that section is involved in the present appeal, and therefore, have no hesitation in refusing the certificate asked for.

Mahabir Prasad J.—I agree.

D.H. *Appeal allowed.*

A. I. R. (37) 1950 Patna 19 *[C. N. 6.]*

RAMASWAMI AND NARAYAN JJ.

Bidya Chaudhary and others—Petitioners v. *Province of Bihar and others — Opposite Party.*

Criminal Misc. Nos. 314, 315, 322, 337, 338, 332, 364, 395, 363, 360, 361, 362, 323, 325, 342, 300, 324, 328, 329, 345 to 347, 352 to 354, 356 to 358, 370, 375 to 394, 396 to 405 and 417 of 1949, Decided on 21st June 1949.

(a) Bihar Maintenance of Public Order Ordinance, 1949 (No. II [2] of 1949) — This Ordinance is *ultra vires* and invalid.

Bihar Maintenance of Public Order Ordinance, 1949 (No. II [2] of 1949) was promulgated on 3rd June 1949 when the Bihar Provincial Legislatures were in session. As the Governor in thus promulgating the Ordinance acted beyond the authority conferred upon him by S. 88, Government of India Act, 1935, the said Ordinance is *ultra vires* and invalid. [Paras 5, 10]

(b) Government of India Act (1935), S. 88 — Governor can promulgate Ordinance only on absolute condition that Provincial Legislatures were not in session at the time.

If S. 88 is read in its context and the constitutional scope of the statute is considered, it cannot be doubted that the intention of the Legislature was that the Governor ought to be empowered to promulgate Ordinances only on the absolute condition that the Provincial Legislatures were not in session at the time. It is well-known rule of construction that an absolute enactment must be exactly obeyed, that the act permitted is lawful only if done in accordance with the conditions annexed to the statutory permission. If an absolute enactment is neglected or contravened, a Court of law will treat the thing which is being done as invalid and altogether void: *English cases referred.* [Para 9]

(c) Constitutional law — Power given by constitutional instrument—If text is explicit, it is conclusive in what it directs and in what it forbids —Government of India Act (1935), S. 88.

When a right or power given by a constitutional instrument is challenged, the duty of the Court is to keep close to the words of the constitutional instrument, and see first whether the power is granted, and secondly, whether there is anything else which restricts the rights so granted. If the text is explicit, the text is conclusive, alike in what it directs and in what it forbids: 1912 App. Cas. 571, *Rel. on.* [Para 6]

Basanta Chandra Ghosh (in 315), Thakur Prasad (in 337 and 417), Amala Kant Chaudhury (in 338); D. L. Nandkeolyar (in 332); Basanta Chandra Ghosh and Umesh Chandra Prasad Sinha (in 364 and 398), Basanta Chandra Ghosh and Amala Kant Chaudhury (in 360, 362 and 363); and Basanta Chandra Ghosh (in 361)— for Petitioners.

The Government Advocate— for Opposite Party.

Ramaswami J.—These applications are under S. 491, Criminal P. C., by Bidya Chaudhary and 57 others who allege that they are illegally and improperly detained under S. 2 (1), Bihar Maintenance of Public Order Ordinance (Ord. II [2] of 1949).

[2] The material facts are not in dispute. The applicants had at first been arrested under Bihar Maintenance of Public Order Act, 1947. Section 1 (3) of that Act provided that it shall remain in force for a period of one year from the date of its commencement. The proviso contained a power to extend the operation of the Act for a further period of one year by the resolution of the two Houses of Legislature of the Province, and further gave the Provincial Government the power of modification, if any, of the Act. The Federal Court decided by their judgment dated 28th May 1949, that the proviso was *ultra vires* of the Provincial Legislature, and the extension of the Act beyond one year was invalid. The Federal Court also held that Bihar Act V [5] of 1949 was infructuous, as the Bihar Maintenance of Public Order Act of 1947, which it sought to amend, had come to an end when the first year expired. On 3rd June 1949, the Governor of Bihar promulgated Ordinance II [2] of 1949, which re-enacted in substance the provisions of Bihar Maintenance of Public Order Act, 1947, and which purported to validate the orders of detention already made. It is the undisputed case that all the applicants have been served with orders of the Provincial Government under S. 2 (1) of the Ordinance.

[3] The validity of the detention is challenged in these proceedings on the ground that the Governor of Bihar in promulgating the Ordinance in question has exceeded his legislative competence.

[4] Section 88, Government of India Act is headed "Power of Governor to promulgate Ordinance *during recess of Legislature*". Clause (1) of the section is to the following effect:

> "If at any time when the Legislature of a Province is *not in session* the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require :
>
> Provided that the Governor shall not, without instructions from the Governor-General, promulgate any such Ordinance if an Act of the Provincial Legislature containing the same provisions would under this Act have been invalid unless, having been reserved for the consideration of the Governor-General, it had received assent of the Governor-General."

It is manifest that this section, while granting legislative power to a Provincial Governor, imposes an express condition or restriction limiting its exercise. The section expressly enacts that the Governor is empowered to issue Ordinance only at a time when the Legislature of the Province is not in session.

[5] The argument on behalf of the applicants is that the Governor of Bihar promulgated the Ordinance on 3rd June when the Provincial Legislatures were in session, and hence acted beyond the authority conferred upon him by S. 88, Government of India Act.

[6] The rule of construction as regards a constitutional instrument has been stated by Lord Selbourne in *Queen* v. *Burah*, 5 I. A. 178 : (4 Cal. 172 P. C.):

> "The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question ; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited, it is not for any Court of Justice to enquire further, or to enlarge constructively those conditions and restrictions."

When, therefore, a right or power is challenged, the duty of the Court is to keep close to the words of the constitutional instrument, and see first whether the power is granted, and secondly whether there is anything else which restricts the rights so granted. If the text is explicit, the text is conclusive, alike in what it directs and in what it forbids (*A. G. for Ontario* v. *A. G. for Canada*, 1912 A. C. 571: (81 L. J. P. C. 210)).

[7] Now S. 62, Government of India Act is headed "Sessions of the Legislature, prorogation and dissolution". Sub-section (2) of the section enacts that the Governor may from time to time summon the Chambers or either Chamber to meet at such time and place as he thinks fit, prorogue the Chamber or Chambers, and dissolve the Legislative Assembly. The word "session" is defined in R. 2 (1), Bihar Legislative Assembly Rules, which have been made under S. 84 (1) of the Act. The word "session" under this statutory rule means the period commencing with the first meeting of the Assembly summoned by the Governor and ending with its prorogation. The following passage from May's Parliamentary Practice (14th Edition) is particularly relevant in this context:

> "A session is the period of time between the meeting of a Parliament, whether after the prorogation or dissolution, and its prorogation . . . . During the course of a session, either House may adjourn itself of its own motion to such date as it pleases. The period between the prorogation of Parliament and its reassembly in a new session is termed a 'recess'; while the period between the adjournment of either House and the resumption of its sitting is generally called an 'adjournment.'
>
> A prorogation terminates a session ; an adjournment is an interruption in the course of one and the same session."

[8] It is undisputed that the impugned Ordinance was promulgated on 3rd June 1949. From the Notification No. 1940 G. S., dated 6th June 1949, it is patent that the Governor of Bihar prorogued the Bihar Legislative Council on 6th June 1949, by virtue of the powers conferred under S. 62 (2) (b), Government of India Act. The Notification No. 1941 G. S. of the same date also states that the Governor of Bihar prorogued the Bihar Legislative Assembly on the same date. On these facts, it is manifest that the Legislature was in session on 3rd June 1949, when the Governor of Bihar promulgated the Ordinance.

[9] If S. 88 of the Act is read in its context and the constitutional scope of the statute is considered, it cannot be doubted that the intention of the Legislature was that the Governor ought to be empowered to promulgate Ordinances only on the absolute condition that the Provincial Legislatures were not in session at the time. It is well-known rule of construction that an absolute enactment must be exactly obeyed, that the act permitted is lawful only if done in accordance with the conditions annexed to the statutory permission. If an absolute enactment is neglected or contravened, a Court of law will treat the thing which is being done as invalid and altogether void. The principle is supported by important authorities. In *R.* v. *Loxdale*, (1758) 1 Burr. 445, it appeared that five overseers had been appointed to act for a certain parish, whereas under the Poor Relief Act, 1601, only four, three, or two overseers may be appointed.

Lord Mansfield declared the appointment invalid, and added that:

> "Justices have no power to appoint overseers but by the special authority given them by Act of Parliament. Therefore this special authority must be strictly pursued, and cannot be exceeded by them."

Also in *Thwaites* v. *Wilding*, (1883) 12 Q. B. D. 4: (53 L. J. Q. B. 1), Brett, M. R. said of the Lodgers' Goods Protection Act, 1871:

> "The words of the statute are imperative. It is said that the construction in favour of the defendants will render the statute ineffectual to protect lodgers. I do not think so; the Legislature has imposed conditions, and these conditions must be rigidly complied with in order to deprive the landlord of his remedy at common law and to bring the lodger within the protection of the statute."

In *Stradling* v. *Morgan*, (1560) Plowd. 198 at p. 206, the question was whether an action founded upon a statute could be commenced elsewhere than before the justices of Glamorgan at their sessions, for by 34 and 35 Hen. 8, C. 26, it was enacted that:

> "all actions founded upon any statutes shall be sued by original writ, to be obtained and sealed with the said original seal returnable before the justices, at their sessions, within the limits of their authorities, in manner and form before declared."

It was contended that these words had a negative meaning, that is to say, that the statute appoints the place, order, and form of such suits, and that they cannot sue in any other place or form, and therefore that this action, founded upon a statute, which is appointed to be returned before the justices of Glamorgan, at their sessions, cannot be sued or returned elsewhere or before any other justices. And so it was decided by the Court, and a verdict which had been found for the plaintiff was set aside.

[10] Upon these grounds, I am of opinion that the Bihar Ordinance II [2] of 1949 is *ultra vires* and invalid and that all the applicants have been illegally and improperly detained under the provisions of this Ordinance.

[10a] In this context, I would adopt and adapt a passage from the opinion of Lord Shaw in *Rex* v. *Halliday*, 1917 A. C. 260 at p. 287: (86 L. J. K. B. 1119):

> "Whether the Government has exceeded its statutory mandate is a question of ultra or intra vires such as that which is now being tried. In so far as the mandate has been exceeded, there lurk the elements of a transition to arbitrary government and therein of grave constitutional and public danger. The increasing crush of legislative efforts and the convenience to the Executive of a refuge to the device of Orders in Council would increase that danger tenfold were the judiciary to approach any such action of the Government in a spirit of compliance rather than of independent scrutiny."

[11] For the reasons already given, I would order that all the applicants should be released from custody forthwith.

[12] Let a certificate be issued under S. 205, Government of India Act.

Narayan J.—I agree.

V.S.B. *Order accordingly.*

A. I. R. (37) 1950 Patna 21 [*C. N. 7.*]

SINHA AND MAHABIR PRASAD JJ.

Mt. Dulhin Sia Sakhi Kuar — Defendant — Appellant v. *Ramautar Singh and another, Plaintiffs and others, Defendants — Respondents.*

A. F. O. D. No. 152 of 1945, Decided on 23rd August 1949, from decision of Addl. Sub-Judge, Darbhanga, D/- 31st January 1945.

Limitation Act (1908), Art. 116—Registered sale deed — Vendee undertaking to pay mortgage-debt of vendor—Failure to pay — Final decree for sale passed against vendor and vendee — Decree satisfied by vendor—Vendor can sue vendee for breach of contract—Cause of action arises when vendor was made to pay decretal amount or on date of final decree — Suit brought within 3 years from final decree held not barred.

Under a registered sale-deed, the vendee undertook to pay an outstanding mortgage debt of the vendor out of the consideration money left in his hands. He failed to discharge the debt with the result that a final decree for sale was passed against the vendor and the vendee. The vendor paid the decretal amount and brought a suit for damages against the vendee for breach of contract:

Held, that the plaintiff had a cause of action against the vendee for breach of contract to liquidate the mortgage-debt. The cause of action did not arise on the date of the contract but arose on the date when the plaintiff was made to pay the decretal amount or on the date of the final decree at the earliest and therefore, the suit brought within 3 years from the date of final decree was within time: A. I. R. (18) 1931 Pat. 271, *Rel. on.* [Paras 4 and 5]

Annotation: ('42-Com.) Limitation Act, Art. 116 N. 15, Pts. 1 and 8.

Ganesh Sharma, M. P. Singh, Lakshmi Narayan Sinha and Ramanugrah N. Singh—for Appellant.

Sarjoo Prasad, A. K. Mitter and Lala Atul Chandra—for Respondents.

Sinha J.—This is a defendant's appeal from the decision of the learned Additional Subordinate Judge of Darbhanga decreeing the plaintiff's suit for damages for breach of a contract in writing registered.

[2] The facts, which are no more in controversy at this stage, may shortly be stated as follows: The plaintiff executed a mortgage bond on 9th August 1929, in favour of one Raghunandan Singh for Rs. 2,700. In order to pay off this pre-existing debt, the plaintiff executed a sale-deed on 1st June 1931, in favour of the appellant who was a mere name lender on behalf of her husband and his other members of the joint family who are also party-defendants to the suit. The bulk of the consideration money was left in the hands of the vendee for the payment

of the mortgage-debt aforesaid. But the vendee did not pay up the mortgage-debt, with the result that judgment was recovered by the mortgagee. The preliminary decree for sale was passed on 15th January 1940, which was made final on 27th January 1941. The plaintiff had also been impleaded as defendant along with the vendee. He paid up the decretal money in several instalments in course of the years 1941 and 1942, and then instituted this suit on 31st May 1943, for recovery of the money which he paid, and which, he claimed should have been paid by the vendee, the appellant.

[3] A number of defences were raised in the Court below, challenging the plaintiff's allegations on questions of fact. These defences have not been persisted in in this Court.

[4] Mr. Ganesh Sharma, appearing on behalf of the appellant, first raised the contention that the decree being one for sale of the mortgaged property, the plaintiff was not interested in the payment of the money, and, therefore, if he actually paid the decretal sum, he was a mere volunteer who could not recover the said amount from the defendants. This contention was raised apparently with reference to the provisions of Ss. 69 and 70, Contract Act. But the suit, in terms is one for damages for breach of contract as evidenced by the sale-deed of the year 1931. To that sale-deed, the mortgagee was not a party. The vendee undertook, on behalf of the vendor, to pay up his outstanding mortgage-debt. In so far as she did not liquidate that debt, she has committed a breach of contract in writing registered. It is, therefore, clear that the plaintiff has a cause of action against the defendant-appellant.

[5] It was next contended that, viewed as a suit for a breach of contract, this suit was barred by limitation. Mr. Ganesh Sharma contended that, as no time was fixed for the payment of the money, the period of limitation began to run from the date of the contract itself, namely, 1st June 1931. If he is right in that contention, certainly the suit is barred by limitation either of three years or of six years. But, in my opinion, there is no substance in this contention, because the plaintiff's cause of action would arise on the date he was made to pay the decretal sum, that is to say, when he was damnified, or, at the earliest, when the decree was made final on 27th January 1941, on the default of payment by the mortgagor or his vendee, the appellant—see in this connection the decision of a Division Bench of this Court in the case of *Mt. Rajbansi Kuer* v. *Bishundeo Narayan Singh*, 10 Pat. 451: (A. I. R. (18) 1931 Pat. 271. In that case, this Court has laid it down that the cause of action for such a suit would arise upon the payment being made by the plaintiff. It would on that date be deemed that the vendee had not carried out the terms of his contract.

[6] These were the only contentions raised on behalf of the appellant, and, as there is no substance in either of them, the appeal must be dismissed with costs.

Mahabir Prasad J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 22 *[C. N. 8.]*

REUBEN AND NARAYAN JJ.

Tarak Nath Dubey — Appellant v. *Raghu Nandan Pandey and others—Respondents.*

A. F. A. D. No. 2297 of 1947, Decided on 23rd August 1949, from decision of Addl. Sub-Judge, Bhagalpur, D/- 28th June 1947.

(a) T. P. Act (1882), Ss. 117 and 106 — Agricultural lease — Alteration of rent — Proof — Verbal declaration is sufficient.

A lease in respect of agricultural lands comes under the operation of S. 117, and for such a lease a registered instrument cannot be necessary under the law. A verbal settlement is sufficient, and hence in such a case, to prove alteration of rent, a verbal declaration would be sufficient. [Para 6]

Annotation: ('45-Com.) T. P. Act, S. 117, N. 4.

(b) Tenancy laws — Bihar Tenancy Act (VIII [8] of 1885), S. 188 — Joint landlords — Reduction of rent by only some — Section 188 is no bar.

Where some of the joint landlords agree to receive rent from their tenants at a reduced jama, that cannot be regarded as an act which the landlord is required or authorised to do under the Bihar Tenancy Act, and consequently, S. 188 is no bar to some of the joint landlords reducing the rent in respect of their share, or condescending to receive rent for their share at a reduced jama: 38 Cal. 270, *Applied.* [Para 7]

(c) Tenancy laws—Landlord and tenant—Rent—Co-sharer landlords cannot realize rent at different jamas—Co-sharer landlords—Reduction of rent by some — Others continuing to charge original jama — Transferee is not bound by reduction — Agreement reducing rent is not covenant running with land — T. P. Act (1882), S. 40.

Where some of the cosharer landlords reduce the *jama* for their share and conceal the fact of reduction of rent when they sell their interest, and it is admitted that the other co-sharers have not reduced the jama and the tenant is paying rent to them according to the original jama, the transferee is not bound by the reduction. If it were held that the reduction is binding on the transferee, the tenure would be deemed to be a tenure carrying two rentals —a situation inconceivable in law: 4 Cal. 96 (F. B.), 17 Cal. 695 and 25 Cal. 917, *Rel. on.* [Para 9]

The agreement between the transferee's predecessors and the tenant by which the rent was reduced cannot be regarded as a covenant running with the land. [Para 11]

Annotation: ('45-Com.) T. P. Act, S. 40, N. 1, 15.

S. C. Mazumdar and Sushil Kumar Mazumdar — for Appellant.

Lalnarayan Sinha and G. P. Singh — for Respondents.

Narayan J.—This is a second appeal by the plaintiff arising out of a suit for recovery of arrears of rent with regard to a tenure. The plaintiff had claimed the rent as purchaser of the interest of two persons named Hira Lal Pathak and Ram Kishore Pathak by two sale-deeds, and the case made out by him was that the tenure carried a yearly jama of Rs. 328 besides cess, out of which he was entitled to realise 1/3rd share.

[2] The defendants pleaded that Hira Lal Pathak and Ram Kishore Pathak had reduced the jama to Rs. 200 in the year 1346 and that for the years 1347, 1348 and 1349 rent had been realised by them at this reduced rate; and, consequently, it was contended by the defendants that the plaintiff as the purchaser of the interest of Hira Lal Pathak and Ram Kishore Pathak was not entitled to claim a higher jama.

[3] The Courts below upheld the contention of the defendants and passed a decree at the reduced jama of Rs. 200 besides cess.

[4] Mr. Mazumdar, on behalf of the plaintiff-appellant, has contended before us that the Courts below have committed an error of law in passing a decree in favour of the plaintiff at the reduced jama of Rs. 200, though, admittedly, the defendants have been paying rent to the cosharers of the plaintiff at the original jama of Rs. 328.

[5] The point raised is a somewhat difficult one, and though I am not able to accept the line of reasoning adopted by Mr. Mazumdar, on a consideration of the legal principles, which can be made applicable to such a case, and on the strength of certain authorities, which I have been able to find out, I think a decree should be, in this suit, at the original jama of Rs. 328.

[6] Mr. Mazumdar was at pains to show that the rent could not be reduced without a document, and that the receipt, which had been put forward by the defendants as evidence of the variation of the rent being an unregistered document, is inadmissible. But a lease in respect of agricultural lands comes under the operation of S. 117, T. P. Act, and for such a lease a registered instrument cannot be necessary under the law. A verbal settlement is sufficient, and if the defendants are able to show in this case that the rent was altered by a verbal declaration, that will be sufficient. It appears from the khewat that even at the inception of this tenancy the jama had been verbally settled, and evidence has been adduced by the defendant indicating that the jama was reduced even before the receipt, Ex. A, in which the causes of reduction are mentioned, was granted. The evidence of Raghunandan Pandey D. W. 1 has been placed before us, and this witness appears to have stated that in Jeth 1346 the rent was reduced to Rs. 200 and that he made payment of rent in Asarh 1346 and obtained receipt according to the reduced jama. The receipt, Ex. A, is dated 8th June 1939, which corresponds to 5th Asarh 1346, and, as the evidence of D. W. 1 shows, the reduction had been made by the landlord in the preceding Jeth. Section 92, Evidence Act has, therefore, no application in this case, and a discussion with regard to the applicability of this section was, in my opinion, beside the point.

[7] The other contention of Mr. Mazumdar was that S. 188, Bihar Tenancy Act was a bar to the alteration of rent by one or some of the joint landlords. But what S. 188, Bihar Tenancy Act, says is that where two or more persons are joint landlords, anything which the landlord is under this Act required or authorised to do must be done either by both or all those persons acting together, or by an agent authorised to act on behalf of both or all of them. It is important to note that the section refers only to an act which the landlord is required or authorised *to do under this Act*. The distinction has been pointed out by their Lordships of the Judicial Committee in *Jatindra Nath* v. *Prasanna Kumar*, 38 Cal. 270 : (8 I. C. 842), in which case their Lordships held that even the bringing of a suit for arrears of rent was not a thing which the landlord was either required or authorised to do under the Bengal Tenancy Act, and that the rent in arrears being a debt the right to recover it arose under the general law. Applying this principle, it is obvious that if some of the landlords agreed to receive rent from these defendants at a reduced jama, that cannot be regarded as an act which the landlord was required or authorised to do under the Bihar Tenancy Act, and, consequently, S. 188 was no bar to the plaintiff's predecessors reducing the rent in respect of their share, or condescending to receive rent for their share at a reduced jama.

[8] The contentions urged by Mr. Mazumdar, therefore, appear to me to be without any substance, but still the question remains how far this present plaintiff is bound by the reduction made by his predecessors. It is necessary to point out that when Hira Lal Pathak and Ram Kishore Pathak sold their proprietary interest to the plaintiff they gave him to understand that the tenure still carried the jama, which had been recorded in the record-of-rights, and this fact has to be considered along with another important fact, which is this that neither the contents of the receipts nor the allegations of the defendants go to indicate that the defendants have made out any case for a permanent reduction of rent. There had been no deterioration in the quality of the soil nor had any portion of the tenure diluviated or gone out of the

tenants' hands. The reasons for reduction as mentioned in the receipt, Ex. A, are that the produce had gone down on account of want of irrigation facilities, and that the rent of the tenure was high. While these are the grounds mentioned in the receipt, the statement of D. W. 1 in his deposition was that there were no irrigation facilities and that the crops were being damaged by insects. On none of these grounds could the tenant seek a permanent reduction of rent, and it appears to me that because no permanent reduction had been made, when the proprietary interest was transferred, the plaintiff's predecessors did not consider it necessary to inform the plaintiff that any reduction had been made. For the reasons mentioned in the receipt or for the reasons mentioned by D. W. 1 in his deposition, the two being not quite consistent the plaintiff's predecessors might have realised their share of rent from the defendants at a reduced jama, but that was nothing but a temporary remission of rent, it being quite open to a cosharer to remit a portion of the rent for some years. I am, therefore, of the opinion that the materials available do not lead us to hold that the plaintiff's predecessors had reduced the jama for their share permanently.

[9] Even assuming, however, that they had reduced the jama permanently, and fraudulently concealed the fact of reduction of rent when they sold their interest to the plaintiff, I have no hesitation in holding that the plaintiff is not bound by that reduction. Admittedly, the other cosharers have not reduced the jama, and D. W. 1 has admitted that he is still paying rent to them according to the original jama. If, therefore, it is held that so far as the plaintiff's cosharers are concerned, the original jama is still payable to them, and so far as the plaintiff is concerned he can realise his share of rent only at the reduced jama, the tenure would be deemed to be a tenure carrying two rentals— a situation, which appears to me to be inconceivable in law. This is the view which has been taken in some of the authorities which we have been able to find out, and I can respectfully point out that the other view, namely, that the different cosharers can realise rent at different jamas is wholly unwarranted by law. The Full Bench decision of the Calcutta High Court in *Guni Mahomed* v. *Moran*, 4 Cal. 96: (2 C. L. R. 371 F.B.), which is a case decided by five Judges of the Calcutta High Court, appears to me to be an authority which is directly in point. Their Lordships have laid down in this case that though under an arrangement some of the cosharers can realise their proportionate share of the rent separately and can bring separate suits for the same, such an arrangement will not enable one co-sharer to sue the tenant for a kabuliat, because a co-sharer who obtains a kabuliat is bound at the request of the tenant to give him patta upon the same terms, and the grant and acceptance of a binding lease of any separate share cannot exist contemporaneously with the original lease of the entire tenure. While discussing the question, Garth C. J., pointed out that a kabuliat by which an entirely new and separate tenancy is created is obviously inconsistent with it, and that if a suit for kabuliat can be maintained, it would bind the tenant for ever. The question as to whether the landlord or the tenant would be prejudicially affected by it is not material, it being enough for our present purpose that such an arrangement would be binding on both parties and would lead to the creation of a tenancy which would be inconsistent with the original tenancy.

[10] Their Lordships in this case referred, with approval, to the view of Norman Acting C. J., and Dwarka Nath Mitter J., as expressed in the Full Bench case of *Indur Chunder* v. *Bindabun Beharee*, 15 W. R. 21 : (8 Beng. L. R. 257 F. B.). His Lordship, Norman C. J., had observed as follows :

> "A tenure is an entire thing. The obligation to pay the rent reserved upon the letting of land or in respect of the tenure of land by a ryot is either a contract or an obligation in the nature of a contract to pay the rent. The obligation is single and entire. . . . . A *ryot's* undertaking is to pay his rent simply, not to pay to the several proprietors according to their shares . . . . . . I think it clear that, as a general rule, the holder of a tenure cannot be sued by owners of fractional shares in the superior tenure for separate kubooliats according to the proportions to which they allege themselves to be entitled in the superior tenure."

Dwarka Nath Mitter J. had observed as follows:

> "I wish to state, however, that, as a matter of principle, the share-holders of an undivided estate have no right to divide a holding or tenure without the consent of the tenant. The payment to each share-holder of his quota of the rent is of itself no evidence of such consent; although, when coupled with other facts and circumstances, it may justify a Court of justice in coming to the conclusion that the tenant actually consented to the division of his tenure into a corresponding number of distinct holdings."

When the obligation is decreed to be single and entire in spite of the arrangement by which the co-sharers realise their respective share of rent separately and when the tenure is deemed to be an entire thing in itself, it cannot be urged that under the law, there is no bar to a particular tenure carrying two rentals.

[11] In *Gopal Chunder Das* v. *Umesh Narain*, 17 Cal. 695, the Full Bench case was referred to, and their Lordships pointed out that as held by the Full Bench an arrangement of the nature indicated above does not give rise to a separate tenancy and that the original tenancy unde all the landlords still continues. In *Baidya Nath*

v. *Ilim*, 25 Cal. 917: (2 C. W. N. 44), the decision in *Gopal Chunder Das* v. *Umesh Narain*, 17 Cal. 695, was referred to with approval, and in this case also the principle that the holding or a tenure is to be deemed to be an entire one was reiterated. I think these authorities are conclusive so far as the point raised is concerned, and there is no justification for the view that a tenure can carry two rentals for ever. It was argued that as the plaintiff has stepped into the shoes of Hira Lal Pathak and Ram Kishore Pathak he is bound by their actions and that he cannot go beyond the agreement by which the rent was reduced. But the simple answer to this contention is that if the plaintiff's predecessors had entered into such an agreement, that agreement cannot be regarded as a covenant running with the land. It was purely a personal contract between the Pathaks and the tenant, and I have already said that the conduct of the Pathaks clearly shows that they also treated the arrangement, which they had made, as a temporary arrangement, and the agreement into which they had entered as their personal agreement. My conclusion, therefore, in disagreement with the Courts below is that the plaintiff is entitled to a decree at the jama claimed.

[12] The appeal is allowed, and the suit is decreed in full with costs throughout.

[13] **Reuben J.**—I agree. First of all, there is no evidence on the record to support the conclusion that there was a permanent reduction of the rent. All that happened was that Hira Lal Pathak and Ram Kishore Pathak bound themselves personally to realise rent only at the rental rate of Rs. 200 ; the agreement was not intended to bind the tenancy, and does not bind the person to whom the landlord's right in the tenancy has been transferred.

[14] Secondly, it seems to me that this is a case of an entire tenancy in which, though the co-sharer landlords by private agreement between the parties have been realising their shares of the rent separately, they are not entitled each separately to alter the rent.

[15] In *Doorga Prosad* v. *Joynarain*, 4 Cal. 96, a Full Bench of five Judges dealt with tenancies of this kind. Certain co-sharer landlords had sued for (1) a *kabuliat* for their share and (2) recovery of rent in respect of their share at an enhanced rate. The Full Bench rejected both these claims. It held that the arrangement for separate realisation by each co-sharer landlord of his share of the rent did not break up the entirety of the tenancy, and referred with approval to the observations of Norman, Acting C. J., and Dwarka Nath Mitter J., in *Indur Chunder Doogur* v. *Bindabun Beharee*, 15 W. R. 21 : (8 Beng. L. R. 257 F. B.), to which my learned brother has already referred. Having observed that a kabuliat in favour of one co-sharer would be inconsistent with the continued existence of the original tenancy, the Full Bench remarked that the right of one co-sharer to enhance the rent of his share separately is governed by the same principles. *Romanath Ruckhit* v. *Chand Huree Bhoova*, 14 W. R. 432: (6 Beng. L.R. 356), is only apparently inconsistent with these observations, it not being clear whether the tenure with which their Lordships were concerned had ever been held at an entire rent *vide* : *Doorga Prosad Mytse* v. *Joynarain Hazra*, 4 Cal. 96 at p. 102. The principle was reaffirmed in *Gopal Chunder Das* v. *Umesh Narain Choudhry*, 17 Cal. 695, where their Lordships rejected a claim by a co-sharer landlord for enhancement of rent, observing

> "The right of some of several co-sharers to collect separately their share of the entire rent of an undivided holding is quite distinct. It rests on an arrangement between the co-sharers and the tenants as to the mode in which the entire rent shall be collected, but which preserves intact the original tenancy both as regards the area of the holding and the rent paid."

V.B.B. *Appeal allowed.*

A. I. R. (37) 1950 Patna 25 *(C. N. 9.)*

REUBEN AND NARAYAN JJ.

Dwarika Sahu — *Appellant* v. *Mt. Anandi and others* — *Respondents.*

A. F. A. D. No. 2601 of 1947, Decided on 22nd August 1949, from decision of Addl. Sub-Judge, Hazaribagh, D/- 10th October 1947.

Limitation Act (1908), Art. 11A — This article and Art. 11 — Distinction—Article 11 covers order whether made with or without investigation — Article 11A does not apply where there has been no investigation — Plaintiff instituting case under O. 21, R. 97, Civil P. C.—No appearance on plaintiff's behalf on very first date fixed—No likelihood of evidence being gone into on such date — Case dismissed for default — Plaintiff filing suit for possession — Suit filed more than one year after dismissal of case under O. 21, R. 97—Suit held was not governed by Art. 11A—Limitation Act (1908), Art. 11—Civil P. C. (1908), O. 21, Rr. 63 and 103.

Reading Art. 11 with O. 21, R. 63, it is clear that Art. 11 will cover the final order in a proceeding, whether it falls specifically under R. 60, 61 or 62, or not, and whether it was made with or without investigation. There is a significant difference, however, between Rr. 63 and 103 by which the final orders in claim cases are made conclusive. Whereas R. 63 makes conclusive the final order without any specification of the particular provision under which it is passed, R. 103 confines the conclusive effect of the decision to orders made under R. 98, 99 or 101, that is to say, to orders made after investigation. It is incorrect to construe Art. 11A separately from the corresponding provision in the Civil Procedure Code, so as to cover a suit directed against a final order which does not fall specifically within the provisions of R. 98, 99 or 101. Rule 103 gives a conclusive character to certain summary decisions and provides that they may be challenged by suit. Art. 11A is the provision fixing the period of limitation for the institution of such a suit. In the case of orders which the Code has expressly refrained from making conclusive, there is no reason why the unsuccessful party should be deprived of his right under the general law of suing on his title for recovery of possession. Article 11A has therefore no application where, in the summary proceedings arising out of the claim in the execution case, there has been no investigation : A. I. R. (9) 1922 Cal. 229 ; A. I. R. (4) 1917 All. 426 ; A. I. R. (7) 1920 Bom. 64 and A. I. R. (5) 1918 Mad. 554, *Rel. on.* [Paras 13, 15, 16 and 18]

The plaintiff instituted a case under O. 21, R. 97 of the Code. On the very first date fixed in the case, however, there was no appearance on his behalf and the case was dismissed on 10th April 1943. At the time when the date was fixed, the opposite party had not appeared. There was no certainty that he would appear on the first date and it was not at all certain, rather it was most unlikely, that evidence would be gone into on the first date fixed in the case. The Munsif in dismissing the objection made no reference to the absence of evidence, but expressly dismissed the case "for default." The present suit for declaration of title and recovery of possession was filed by the plaintiff on 2nd May 1944 more than a year after the dismissal of his objection, under O. 21, R. 97:

Held that the order dismissing the case was not one passed after investigation and therefore the suit was not governed by Art. 11A: 15 Cal. 521 (P. C.) ; 19 All. 253 (F. B.) ; 32 Cal. 537 and A. I. R. (5) 1918 All 72, *Disting.*; A. I. R. (7) 1920 Pat. 123, *Expl. and Disting.* [Para 21]

Annotation: ('42 Com.) Lim. Act, Art. 11, N. 12, Pt. 3; Art. 11A, N. 8, Pt. 4.

Sarjoo Prasad and R. P. Katriar—for Appellant.
J. M. Ghose — for Respondents.

Reuben J. — This appeal by the plaintiff is directed against a decision of the Additional Subordinate Judge of Hazaribagh, reversing a decision of the Munsif of Hazaribagh. It arises out of a suit for the declaration of title to and recovery of possession of a house, being holding No. 933 in the Municipality of Hazaribagh.

[2] This house formerly belonged to one Hazari Barai. Hazari had two sons Shib Charan and Chedi. Shib Charan died leaving two sons Shyamlal and Lalji. Chedi died leaving a widow Tejni and a daughter Anandi. Mt. Tejni is now dead. The plaintiff claims the house by purchasing in execution of a decree obtained by him against Shyamlal and Lalji on the foot of a handnote. According to him, Chedi died joint with his brother Shib Charan, and the house finally came by survivorship to Shyamlal and Lalji. His purchase was in the year 1940. In the course of the execution of the money decree, a claim under O. 21, R. 58, was filed by Mt. Rajeshwari (defendant 4), which was decided in her favour. The plaintiff, however, succeeded on 22nd December 1941 in getting a decision in his favour in Title Suit No. 271 of 1940 brought by him under O. 21, R. 63, Civil P. C. Having succeeded in this suit, he asked the Court for delivery of possession in pursuance of his purchase in the money execution. Delivery of possession was resisted by Anandi (defendant 1), claiming a half share in the house on the contention that her father Chedi separated from his brother Shib Charan and that she inherited his half share of the house. The plaintiff, thereupon, instituted a case under O. 21, R. 97 of the Code. On the very first date fixed in the case, however, there was no appearance on his behalf and the case was dismissed on 10th April 1943. The present suit was filed by him on 2nd May 1944, more than a year after the dismissal of his objection under O. 21, R. 97.

[3] Mt. Anandi contested the suit setting up the same story as before. Both the Courts below have agreed in rejecting her story. They have held that Chedi died joint with his brother and that the house passed by survivorship to Shyamlal and Lalji, with the consequent result that Mt. Anandi has no legal interest in it. The suit was decreed by the Munsif. His decree has been reversed and the suit dismissed by the Subordinate Judge on the ground that the limitation for the filing of the suit is governed by Art. 11-A of Sch. 1, Limitation Act of 1908. Hence, the present appeal. In the opinion of the Munsif, Art. 11-A had no application to this suit, because the final order passed in the proceeding under O. 21, R. 97, was without any investigation having been made by the Court. The Subordinate Judge on the contrary, held that the decision of a Division Bench of this Court in *Raziuddin Hussain* v. *Bindesri Prasad Singh*, 5 Pat. L. J. 652 : (A. I. R. (7) 1920 Pat. 123), is an authority that an investigation is not necessary for the applicability of this Article.

[4] Only two points arise in the present appeal : firstly, whether investigation is necessary for the applicability of Art. 11-A, and secondly, whether in this particular case there was investigation. I shall deal first with the second point which is readily disposed of.

[5] Admittedly, the application under O. 21, R. 97, was dismissed in the absence of the plaintiff on his failure to appear when the case was called out. But Mr. Ghosh, for the respondents, cites *Sardari Lal* v. *Ambika Pershad*, 15 I. A. 123 : (15 Cal. 521 P. C.), as an authority that the Civil Procedure Code does not prescribe for the purpose of these summary proceedings such a full investigation as in a suit. The case is an authority for the proposition that the Civil Procedure Code does not prescribe the form or the extent of the investigation that should be made in summary proceedings of this kind, and that, when the question arises as to whether an investigation was made or not, it should be decided on the facts of the particular case. The proceeding which their Lordships had to consider was evidently not one in which it could be said that there had been no investigation; the

Subordinate Judge had actually given effect to the objection and had directed that :

> "The objected property should be released on the ground of its being ancestral property, and that only the right of partition of the judgment-debtor be sold".

It was clearly a decision on the merits. As their Lordships suggested, this decision may have proceeded upon an agreement between the parties as to the facts. That is to say, the Court had before it the admission of the parties concerned as evidence on which it could act.

[6] Before I refer to the other cases cited by Mr. Ghose, it will be convenient to set out the relevant orders in the proceedings under O. 21, R. 97 :

> "12th March 1943. Register the application as Misc. case. Issue notice to the O. Parties fixing 10th April 1943 for disposal. . . . . . . 10th April 1943. Notices on O. Parties Nos. 2 to 7 served personally. Notice of O. party No. 1 served by affixing on refusal and of O. Party 8 also served by affixing on refusal of his father who lives jointly. O. Parties appear through pleaders and file *tardids*. Appeal does not take any steps.
>
> None responds or appears to repeated calls for the applicant. O. Parties Nos. 1 and 2 are present. The Misc. case is therefore dismissed for default with costs to the Opposite party. Pleader's fee Rs. 8. . . ."

These orders show that the case was disposed of by the executing Court on the very first date fixed for the appearance of the opposite party. Let us turn now to the cases on which Mr. Ghosh relies.

[7] In *Lachmi Narain* v. *H. C. Martindell*, 19 ALL. 253 : (1897 A. W. N. 60 F. B.), the parties appeared on 18th November, and the objector stated that he had not had sufficient time to produce certain evidence which he wished to produce. He asked for an adjournment, and the case was adjourned until 28th November, with the warning that if he did not then produce his evidence, his claim would be dismissed. He did not appear on 28th. The Court waited till 29th, and again till 30th, and then on 30th, as he did not appear, his claim was rejected for want of prosecution. Their Lordships, in holding that the case must be treated as one in which there had been an investigation, pointed out that the onus of proof lay on the objector, that he had been given a full opportunity of substantiating his right, and that he had failed to do so. In *Rahim Bux* v. *Abdul Khader*, 32 Cal. 537, the objector was present in Court on the day of hearing and asked for time. The Court refused to grant him time and "the case thereupon went as if the claimant had failed to adduce any evidence." The order passed by the Court rejecting the claim was :

> "The claimant has adduced no evidence, and this is due entirely to laches on the part of the claimant. He presented his petition very late, and it would not have been registered had not the petitioner's pleader undertaken to produce evidence today at all hazards. It appears, however, that the petition was filed on 25th, but boat hire was not deposited till six days after ; that is, on 31st. Hence summons to witnesses could not be served in time. Claim rejected with costs".

It was clearly a case in which the Court was dismissing the objection on account of the failure of the claimant, in spite of opportunity given, to produce evidence in support of his claim and not merely a dismissal for default. As has been pointed out in *Nirode Barani Dasi* v. *Manindra Narayan*, 26 C. W. N. 853 : (A. I. R. (9) 1922 Cal. 229), there is a real distinction between

> "a case where it is dismissed for default, and a case where the party appears and fails to adduce evidence and the case is in consequence dismissed in which event the dismissal is not one for default."

In the course of their decision in *Rahim Bux's case*, (32 Cal. 537), their Lordships referred to *Kallar Singh* v. *Toril Mahton*, 1 C. W. N. 24 and distinguished it on the ground that there was no apperance for the claimant while the decree-holder was present. In the present case, also, the claimant was absent when the objection was dismissed. In *Gokul* v. *Mohri Bibi*, 40 ALL. 325 : (A. I. R. (5) 1918 ALL. 72), on 15th June, the date fixed for hearing of the objection, an application was made by the objector's pleader praying for an adjournment. The application was rejected and the objection was dismissed by the following order :

> "This is an objection under S. 278, Civil P. C. The correctness of it is disputed by the decree-holder. The objector has produced no evidence to make out the truth of his claim, and it is disallowed with costs."

It is evident from the form of the order adopted by the Court that it regarded itself as dismissing the case not merely for the default of the objector but because there was no evidence in support of the claim. It is also clear that at the time when this order was passed there was an appearance on behalf of the objector.

[8] To turn back again to the facts of the present case, the order of dismissal was passed on the very first date fixed in the case. At the time when the date was fixed, the opposite party had not appeared. There was no certainty that they would appear on the first date and it was not at all certain, rather it was most unlikely, that evidence would be gone into on the first date fixed in the case. When, therefore, the case was summarily dismissed on 10th April 1943, how can it be said that the order was one passed after investigation? The Munsif in dismissing the objection makes no reference to the absence of evidence, but expressly dismisses the case "for default." This shows that he too did not regard the date as a peremptory date for taking evidence. Of the cases cited by Mr. Ghosh, there is only one that is at all comparable with the case before us, in that the objector did not appear on the date when the case was

dismissed. This is the *case of Laahmi Narain*, 19 ALL. 253 : (1897 A. W. N. 60 (F. B.)). The facts of that case, as set out by me above, show that the order dismissing the objection was passed by the Court after fixing a peremptory date for the taking of evidence, and after having given the objector two further opportunities of adducing evidence in the case. In these circumstances, the objector could not be allowed to assert in a subsequent proceeding that his objection had been rejected without investigation. For these reasons, I find myself unable to regard the present case as one in which there has been an investigation.

[9] I come now to the first point. Article 11-A of the present Limitation Act is as follows:

"Article.	Description of suit.	Period of Limitation.	Time from which period begins to run.
11-A.	By a person against whom an order has been made under the Code of Civil Procedure, 1908, upon an application by the holder of a decree for possession of immovable property or by the purchaser of such property sold in execution of a decree, complaining of resistance or obstruction to the delivery of possession thereof, or upon an application by any person dispossessed of such property in the delivery of possession thereof to the decree-holder or purchaser, to establish the right which he claims to the present possession of the property comprised in the order.	One year.	The date of the order."

[10] In considering its scope, it is necessary also to consider Art. 11, the relevant portion of which is as follows:

"Article.	Description of suit.	Period of Limitation.	Time from which period begins to run.
"11.	By a person against whom any of the following orders has been made to establish the right which he claims to the property comprised in the order.	One year.	The date of the order."
(1)	Order under the Code of Civil procedure, 1908, on a claim preferred to, or an objection made to the attachment of property attached in execution of a decree.		

These two Articles correspond to Art. 11 in the second schedule to the previous Limitation Act, Act XV [15] of 1877, which was as follows:

"Article.	Description of suit.	Period of Limitation.	Time from which period begins to run.
"11.	By person against whom an order is passed under S. 280, 281, 282 or 335 of the Code of Civil Procedure to establish his right to, or to the present possession of the property comprised in the order.	One year.	The date of the order."

[11] The references in this article are to the Code of Civil Procedure of 1882, being Act XIV [14] of 1882. I set out below the relevant portions of this Code, which I shall refer to henceforward as the previous Code :

> "*278.* If any claim be preferred to, or any objection be made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit......
>
> *279.* The claimant or objector must adduce evidence to show that at the date of the attachment be had some interest in, or was in possession of, the property attached.
>
> *280.* If upon the said investigation the Court is satified that for the reason stated in the claim or objection, such property was not, when attached, in the possession of the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment debtor at such time it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall pass an order for releasing the property, wholly or to such extent as it thinks fit, from attachment.
>
> *281. If the Court is satisfied* that the property was, at the time it was attached, in possesion of the judgment-debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim.
>
> *282. If the Court is satisfied* that the property is subject to a mortgage or lien in favour of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to such mortgage or lien.
>
> *283.* The party against whom an order under *S. 280, 281 or 282* is passed may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive.
>
> *335.* If the purchaser of any such property (i. e., immoveable property sold in execution of a decree) is resisted or obstructed by any person other than the judgment-debtor claiming in good faith a right to the present possession thereof, or if, in delivering possession thereof, any such person is dispossessed, the Court, on the complaint of the purchaser or the person so dispos-

sessed, *shall inquire* into the matter of the resistance, obstruction or dispossession, as the case may be, *and pass such* order thereon as it thinks fit.

The party against whom *such order* is passed may institute a suit to establish the right which he claims to the present possession of the property; but, subject to the result of such suit, if any, the order shall be final."

[12] It is clear from the portions of these sections placed by me in italics that the previous Code contemplated that the orders under Ss. 280, 281, 282 and 335 should be passed after an investigation. It was, therefore, held in several decisions of the High Courts in India that the article had no application in cases where the claim was dismissed without investigation. Article 11 of the previous Limitation Act has now been split up into two articles corresponding to the two different stages of execution at which claims to property may be raised. The present Art. 11 relates to objections raised when property is being sought to be attached and sold and Art. 11-A to cases in which the property has been sold or there is a decree for possession and the auction-purchaser, or the decree-holder, as the case may be, seeks to obtain delivery of possession through the Court. In contrast to the old Art. 11, neither of the two present articles makes a specific reference to the particular provision of the Code under which the decision sought to be challenged must have been passed. We have now to consider what the effect of this alteration is.

[13] So far as the present Art. 11 is concerned, there is no doubt at all and the correct interpretation of this article has been set out in several decisions of the High Courts in India. It relates to cases arising out of objections filed at the stage of attachment and sale, that is to say, cases that would fall under Ss. 280, 281 and 282 of the previous Code. The corresponding provisions of the present Code are O. 21, Rr. 60, 61 and 62 respectively. These provisions, as enacted in 1908, are substantially the same as the old sections and require an investigation by the Court before passing an order allowing or disallowing the claim. There, is, however, a substantial difference in O. 21, R. 63 corresponding to S. 283 of the previous Code by which the order passed by a Court on such a claim is made conclusive subject to the result of a suit instituted as provided by that rule. Whereas, under S. 283 of the previous Code, it was only an order under the specific S. 280, 281 or 282 which was made conclusive, R. 63 is so framed as to make conclusive any final order passed on the objection whether it falls specifically under R. 60, 61 or 62, or not. The rule provides:

"Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive."

Reading the present Art. 11 with O. 21, R. 63, it is clear that Art. 11 will cover the final order in such a proceeding, whether it falls specifically under R. 60, 61 or 62, or not, and whether it was made with or without investigation.

[14] Coming now to Art. 11-A and the corresponding provisions in the present Code, we find a difference. The provisions of S. 335 of the previous Code are scattered over several provisions of the present Code. I reproduce these below in the form in which they were enacted in 1908:

"97. *(1)* Where the holder of a decree for the possession of immoveable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.

(2) The Court *shall fix a day for investigating* the matter and shall summon the party against whom the application is made to appear and answer the same.

98. Where the Court is satisfied, that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation, to be detained in the civil prison for a term which may extend to thirty days.

99. Where the Court is satisfied that the resistance or obstruction was occasioned by any person (other than the judgment-debtor) claiming in good faith to be in possession of the property on his own account or on account of same person other than the judgment-debtor, the Court shall make an order dismissing the application.

100 (1). Where any person other than the judgment-debtor is dispossessed of immoveable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.

(2) The Court shall fix a day for *investigating* the matter and shall summon the party against whom the application is made to appear and answer the same.

101. Where the Court is *satisfied* that the applicant was in possession of the property on his own account or on account of some person other than the judgment-debtor, it shall direct that the applicant be put into possession of the property.

103 Any party not being a judgment-debtor against whom an order is made under R. 98, R 99 or R 101, may institute a suit to establish the right which he claims to the present possession of the property; but, subject to the result of such suit (if any), the order shall be conclusive."

[15] Again, as the portions placed by me in italics show, there is an insistence on an investigation by the Court before orders are passed by the Court under these specific provisions. I have indicated that this is also the case with the rules relating to claims made at the stage of attachment and sale. There is a significant difference, however, between Rr. 63 and 103 by

which the final orders in claim cases are made conclusive whereas R. 63 makes conclusive the final order without any specification of the particular provision under which it is passed, R. 103 confines the conclusive effect of the decision to orders made under R. 98, 99 or 101, that is to say, to orders made after investigation.

[16] Mr. Ghosh has conceded that the suit contemplated by R. 103, is a suit directed against a decision made after investigation. He contends however, that R. 11-A must be read on its own terms to cover a wider range of suits, not only suits strictly within the provisions of R. 103, but a suit directed against a final order which does not fall specifically within the provisions of R. 98, 99 or 101. It appears to me incorrect to construe Art. 11-A separately from the corresponding provision in the Civil Procedure Code. Rule 103 gives a conclusive character to certain summary decisions and provides that they may be challenged by suit. Art. 11-A is the provision fixing the period of limitation for the institution of such a suit. In the case of orders which the Code has expressly refrained from making conclusive, there is no reason why the unsuccessful party should be deprived of his right under the general law of suing on his title for recovery of possession.

[17] As another reason against this interpretation, Mr. Ghosh has referred to the observation of their Lordships of the Judicial Committee in *Sardhari Lal* v. *Ambika Pershad* (15 I. A. 123 : 15 Cal. 521 P. C.) (*Supra*) regarding the policy of the Limitation Act to secure speedy settlement of questions of title raised at the stage of execution. Their Lordships were dealing with a case of an objection at the stage of the attachment and sale of the property, and have carefully confined their remark to this stage:

> "....The policy of the Act evidently is to secure the speedy settlement of questions of title raised at execution sales, and for that reason a year is fixed as the time within which the suit must be brought."

This is still the policy of the Act as I have shown in discussing Art. 11, and the corresponding provisions of the Civil Procedure Code. Article 11-A deals with a later stage of the execution proceedings. The suitor who has obtained a decree for possession and the auction-purchaser who has purchased property in execution are not bound to obtain delivery of the property by execution proceedings in the Court. There is nothing to prevent them from proceeding by way of a suit for declaration of title and recovery of possession. Such a suit would be governed by the ordinary rule as to limitation. Where, however, the party claiming a right to possession has put the matter in issue and investigation has been made by a Court, the law insists that a suit challenging the summary decision must be instituted within one year.

[18] On the above grounds, I am of the opinion that Art. 11-A has no application where, in the summary proceedings arising out of the claim in the execution case, there has been no investigation. This view has been taken in several reported cases, *Sm. Nirode Barani Dasi* v. *Manindra Narayan Chandra*, 26 C. W. N. 853 :(A. I. R. (9) 1922 Cal. 229), *Ali Mohammad* v. *Ram Narain*, A. I. R. (4) 1917 ALL. 426 : (39 I. C. 797), *Laxmishankar* v. *Hanjabhai*, A. I. R. (7) 1920 Bom. 64 : (44 Bom. 515), *Venkatasubba Reddi* v. *Chundi Linga Reddi*, A. I. R. (5) 1918 Mad. 554 (1) :(41 I. C. 640).

[19] Mr. Ghosh has finally urged that, in view of the decision in *Raziuddin Hussain* v. *Bindesri Prasad Singh*, 5 P.L.J. 652 :(A.I.R. (7) 1920 Pat. 123), it is not open to this Bench to take the view which I have indicated, and that, if we differ from that decision, the matter must be referred to a Full Bench. I am unable to agree with this contention, for I do not regard that decision as a decision on the proper construction of Art. 11-A. The case before their Lordships arose out of the dismissal of an application under O. 21, R. 100, Civil P. C. but through some misapprehension, which I am unable to understand, their Lordships construed not Art. *11-A* but Art. 11 of the Schedule to the Limitation Act, and, in coming to their conclusion that an investigation is not necessary for the applicability of this Article, relied on *Nagendra Lal* v. *Fani Bhusan*, 23 C. W. N. 375 : (A. I. R. (6) 1919 Cal. 835), *Venkataratnam* v. *Ranganayakamma Garu*, 41 Mad. 985 :(A.I R. (6) 1919 Mad. 738 F.B.) and *Gokul* v. *Mohri Bibi*, 40 ALL. 325 : (A. I. R. (5) 1918 ALL. 72), which Mr. Ghosh concedes, are all cases under Art. 11. Their attention not having been drawn to Art. 11-A, they did not consider the decisions dealing with that provision, some of which I have mentioned above. Further, from the facts as set out in the judgment of Sultan Ahmed J. I think that was not really a case of absence of investigation. The summary proceeding was fixed for hearing on 11th September 1915. On that date, the claimant appeared, but did not adduce evidence. He asked for time and this was refused and the Court recorded the following order:

> "Applicant again applies for time. It is highly frivolous and is therefore rejected. Applicant takes no step to adduce evidence; other side is ready; ordered that the application is struck off for default with costs and pleader fee Rs. 4."

[20] Evidently, there had been previous occasions on which the case was fixed for hearing and the claimant had asked for time. On the date in question the applicant was present and once more asked for time. When that time was

refused, the applicant adduced no evidence and the other side was ready and present. The case is on a par with *Lachmi Narain* v. *H. C. Martindell*, (19 ALL. 253 : 1897 A. W. N. 60 F. B.) *(supra)*. The use of the words "for default" makes no difference, what the Court really did was that it dismissed the claim because the claimant had failed to adduce evidence in support of it.

[21] On the above grounds, I consider that this suit was not governed by Art. 11-A and was rightly decreed by the Munsif. In the circumstances, I would allow the appeal, set aside the decree of the Subordinate Judge and restore the decree of the Munsif. The plaintiff will get his costs throughout.

[22] **Narayan J.** — I agree. The decision of this Court in *Raziuddin Hussain* v. *Bindeshwari Pd. Singh*, (5 P. L. J. 652 : A. I. R. (7) 1920 Pat. 123), does not trouble me at all. That was a case in which, for some reason or other, Art. 11-A was not considered at all. The decision is therefore not binding on us, and we respectfully agree with the view taken by the other High Courts in the cases referred to by my learned brother.

V. R. B. *Appeal allowed.*

A. I. R. (37) 1950 Patna 31 *[C. N. 10.]*

MANOHAR LALL AND RAMASWAMI JJ.

Bansi Ram and another — Appellants v. *Commissioner of Daudnagar Municipality — Respondent.*

A. F. A.D No. 2388 of 1947, Decided on 5th August 1949, from decision of Addl. Dist. Judge, Gaya, D/- 21st August 1947.

Bengal Ferries Act (I [1] of 1885), Ss. 24, 26 — Sections do not abrogate rights and obligations of parties — Lease providing for cancellation if lessee charged higher tolls — Lessor can cancel lease.

Sections 24 and 26 provide criminal liability of the lessee who breaks the conditions which make him liable to convictions under S 24, and do not at all abrogate the rights and obligations of the parties which have been already entered into by the agreement under which the lease was granted. If in the lease itself there is a clear stipulation that the lease is liable to be determined or cancelled if the lessee charged tolls higher than he is lawfully entitled to the lessor can cancel the lease and eject the lessee. [Para 4]

Rajkishore Prasad— for Appellants.

K. C. Sanyal and R. S. Sinha — for Respondent.

Judgment.— This is an appeal by the plaintiffs who are aggrieved by the decision of the appellate Additional District Judge of Gaya, dated 21st August 1947 by which he dismissed their suit which was instituted on 2nd January 1946 for recovery of damages on account of ejectment from a ferry leased to them before the expiry of its term of three years, and also for refund of security.

[2] It is established that on 1st April 1944, the plaintiffs were granted a lease by the defendants from 1st April 1944 to 31st March 1947, at the rate of 3,300 per annum to run a ferry. The lease is evidenced by the contract, Ex. 1, which contains a number of terms which the plaintiffs had to carry out, and also contains a stipulation that if some or any of the terms are not complied with, the lease will be liable to be forfeited. The allegations of the defendants upon which they cancelled the lease on 13th July 1945, are that the plaintiffs were charging higher rates of tolls, not providing the approach road and not keeping the landing ground of the ghat in order. All these allegations have been found to be established by the Court of fact, and accordingly the appellate Court has dismissed the suit.

[3] Mr. Rajkishore Prasad argues, in the first place, that the lease could only be cancelled in accordance with the provisions of Ss. 13, 24 and 26, Ferries Act, I [1] of 1885. The argument as to the applicability of S. 13 is that the lease of the tolls of a ferry shall be liable to be cancelled at once by the Magistrate of the district only if the lessee has failed to make due provision for the convenience or safety of the public within fifteen days after being required to do so by a notice in writing from such Magistrate. In our opinion, it is unnecessary to consider the correctness of this argument because in the view we take the lease has been rightly determined on account of the finding that the plaintiffs were guilty of charging higher rates of tolls against the stipulation in the lease.

[4] The question to be considered then is whether Ss. 24 and 26 apply in the present case as argued by Mr. Rajkishore Prasad. Now S. 24 *inter alia* only says that every lessee who takes a sum higher than the lawful tolls shall be punished with fine, and S. 26 says that if any lessee having been convicted of an offence under S. 24 is again convicted of an offence under S. 23 or 24 or 25, the Magistrate of the district may cancel the lease of the tolls of the ferry. In our opinion, these two sections provide criminal liability of the lessee who breaks the conditions which make him liable to convictions under S. 24, and do not at all abrogate the rights and obligations of the parties which have been already entered into by the agreement under which the lease was granted. In the lease itself there is a clear stipulation that the lease is liable to be determined or cancelled if the lessee charges tolls higher than he is lawfully entitled to. This has exactly happened in the present case, and the lessee was called upon to show cause on or about 13th July 1945, and the lease was cancelled and the lessee was ejected one week later.

[5] We cannot accept the correctness of the contention regarding S. 26 as put forward by the learned advocate. It is conceivable that the Magistrate of the district may have no information as to the fact that the lessee has been charging tolls higher than the lawful tolls, and he may come to know of it after he has been informed of this by going through the judgment of the criminal Court. He then gets power under S. 26 to cancel the lease, but he may not cancel it and he may wait till the lessee is again convicted. This right of the lessor (Magistrate of the district?) to cancel the lease is independent of the right of the lessor to cancel it according to the terms of the lease. In our opinion, the argument based upon any of the sections of the Ferries Act has no application in the present case in view of the finding that the plaintiffs had been guilty of charging higher rates of tolls.

[6] An argument was advanced before us that the plaintiffs should have been granted a decree for recovery of Rs. 825 being the amount of security which they had deposited with the defendants. This argument would have been entitled to succeed if it had not been disclosed to us that the defendants had already realised a sum of Rs. 1900 said to be due to them from the plaintiffs after making a deduction of this Rs. 825 by means of some certificate proceedings. The cause of action for the recovery of Rs. 825 is soldered up with the cause of action for the alleged illegal recovery of Rs. 1900. That cannot form a subject of decision before us in this appeal.

[7] The result is that the appeal fails and is dismissed with costs.

D.H. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 32 *[C. N. 11.]*

MANOHAR LALL AND RAMASWAMI JJ.

Jageshar Thakur—Appellant v. *Mahabharath Thakur—Respondent.*

A. F. A. D. No. 217 of 1948, Decided on 1st August 1949, from decision of Sub-Judge, Muzaffarpur, D/- 15th January 1948.

Civil P. C. (1908), S. 80—Village headman appointed under Bihar Act VI [6] of 1943 is public officer—He filing malicious petitions against plaintiff accusing him of certain offences—He acts in his official capacity—Notice under S. 80 is necessary.

If an act done by a public officer is apparently an official act, its character as such will not be changed by allegations that it was done in bad faith or that it had not that character which it purports to have: A. I. R. (5) 1918 Mad. 62 (F. B.); A. I. R. (28) 1941 Pat. 385 and A. I. R. (17) 1930 All. 742, *Ref.* [Para 5]

Hence where a headman of a village who is a public officer appointed under Bihar Act VI [6] of 1943 files malicious petitions against a certain person accusing him of certain offences he purports to act in his official capacity and therefore would be entitled to a notice under S. 80 before a suit can be filed against him: A. I. R. (33) 1946 Pat. 31; A. I. R. (27) 1940 Pat. 516 and A. I. R. (21) 1934 P. C. 96, *Disting.* [Para 3]

Annotation; ('44-Com.) Civil P. C., S. 2 (17) pt. 23; S. 80 N. 5.

Rajkishore Prasad—for Appellant.
Ishwari Nandan Prasad—for Respondent.

Judgment.—In this appeal by the defendant the only question for decision is whether the appellant was entitled to a notice under S. 80, Civil P. C. which admittedly has not been served upon him in this case.

[2] The facts found are that the appellant as a headman of a village appointed under Bihar Act VI [6] of 1943 filed malicious petitions against the plaintiff accusing him of the offences which upon the evidence it has been found were not committed by him at all.

[3] It is apparent to us that in this case notice under S. 80 of the Code of Civil Procedure ought to have been given because the appellant is a public officer appointed under Bihar Act VI [6] of 1943 to carry on certain duties which may be assigned to him from time to time by the District Magistrate of the area concerned, and secondly because he purported to act as a public officer.

[4] A large number of cases have been cited before us on behalf of the respondent, but the cases relied upon on behalf of the respondent can be distinguished on the ground that in those cases it was found that there was no illegal act committed by the public officer; for instance see *Surendra Nath* v. *Jagat Narain*, A. I. R. (33) 1946 Pat. 31: (24 Pat. 514), *Jyoti Prasad* v. *Henry Seddon*, 19 Pat. 433: (A. I. R. (27) 1940 Pat. 516) and *Revati Mohan Das* v. *Jatindra Mohan*, 61 I. A. 171: (A. I. R. (21) 1934 P. C. 96).

[5] On the other hand, the view consistently taken in this Court and other High Courts is that if an act done by a public officer is apparently an official act, its character as such will not be changed by allegations that it was done in bad faith or that it had not that character which it purports to have; see *Koti Reddi* v. *Subbiah*, 41 Mad. 792: (A. I. R. (5) 1918 Mad. 62 F. B.), *Nand Kumar Sinha* v. *Pashupathi Ghosh*, A. I. R. (28) 1941 Pat. 385: (42 Cr. L. J. 375) and *Muhammad Sharif* v. *Nasir Ali*, 53 ALL. 44: (A. I. R. (17) 1930 ALL. 742).

[6] For these reasons, the appeal must be allowed and the suit of the plaintiff dismissed. Having regard to the finding that the act complained of was malicious, the parties will bear their own costs in all the Courts.

K.S. *Appeal allowed.*

A. I. R. (37) 1950 Patna 33 *[C. N. 12.]*

REUBEN AND NARAYAN JJ.

Chanderdeb Lall and others — Appellants v. Nandji Lall and others — Respondents.

A. F. A. D. No. 2516 of 1946, Decided on 27th July 1949, from decision of Dist. Judge, Purnea, D/- 16th September 1946.

Hindu law—Partition—Suit for—Plaintiff claiming that certain property held by individual member was joint family property — Burden to prove that family was possessed of sufficient property by which property in question could have been acquired lies on him—On such proof burden shifts to other side who alleges self-acquisition to prove that it was acquired without aid of family fund.

There is no presumption that the family, because it is joint, possesses joint property or any property and, when in a suit for partition a party claims that any particular item of property held by an individual member is a joint family property, the burden of proving that it is so rests on the party asserting it. He must show that the family was possessed of some property with the aid of which the property in question could have been acquired, and it is only after that is shown that the onus shifts to the party alleging self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate: A. I. R. (24) 1937 Mad. 538 and A.I.R. (25) 1938 Mad. 841, *Rel. on.* [Para 6]

Raj Kishore Prasad — for Appellants.

Harinandansingh, Nripendra Nath Roy and Kumar Chhatrapati Kumarsinha — for Respondents.

Narayan J.—This is an appeal by the defendants arising out of a suit for partition.

[2] One Ganpat Lal had five sons, Satnarain Lal, Chhabilchand Lal, Ranjil Chand, Ramdayal and Chanderdeo. Satnarain and Chhabilchand died issueless, and the plaintiff is the son of Ramjil Chand, who had another son Makhan Lal, who also died without an issue. Ramdayal is defendant 1 in the suit and Chanderdeo is defendant 2, defendants 3, 4 and 5 being the sons of Chanderdeo. The case made out by the plaintiff was that the five brothers lived joint and that he and the defendants still constitute members of a joint Hindu family. It was further alleged by the plaintiff that most of the jote lands and movables in possession of the family had been acquired jointly by the five brothers, and that some of the lands had been purchased in the names of the different members of the family. He wanted a partition of his 5 annas 4 pies share in the family properties. Defendants 2 to 5, who are the appellants before us, contested the suit and their contention was that all the five sons of Ganpat had separated from one another and that the properties standing in the names of the defendants were their self-acquired properties.

[3] The Court of first instance the Munsif of Katihar, dismissed the suit, his finding being that the separation between the brothers took place long ago, and that the properties have already been divided. That Court further held that lots 1 and 2 which stood in the name of Ramdayal (defendant 1), lots 3 and 4 which stood in the name of defendant 2, and lot 5 which stood in the name of defendant 3 were the self-acquired properties of these defendants.

[4] The lower appellate Court reversed the decision of the Court of first instance. The learned District Judge was of the opinion that the family still continued to be joint and that all these properties were liable to be partitioned as joint family properties.

[5] Mr. Raj Kishore Prasad on behalf of the appellants has submitted before us that the lower appellate Court has not considered the evidence properly and that the decision of the lower appellate Court disregards the legal principles on which a case like this has to be decided.

[6] We agree with Mr. Raj Kishore Prasad that it is a fit case which should be sent back to the Court below. The lower appellate Court has begun the discussion of the evidence by referring to the statement of Ramdayal (defendant 1), who is the oldest surviving member of the family and who did not contest the suit but was examined as a witness on behalf of the plaintiff. This witness had filed a petition admitting the claim of the plaintiff, and it appears that the learned District Judge was very much influenced by this admission of defendant 1. But the learned Munsif has pointed out that Ramdayal had stated in his cross-examination that there was never any joint fund belonging to the brothers. The judgment of the learned District Judge does not show that he took any notice of this statement made by Ramdayal and this circumstance alone is sufficient for holding that the case has not been properly considered by the learned District Judge. It seems that the learned District Judge completely overlooked the principle that there is no presumption that the family, because it is joint, possesses joint property or any property and that, when in a suit for partition, a party claims that any particular item of property is a joint family property, the burden of proving that it is so rests on the party asserting it. The plaintiff in this case had, therefore, to establish that the family was possessed of some property with the income of which the properties claimed by him in this suit could have been acquired or from which the presumption could be drawn that all the properties possessed by the family are joint family properties. In the plaint, there is a statement to the effect that most of the jote lands, cattle, carts, horses and houses had been acquired jointly by the five brothers and that some lands were purchased in the name of Satnarain, some in the name of Chhabilchandlal and some in the names of defendants 1, 2 and 3.

Mr. Harinandan Singh has relied on this statement in the plaint for the purpose of showing that the plaintiff did not make out a case that these properties were ancestral properties. Now if these properties are properties subsequently acquired, it was absolutely necessary for the plaintiff to show that the family possessed properties with the income of which these properties could be acquired, or joint family fund which could enable them to acquire these properties. The discussion in the judgment of the Court of first instance goes to show that the plaintiff had failed to establish that these properties had been acquired by the joint family with joint family fund or with the income of the joint family properties. Of course, the learned District Judge has also discussed the evidence and has relied on certain documents for the purpose of showing that there was a disruption of the joint family and that the properties were partitioned. But he has not at all considered whether there was sufficient evidence in this case to establish that the family was possessed of joint family properties or funds with which the properties, which are the subject-matter of the suit, could be acquired. On the other hand, the learned District Judge has observed as follows:

> "It is true that the family originally had very limited means and at least two of them namely the father of the plaintiff and D. W. 1 served in Darbhanga Raj. They were full brothers and there was nothing surprising if they made a common fund of their earnings and acquired properties out of their earnings in the name of certain members of the joint family."

Firstly, this is no finding at all. The learned District Judge merely thinks that it is possible that out of the common fund of the plaintiff and D. W. 1 these properties might have been acquired. If the properties were acquired only out of the common fund belonging to the plaintiff and D. W. 1, then they would be separate properties of the plaintiff and D. W. 1. The important fact of this case is that out of the five lots which are the subject-matter of the suit, lots 1 and 2 stand in the name of Ramdayal (defendant 1), lots 3 and 4 stand in the name of Chanderdeo (defendant 2) and lot No. 5 stands in the name of Bansidhar (defendant 3), son of Chanderdeo. As was held by the Madras High Court in the case of *Venkataramayya* v. *Seshamma*, I. L. R. (1937) Mad. 1012: (A. I. R. (24) 1937 Mad. 538), a party alleging that the property held by an individual member of a joint Hindu family is a joint family property must show that the family was possessed of some property with the aid of which the property in question could have been acquired, and that it is only after that is shown that the onus shifts to to the party alleging self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate. In another Madras case, *Vythianatha* v. *Varadaraja*, I. L. R. (1938) Mad. 696: (A. I. R. (25) 1938 Mad. 841), it was held that a party alleging that the property held by an individual member of a joint Hindu family is a joint family property must show that the family was possessed of some nucleus with the aid of which the property in question could have been acquired and that mere existence of a nucleus, however small or insignificant, is not enough. It is to be shown that the nucleus was of such value as could have reasonably formed the basis of the acquisition of the property in question. When this is shown, the onus will shift to the party alleging self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate. Unfortunately, the judgment of the learned District Judge does not show that he was alive to these principles and he misdirected himself when, after pointing out that in all probability these are the self-acquired properties of the plaintiff and D. W. 1, he decreed the plaintiff's claim for partition.

[7] In the circumstances the case has to go back for a fresh decision by the lower appellate Court. We have not decided the questions of fact raised in this case finally, and the lower appellate Court should not feel embarrassed by any observation made by us so far as the facts are concerned. The appeal is allowed and the judgment and the decree of the lower appellate Court are set aside and the case is sent back to that Court for a fresh decision according to law. Costs of this appeal will follow the result.

Reuben J.—I agree.

K.S. *Case remanded.*

A. I. R. (37) 1950 Patna 34 *[C. N. 13.]*

MANOHAR LALL AND RAMASWAMI JJ.

Surju Mahton and others — Appellants v. *Parbhu Chand Sao and others — Respondents.*

A. F. A. D. No. 1760 of 1947, Decided on 10th August 1949, from decision of Sub-Judge, Patna, D/- 31st May 1947.

Transfer of Property Act (1882), S. 68 — Later simple mortgagee obtaining decree without making prior usufructuary mortgagee party to suit and dispossessing him in execution — Usufructuary mortgagee can sue later mortgagee for recovery of possession.

Where a subsequent simple mortgagee obtains a decree on his mortgage without making the prior usufructuary mortgagee party to the suit and dispossesses him in execution of the decree, the remedy of the latter is not merely to sue for money which he advanced. He has a right to bring a suit for recovery of possession against the later mortgagee, who is a representative of the mortgagor, having only purchased the equity of redemption. 25 All. 115 (P. C.). *Ref.* [Paras 2 & 3]

Annotation: ('45-Com.) T. P. Act, S. 68 N. 5 Pt. 25.

Raj Kishore Prasad—for Appellants.
Gakulanandan Pd. and Ramdeo Pd. Singh
—for Respondents.

Judgment.—This is an appeal by defendants 1 to 12 who are subsequent simple mortgagees of the property in dispute from defendants 13 to 20 after they had executed an ijara in favour of the plaintiffs. Defendants 1 to 12 having obtained a decree to enforce their simple mortgage against defendants 12 to 20 put the property to sale, became the auction purchasers and obtained delivery of possession, thereby dispossessing the plaintiffs. (To this suit the plaintiffs were no parties.) This suit has been decreed for recovery of possession. Hence the appeal to this Court.

[2] Mr. Raj Kishore Prasad argued that under the document of usufructuary mortgage the only remedy of the plaintiffs was to sue for recovery of the money which they advanced. But having regard to the terms in Ex. 1, it is clear to us that this only gives a personal remedy to the plaintiffs, and this is on the line of S. 68 (1) (a), T. P. Act. It does not debar the plaintiffs from enforcing their rights under the general law, namely, the right to retain possession, and to be put into possession undisturbed. The disturbance in the present case is by the representatives of the mortgagors, because defendants 1 to 12 have only purchased the equity of redemption.

[3] Mr. Raj Kishore Prasad has been unable to place before us any authority which would coerce us to hold that the plaintiffs have no right to retain possession or to be put in possession and cannot maintain the suit for recovery of possession when they have been dispossessed either by the mortgagors or by the later mortgagees. Indeed, S. 68 (1) (d) itself provides that where the mortgagee being entitled to possession, the mortgagor fails to deliver the same to him or to secure the possession, then the mortgagee has a right to sue for the money advanced, that is to say, the sub-clause presupposes that the mortgagee has a right to be put into possession and to be kept securely in that possession. A reference may also be made to the case of *Nidha Sah* v. *Murlidhar*, 30 I. A. 54 : (25 ALL. 115 P. C.) which shows that their Lordships treated the suit before them not on contract, but on title.

[4] The appeal, therefore, is without any substance which must be dismissed with costs payable to the plaintiffs.

D.H. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 35 [*C. N. 14.*]

RAMASWAMI AND NARAYAN JJ.

Bhutnath Ghosh and others—Petitioners v. *Province of Bihar and others — Opposite Party.*

Criminal Misc. Nos. 462, 472, 369, 460, 368, 327, 340, 341, 344, 406 to 410, 425, 355, 414 to 416, 418, 419, 330, 331, 421, 372, 373, 422, to 424, 434, 435, 365, 371, 374, 426, 427, 430 to 432, 439 to 443, 458, 465, 359, 444 to 449, 452, 453, 466 to 468, 471 and 464 of 1949, Decided on 12th July 1949.

(a) Government of India Act (1935), S. 107—Provincial law—Pith and substance of such law falling within one of items in Sch. VII, List II—It is valid even though it trenches incidentally upon matters dealt with in Sch. VII, List I or List III.

If a Provincial Act deals in pith and substance with a subject in the Provincial List, it would be valid, though it incidentally trenches on matters reserved for the Federal Legislature. Nor is it a material consideration to what extent the Federal field is invaded by the impugned statute. [Para 12]

Similarly, if the subject-matter of a piece of provincial legislation falls as a whole within an item in the Provincial Legislative List then the legislation is valid and no question of repugnancy can arise under S. 107 (1), Government of India Act even if the legislation trenches incidentally upon items in the Concurrent List: A. I. R. (34) 1947 P. C. 72 and A. I. R. (34) 1947 P. C. 60, *Rel. on.* [Para 14]

Annotation:—('46-Man.) Govt. of India Act, S. 107 N. 1.

(b) Government of India Act (1935), S. 88—Ordinance under—Satisfaction of Governor alone is contemplated—Courts cannot question grounds of satisfaction to promulgate Ordinance.

Under S. 88, the Governor and Governor alone must determine for himself whether the circumstances exist which entitle him to promulgate the Ordinance. The Courts cannot investigate the question whether circumstances in fact existed which rendered it necessary for the Governor to promulgate an Ordinance under S. 88. The satisfaction must be the satisfaction of the Governor, and his discretion cannot be questioned in any Court. The position is very similar to that of an emergency which entitles the Governor-General to make Ordinance: (1941) 3 All E. R 338; 1941-3 All E. R. 388 and A. I. R. (32) 1945 P. C. 48, *Ref.* [Paras, 18 and 19]

(c) Public safety—Bihar Maintenance of Public Order (No. 2) Ordinance (IV [4] of 1949)—Subject-matter of Ordinance falls within Sch VII, List II, items 1 and 2—Ordinance cannot be held to be ultra vires for absence of instructions from Governor-General — Government of India Act (1935), S. 107; Sch. VII, List II, items 1 and 2.

The subject-matter of the impugned Ordinance, (Bihar Ordinance IV [4] of 1949) falls clearly within items 1 and 2 of the Provincial Legislative List and therefore there was no necessity for the Governor to invoke any powers from the Concurrent Legislative List. It follows that the Ordinance cannot be held to be *ultra vires* for absence of instructions from the Governor-General. [Para 15]

(d) Interpretation of Statutes—Ultra vires statute—Valid portions not severable from ultra vires provisions—Whole statute is bad but if valid portion is severable from invalid portion, Court may uphold valid portion of it, if thereby a different law is not created: A. I. R. (6) 1919 P. C. 145; 1914 A. C.

237, 1923 A. C. 450, 11 Commonwealth Rep. 1 and 29 Commonwealth Rep. 357, *Ref.* [Para 25]

(e) Public safety—Bihar Maintenance of Public Order (No. 2) Ordinance (IV [4] of 1949)—Pith and substance falls under Sch. VII, List II, item 1—Ordinance is intra vires—Ss. 23, 24 and S. 4 proviso whether ultra vires *(Quære).*

The Ordinance deals in 'pith and substance' with item 1, Sch. VII, List II, namely, public order and preventive detention for reasons connected with maintenance of public order, and is intra vires the Governor of Bihar. [Para 10]

(Quære):— Whether Ss. 23, 24 or the proviso to S. 4 of the Ordinance are ultra vires. [Para 23]

Even assuming that they are invalid they are separable from the rest of the Ordinance which would still retain its original character and therefore would be valid. [Para 27]

B. C. Ghosh and D. K. Sinha (in Nos. 462, 460 418 and 419); B. C. Ghosh (in No. 415); B. C. Ghosh and A. K. Chaudhury; (in Nos. 434, 435 and 458); G. N. Pd. (in Nos. 406 to 410 and 465), N. K. Prasad II and A. K. Verma (in Nos. 330 and 331), S. R. Goshal (in No. 472), Thakur Pd. (in No. 425), Ramji Sinha (in No. 359) and S. A. Ahmad (in No. 471) — for Petitioners.

The Government Advocate—for Opposite Party.

Ramaswami J.— These applications are under S. 491, Criminal P.C., by Bhutnath Ghosh and 59 others who allege that they are illegally and improperly detained under S. 2 (1), Bihar Maintenance of Public Order Ordinance (Ordinance IV [4] of 1949).

[2] The material facts are not controverted. The applicants had at first been arrested under the Bihar Maintenance of Public Order Act, 1947. Section 1 (3) of the Act provided that it shall remain in force for a period of one year from the date of its commencement. The proviso contained a power to extend the operation of the Act for a further period of one year by the resolution of the two Houses of Legislature of the Province, and further gave the Provincial Government the power of modification, if any, of the Act. The Federal Court decided by their judgment dated 28th May 1949, *Jatindra Nath* v. *Province of Bihar*, (A. I. R. (36) 1949 F. C. 175), that the proviso was *ultra vires* of the Provincial Legislature and the extension of the Act beyond one year was invalid. The Federal Court also held that Bihar Act, V [5] of 1949 was infructuous, as the Bihar Maintenance of Public Order Act of 1947, which it sought to amend, had come to an end when the first year expired on 3rd June 1949. The Governor of Bihar promulgated Ordinance II [2] of 1949. On 21st June 1949, this Ordinance was declared *ultra vires* and invalid by a judgment of this Court. On the next date, that is on 22nd June 1949 the Governor of Bihar promulgated Ordinance IV [4] of 1949 which re-enacted in substance, the provisions of Ordinance II [2] of 1949 which it purported to repeal. It is not disputed that the applicants have been served with fresh orders by the Provincial Government under S. 2 (1) of the new Ordinance.

[3] The validity of the detention is challenged in these proceedings on the ground that the Governor of Bihar in promulgating the Ordinance has exceeded his legislative competence. It is, therefore, necessary to examine the terms of the Ordinance and compare them with the sections of the Constitution Act. At the outset, the Ordinance recites that the Governor of Bihar is satisfied that circumstances exist which render it necessary for him to take immediate action to provide for preventive detention and certain cognate matters in connection with the public safety and maintenance of order. Section 2 empowers the Provincial Government to make orders for detention or otherwise of persons with a view to preventing them from acting in a prejudicial manner. Section 3 enacts that the order under S. 2, sub-s. (1), shall be in force for a period not exceeding six months from the date from which it is confirmed or modified under sub-s. (5) of S. 4. Section 4 requires that the grounds of the order of detention and such particulars as may be deemed sufficient by the Provincial Government should be disclosed to the persons affected as soon as may be after the order is made. Section 4 (2) provides that, after the receipt of the representation, the Provincial Government shall place before Advisory Council the grounds on which the order had been made and the representation made by the person affected. Sub-section (3) requires the Provincial Government to constitute an Advisory Council. The Advisory Council is required to submit a report to the Provincial Government who may confirm, modify or cancel the order made under S. 2 (1). Section 5 provides for imposition of collective fines on the inhabitants of any area in certain circumstances. Section 6 relates to control of public processions, meetings and assemblies. Sections 7 and 8 empower the Provincial Government to impose censorship and to prohibit sale or distribution of prejudicial documents. Section 9 refers to requisition of property, S. 10 to unlawful drilling, S. 11 to wearing of unofficial uniforms. Section 13 enables the Provincial Government to notify a "protected place". Section 14 makes it an offence for any person to force entry into a protected place. Section 21 enables any police officer to arrest without warrant any person who is reasonably suspected of having committed an offence punishable under the Ordinance. Section 22 empowers the Provincial Government, by notification, to declare that the offence under the Ordinance should be tried summarily under S. 260, Criminal P. C. Section 23 purports to repeal the Bihar Main-

tenance of Public Order Act, 1947 as amended by the Bihar Maintenance of Public Order (Amendment) Act, 1948 and the Bihar Maintenance of Public Order Ordinance (Ordinance II [2] of 1949).

[4] In these proceedings the main question to be determined is the constitutional validity of this Ordinance.

[5] The answer depends on the interpretation and application of Ss. 88, 100 and 107, Constitution Act.

[6] Section 88 (1) is in the following terms:

> "If at any time when the Legislature of a Province is not in session the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinance as the circumstances appear to him to require:
>
> Provided that the Governor shall not, without instructions from the Governor-General promulgate any such ordinance if an Act of the Provincial Legislature containing the same provisions would under this Act have been invalid unless, having been reserved for the consideration of the Governor-General, it had received assent of the Governor-General."

[7] Section 100 deals with the subject-matter of Dominion and Provincial laws. Section 100 enacts:

> "(1) Notwithstanding anything in the two next succeeding sub-sections, the Dominion Legislature has, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in List I in Sch. VII to this Act (hereinafter called the 'Federal Legislative List').
>
> (2) Notwithstanding anything in the next succeeding sub-section, the Dominion Legislature and, subject to the preceding sub-section a Provincial Legislature also, have power to make laws with respect to any of the matters enumerated in List III in the said Schedule (hereinafter called the 'Concurrent Legislative List').
>
> (3) Subject to the two preceding sub-sections the Provincial Legislature has, and the Dominion Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II in the said Schedule (hereinafter called the 'Provincial Legislative List').
>
> (4) The Dominion Legislature has power to make laws with respect to matters enumerated in the Provincial Legislative List except for a province or any part thereof."

[8] Section 107 makes provision for resolving inconsistency between Dominion laws and Provincial or State laws :

> "*107* (1) If any provision of a Provincial law is repugnant to any provision of a Dominion law which the Dominion Legislature is competent to enact or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of this section, the Dominion law, whether passed before or after the Provincial law, or as the case may be, the existing law, shall prevail and the Provincial law shall, to the extent of repugnancy be void.
>
> (2) Where a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant to the provisions of an earlier Dominion law or an existing law with respect to that matter then, if the Provincial law, having been reserved for the consideration of the Governor General, has received the assent of the Governor General, the Provincial law shall in that Province prevail, but nevertheless the Dominion Legislature may at any time enact further legislation with respect to the same matter:
>
> Provided that no Bill or amendment for making any provision repugnant to any Provincial law, which, having been so reserved, has received the assent of the Governor-General, shall be introduced or moved in the Dominion Legislature without the previous sanction of the Governor-General.
>
> (3) If any provision of law of an Acceding State is repugnant to a Dominion law which extends to that State, the Dominion law whether passed before or after the law of the State shall prevail and the law of the State shall to the extent of the repugnancy be void."

[9] In Federal scheme of Government where there are co-ordinate jurisdictions it is not possible to make a clean cut between the powers of the different Legislatures. It is inevitable that the powers should overlap from time to time. Such overlapping is as much an incident of the constitution as the operation of the law of gravitation is an incident of aeronautics. Should in such cases a strict verbal interpretation be adopted, much legislation would be stifled at birth and many of the subjects exclusively entrusted to Provincial Legislatures cannot be effectively dealt with. Hence the Judicial Committee has evolved the rule that the impugned statute must be examined to ascertain its "pith and substance:" *Union Colliery Co. of British Columbia* v. *Bryden*, 1899 A. C. 580 : (68 L. J. P. C. 118) or its "true nature and character", *Citizens Insurance Co. of Canada* v. *Parsons*, (1881) 7 A. C. 96 : (51 L. J. P. C. 11). The rule has been restated by Lord Atkin in *Gallaghar* v. *Lynn*, 1937 A. C. 863 : (106 L. J. P. C. 116) :

> "It is well established that you are to look at the 'true nature and character of the Legislation . . . . ' the pith and substance of the legislation'. If on the view of the statute as a whole you find that the substance of the legislation is within the express powers then it is not invalidated if incidentally it affects matters which are outside the authorised field. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field. Nor are you to look only at the object of the legislator. An Act may have a perfectly lawful object e. g., to promote the health of the inhabitants, but may seek to achieve that object by invalid methods, e. g., a direct prohibition of any trade with a foreign country. In other words, you may certainly consider the clauses of an Act to see whether they are passed 'in respect of' the forbidden subject."

[10] Applying these principles, I hold that the impugned Ordinance deals in "pith and substance" with item 1 of the Provincial List, namely, public order and preventive detention for reasons connected with maintenance of public order.

[11] Mr. B. C. Ghosh, however, stressed the argument that the Ordinance created new criminal offences, and amended important provisions of the Code of Criminal Procedure, that previous instructions of the Governor-General

ought, therefore, to have been obtained before the Ordinance was promulgated. Learned advocate maintained that the Ordinance invaded matters in the Federal field, and was '*ultra vires*' for absence of such instructions.

[12] But the rule is well established that, if a Provincial Act deals in pith and substance with a subject in the Provincial List, it would be valid though it incidentally trenches on matters reserved for the Federal Legislature. Nor is it a material consideration to what extent the Federal field is invaded by the impugned statute. In *Prafulla Kumar* v. *Bank of Commerce Ltd.*, 74 I. A 23: (A. I. R. (34) 1947 P. C. 60), the Judicial Committee had to consider the Bengal Money lenders Act, 1940. The Act undoubtedly restricted the rights of the holders of promissory notes to recover interest beyond a certain rate, and to that extent the legislation could be regarded as legislation in respect of item 28 in the Federal Legislative List. But the Judicial Committee held that the Act was in pith and substance an Act dealing with money lending which is item 27 in the Provincial Legislative List, and that the Act was *intra vires* and valid. At page 44 Lord Porter observed :

> "No doubt where they come in conflict List I has priority over Lists III and II and List III has priority over List II, but the question still remains, priority in what respect ? Does the priority of the Federal Legislature prevent the Provincial Legislature from dealing with any matter which may incidentally affect any item in its list, or in each case has one to considsr what the substance of an Act is and, whatever its ancillary effect, attribute it to the appropriate list according to its true character ? In their Lordships' opinion the latter is the true view."

[13] The question of conflict between Lists II and III arose directly in another case, namely, *Megh Raj* v. *Allah Rakhia*, 74 I.A. 12 : (A.I.R. (34) 1947 P. C. 72) in which it was held that S. 107, Government of India Act, had no application in a case where the province could show, as it did in that case, that it was acting wholly within its powers under the Provincial List, and was not relying on any power conferred on it by List III of the Concurrent List. In that case it was argued that the Punjab Restitution of Mortgaged Lands Act, 1938, was invalid in that a number of its provisions were in fact legislation on matters falling within List III, namely items 7, 8 and 10 of that List. The Judicial Committee, however, held that the impugned Act which dealt with mortgages on agricultural lands was legislation falling entirely within item 21 of the Provincial Legislative List, that is, land or any interest in land, and therefore, no question of repugnancy could arise by reason of the fact that the Act might trench to a certain extent upon the items in the Concurrent Legislative List. The whole argument in the case turned upon the effect of Ss. 100 and 107, Government of India Act. At p. 22, Lord Wright observed :

> "It follows that in their Lordships' judgment there is not sufficient ground for holding that the impugned Act, or any part of it was invalid. As a whole it fell within the powers given to the province by items 2 and 21 of List II, without any necessity to invoke any powers from the Concurrent List, List III. Accordingly, questions of repugnancy under S. 107, Constitution Act do not arise and need not be considered here."

[14] It is manifest from these two decisions that if the subject-matter of a piece of provincial legislation falls as a whole within an item in the Provincial Legislative List then the legislation is valid and no question of repugnancy can arise under S. 107 (1), Government of India Act even if the legislation trenches incidentally upon items in the Concurrent List.

[15] In my opinion, the subject-matter of the impugned Ordinance in this case falls clearly within Items I and II of the Provincial Legislative List. There was no necessity for the Governor to invoke any powers from the Concurrent Legislative List. It follows that the Ordinance cannot be held to be *ultra vires* for absence of instructions from the Governor-General.

[16] The argument was next addressed that no circumstances existed which entitled the Governor to promulgate the Ordinance under S. 88, Constitution Act.

[17] During the hearing Mr. Basanta Chandra Ghosh filed an affidavit by Sri Sheelbhadra Yajee "ex-General Secretary, All India Forward Bloc", stating that, after he had toured round the important centres of Bihar, he had formed the opinion that there was no immediate danger or apprehension of the public order in the province. In the affidavit it is alleged that by the Ordinance the Provincial Government have assumed arbitrary powers to suppress all other political parties, and the Ordinance was being used for that purpose and to that effect.

[18] But in my opinion, the Court cannot investigate the question whether circumstances in fact existed which rendered it necessary for the Governor to promulgate the Ordinance. It is manifest that the satisfaction must be the satisfaction of the Governor, and his discretion cannot be questioned in any Court. The position is very similar to that of an emergency which entitles the Governor General to make Ordinance. In *Emperor* v. *Benoarilal Sarma*, 72 I. A. 57 : (A. I. R. (32) 1945 P. C. 48 : 46 Cr. L. J 589), the Judicial Committee had to construe S. 72, Government of India Act, which was to this effect :

> "The Governor-General may, in cases of emergency, make and promulgate Ordinances for the peace and good government of British India or any part thereof, and any Ordinance so made shall for the space of not more than six months from its promulgation, have the

> like force of law as an Act passed by the Indian Legislature : but the power of making Ordinance under this section is subject to the like restrictions, as the power of the Indian Legislature to make laws ; and any Ordinance made under this section is subject to the like disallowance as an Act passed by the Indian Legislature and may be controlled or superseded by any such Act."

Viscount Simon expressly held that whether an emergency existed at the time an Ordinance was made and promulgated was a matter of which the Governor-General was the sole judge. His view that there was an emergency justified and authorised the Ordinance. The Judicial Committee followed an earlier decision *Bhagat Singh* v. *Emperor*, 58 I. A. 169 : (A. I. R. (18) 1931 P. C. 111 : 32 Cr. L. J. 727) in which Lord Dunedin observed :

> "A state of emergency is something that does not permit of any exact definition. It connotes a state of matters calling for drastic action, which is to be judged as such by some one. It is more than obvious that that some one must be the Governor General, and he alone. Any other view would render utterly inept the whole provision. Emergency demands immediate action, and that action is prescribed to be taken by the Governor-General. It is he alone who can promulgate the Ordinance."

[19] In my opinion, it is too clear for argument that the Governor and Governor alone must determine for himself whether the circumstances exist which entitle him to promulgate the Ordinance. There is nothing to suggest that the Courts are entitled to question the grounds upon which the Governor is satisfied.

[20] The principles applicable have been fully discussed in two decisions of the House of the Lords, *Liversidge* v. *Anderson*, (1941) 3 ALL E. R. 338 : (110 L. J. K. B 724) and *Greene* v. *Home Secretary*, (1941) 3 ALL E. R. 388 : (58 T. L. R. 53). The former case arose for decision upon the application of the plaintiff for particulars of the defence in an action claiming damages for false imprisonment, the latter on an application for a writ of habeas corpus. In each case the decision was based upon the view of the House as to the substantial issue involved, namely, whether it was open, to any Court to enquire into the reasonableness of belief of the Secretary of State in matters in which the regulation required him to have reasonable cause to believe, before a detention order could be made. The opinion of the majority of the House upon the substantial issue was that the administrative plenary decision was vested in the Home Secretary and it was for him to decide whether he had reasonable grounds. No outsiders' decision was involved and the issue was not within the competence of any Court.

[21] In the same case, Lord Atkin drew a vital distinction between "satisfied" and "reasonable cause." He stated that in the former phrase it was plain that unlimited discretion was given to Secretary of State, but in the latter the discretion was subject to an objective condition to the minister's power to detain, the existence of which would be cognizable in a Court of law. The correct position would appear to be that when the minister is merely "to be satisfied," his bare certificate is enough. When he has "reasonable cause to believe," the majority decision of the House of Lords indicates that the test is subjective and not objective. The administrative discretion is fully vested in Home Secretary and it is for him to decide whether he has reasonable ground. When the Secretary of State has what appears to him reasonable cause, the Court cannot enquire into the truth of the matters in which he believes or reasonableness of his belief in them. *A fortiori* in any matter where the Secretary of State is merely to be satisfied no enquiry by a Court is possible.

[22] In this context, a passage from the judgment of Lord Viscount Maugham is also important. Dealing with the question, he stated:

> "The order on its face purports to be made under the regulation and it states that the Secretary of State had reasonable cause to believe the facts in question. In my opinion, the well-known presumption *omnia esse rita acta* applies to this order, and, accordingly, assuming the order to be proved or admitted, it must be taken prima facie, that is until the contrary is proved, to have been properly made and that the requisite as to the belief of the Secretary of State was complied with. It will be noted that on the view I have expressed as to the construction of the regulation it is the personal belief of the Secretary of State that is in question, and that, if the appellant's contention on this point were correct, the same question would arise in the numerous cases where an executive order depends on the Secretary of State or some other public officer being 'satisfied' of some fact or circumstances: *It has never, I think, been suggested in such cases that the Secretary of State or public officer must prove that he was so 'satisfied' when he made the order.*"

[23] A specific attack was then made on Ss. 23 and 24 and the new proviso to S. 4 of the Ordinance. It was urged that S. 23 was in any case *ultra vires* as it purported to repeal Bihar Act, V [5] of 1947, which had received the Governor-General's assent. It was argued that S. 24 was dependent on S. 23 and was necessarily invalid. Stress was also laid upon the new proviso to S. 4 which is to the following effect:

> "Provided that where the Provincial Government is of opinion that it would be against the public interest to disclose all the grounds of the order, neither the said order nor the detention of the said person thereunder shall be invalid or unlawful or improper on the ground of any defect, vagueness or insufficiency of the communication made to such person under this section."

It was urged that the new proviso empowered the Provincial Government to arbitrarily detain any person without disclosing any *ground* that its enactment was, therefore, beyond the competence of the Provincial Legislature. Learned Advocate made reference to the following remarks made by the learned Judges, in *Murrat Patwa* v. *Province of Bihar*, 26 Pat. 628: (A. I. R. (35) 1948 Pat. 135: 49 Cr. L. J. 132 F. B.):

> "What distinguishes preventive from arbitrary detention, an entirely different subject matter of legislation, is the existence of the reasonable anticipation that some illegal act or acts may otherwise be committed. It is obvious, therefore, that anything that weakens the fair and proper determination of the existence of such reasonable anticipation automatically tends to convert what would otherwise be preventive detention into a purely arbitrary detention, and at some point in that weakening process the question will arise whether an Act which purports to deal with preventive detention does in pith and in substance in fact so deal, or whether it has not overstepped the bounds and become ultra vires the Provincial Legislature in that it constitutes in effect an Act conferring upon the Executive a power of arbitrary detention."

Learned Advocate maintained that in this case the weakening process has reached this critical point and the Ordinance was ultra vires on this account. I consider there is great force in these arguments, but I do not propose to express any final opinion whether Ss. 23 and 24 or the proviso to S. 4 are ultra vires and invalid. In the present proceedings we are mainly concerned with the question whether S. 2 of the Ordinance (by virtue of which the applicants have been ordered to be detained) is within the legislative competence of the Governor of Bihar. If we decide that S. 2 is *intra vires*, the detention of the applicants cannot be held to be illegal or improper, and the applications under S. 491 must necessarily fail.

[24] But the argument was nevertheless stressed that S. 2 (1) of the Ordinance was ultra vires. It was maintained that S. 23 and S. 4 were so interwoven with the scheme that they are not severable, that the whole Ordinance was ultra vires on account of these offending provisions.

[25] In my opinion, this argument is not correct. It is well established rule of construction that where the valid provisions are not severable from the ultra vires provisions, the whole statute must be held to be bad. *In re, Initiative and Referendum Act*, 1919 A.C. 935: (A.I.R. (6) 1919 P. C. 45) and in *Attorney-General for Commonwealth* v. *Colonial Sugar Refining Co., Ltd.*, 1914 A.C. 237: (83 L.J.P.C. 154), the Judicial Committee held that the offending provisions were so interwoven into the scheme of legislation that they were not severable, and that in each instance the whole Act was invalid—an Act of the Province of Manitoba purporting to establish the initiative and referendum and an Act of the Commonwelth Parliament purporting to empower Royal Commissions to conduct enquiries of an unlimited scope. On the other hand, severable portions may be good. In the case of *Brooks Bidlake* v. *Attorney General for British Columbia*, 1923 A. C. 450 : (92 L. J. P. C. 124), the appellants claimed the right to employ Chinese and Japanese labour, inspite of a statute to the contrary. It was argued that the statute was ultra vires of a Dominon statute ratifying the treaty of 1911 between Great Britain and Japan. This argument failed on the ground that the provisions were separable and that at any rate as regards the Chinese the statute could not be questioned.

[26] But the test of severability may not be adequate. In the Australian case, *R.* v. *Commonwealth Court of Conciliation*, 11 Commonwealth Rep. 1, Griffith C. J. suggested a different test:

> "I venture to doubt the accuracy of this test. What a man would have done in a state of facts which never existed is a matter of mere speculation, which a man cannot certainly answer for himself, much less for another. I venture to think that a safer test is whether the statute with the invalid portions omitted would be substantially a different law as to the subject-matter dealt with by what remains from what it would be with the omitted portions forming part of it."

In other words, the Court may uphold the valid portion if it is severable from invalid portion and if thereby a different law is not created. To adopt a metaphor (from the *Navigation Act case*, 29 Commonwealth Rep. 357) the test enables the Court to uphold provisions, however enterwoven, but it cannot separate the woof from the warp and manufacture a new web.

[27] Applying these principles, it is manifest in the present case that even if S. 23 and S. 24 and the new proviso to S. 4 are invalid, they are separable from the rest of the Ordinance which would still retain its original character. In my opinion, S. 2 of the Ordinance would be *intra vires* and valid.

[28] It was then argued that, in promulgating the Ordinance, the Governor of Bihar had not acted *bona fide*. Learned advocate pointed out that, as soon as the Bihar Act V [5] of 1947 was declared invalid by the Federal Court, the Governor of Bihar promulgated Ordinance II of 1949 and when the latter was declared invalid by this Court, the Governor of Bihar enacted the present Ordinance with the same provisions. But it is impossible to infer from this circumstance that the Governor of Bihar had acted in bad faith. On the contrary, the ordinary rule must apply *omnia praesumuntur rite et solenniter essee acta donec probetur in contrarium*—everything is presumed to be rightly and duly performed until the contrary is shown. In illustration of this maxim, there is a general presumption of law that in the absence of proof to the contrary credit should be given to public officers who have acted *prima facie* within the limits of their authority for having done so with

honesty and discretion: *Derby* v. *Burg Imp. Commissioners*, (1879) 4 Ex. 222. It is obvious that in the present case there is no material to suggest that the Governor of Bihar acted *mala fide* and the argument of Mr. B. C. Ghosh in this respect must fail.

[29] Lastly Mr. B. C. Ghosh contended that the activities of the Communists and Forward Bloc were legitimate, that the Government of Bihar had assumed arbitrary powers to suppress all opposition. Learned advocate made reference to the affidavit of Sri Sheelbhadra Yajee filed in this case. But it is not the function of the Court to enquire whether the activities of Communists and Forward Bloc are politically desirable. It cannot be too clearly understood that this Court is not concerned with policies or politics. The Court is only concerned with the question whether the Ordinance is within the constitutional power of the Governor of Bihar, and, if so whether the Ordinance is in whole or part a valid exercise of that power. In *United States* v. *Butler*, 297 U. S. 1 at pp. 62 and 63 Roberts J. has emphatically stated the rule:

> "When an act of Congress is appropriately challenged in the Courts as not conforming to the constitutional mandate, the Judicial branch of the Government has only one duty to lay the article of the constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the Court does, or can do, is to announce its considered judgment upon the question. The only power it has if such it may be called, is the power of judgment. This Court neither approves or condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of the provisions of the Constitution; and having done that, its duty ends."

[30] Upon these grounds, I am of opinion that the main argument fails. I hold that, in promulgating Ordinance IV [4] of 1949, the Governor of Bihar has not acted beyond his legislative competence.

[31] It is necessary to add that we have not dealt with the individual cases of the detenus, as learned advocate on their behalf stated that he had no instructions whether the grounds had been communicated or not. Learned Government Advocate also was not certain on this point. He submitted that Government had issued the grounds, but he was unable to produce copy of grounds in Court. We should, therefore, make it clear that it will be open to the detenus to file fresh applications under S. 491 after the grounds have been served.

[32] With these remarks, I should dismiss all the applications. Let a certificate be granted under S. 205 (1), Government of India Act.

[33] **Narayan J.**—I agree, and cannot usefully add anything to the exhaustive judgment delivered by my learned brother. There is certainly no substance in the contention that the entire Ordinance is invalid. The provisions, to which exception can be taken, have been referred to in the judgment of my learned brother, and they are not inseparable from the rest of the Ordinance. Howsoever regrettable it may be that the Governor had to promulgate one Ordinance after another after the Bihar Maintenance of Public Order Act, 1947, had been declared *ultra vires* by the Federal Court, there is absolutely no lack of good faith, and the question of *mala fide* detention of these detenus does not arise. These are the two main contentions urged by Mr. B. C. Ghosh, and they appear to me to be without any substance.

K.S. *Applications dismissed.*

A. I. R. (37) 1950 Patna 41 *[C. N. 15]*

RAMASWAMI AND NARAYAN JJ.

Jagdish Prasad Pal and another — Petitioners v. *Province of Bihar and others.*

Criminal Misc. Nos. 450 and 451 of 1949, Decided on 12th July 1949.

Public safety — Bihar Maintenance of Public Order (No. 2) Ordinance (No. IV of 1949), S. 2 (1)— Detention under—Court is not entitled to examine adequacy of grounds on which Provincial Government ordered detention.

Section 2 (1) uses the words "the Provincial Government if satisfied". There is a vital distinction between the word "satisfied" and the words "reasonable cause". In the former case unlimited discretion is given to the Provincial Government but in the latter the discretion is subject to an objective condition to the Government's power to detain, the existence of which would be cognizable in the Court of law. Thus, where the Government is merely "to be satisfied" its certificate is enough; and where it has "reasonable cause to believe" then the test is subjective and not objective. Therefore, in the case of detention of a detenu under S. 2 (1) the Court is not entitled to apply the objective standard and to examine the adequacy of the grounds on which the Provincial Government have ordered detention of the detenu : *Liversidge* v. *Anderson*, (1941) 3 All E. R. 338, *Rel. on* ; A. I. R. (32) 1945 P. C. 156 ; A. I. R. (31) 1944 Pat. 354 and A. I. R. (32) 1945 Pat. 44, *Ref.* [Paras 9, 10]

K. K. Sinha and U. C. Sinha — for Petitioners.
Government Advocate — for the Crown.

Ramaswami J.—These applications are on behalf of Sri Jagdish Prasad Pal and Sri Ramcharan Sao complaining that they are illegally and improperly detained under the Bihar Ordinance IV [4] of 1949.

[2] In the batch of criminal miscellaneous cases *Bhuthnath* v. *Province of Bihar*, (A. I. R. (37) 1950 Pat. 35) in which judgment has just been pronounced we have discussed the constitutional validity of the Ordinance and have held that in promulgating it the Governor of Bihar did not exceed his legislative competence.

[3] In these two cases a question is involved as to the construction of S. 2 (1) of the Ordinance.

Learned advocate addressed the argument that the Provincial Government have no sufficient material before it to hold that the applicants would act in a manner prejudicial to public safety or maintenance of public order. It was argued that the Court could apply an objective test and consider whether the materials on which the detention orders were passed were sufficient.

[4] In case No. 450 the material portion of the order is to the effect:

> "That he is an important member of Communist Party of India is clearly associated with Shri B. K. Azad one of the principal Communist leader of this province who absconded for more than a year and he is also one of the secret workers of the party. Although the railway strike did not take place on 9th March 1949, Government have reasons to believe that he is likely to participate in the Communist Party's scheme of carrying out acts of sabotage on important railway and other installations with a view to subvert Government by force.
>
> Government have received secret information, the nature of which cannot be fully disclosed, that he himself has been actually trying to sabotage vital installations. His being an employer in the Jamalpur workshop places him at a point of advantage in this regard."

[5] In case No. 451 the material portion of the order states:

> "That Shri Ramcharan Sao is a very active member of the C. P. I. and is one of the secret workers functioning in Jamalpur. When his house was searched on 3rd March 1949, the police recovered a letter from a very important Communist named Shri B K. Azad who was absconding, directing Shri Ramcharan Sao to pay Rs. 40 to Jagdish Prasad. Another letter was recovered which was written by Shri Surendra Narain Mali, a Communist, who is now under detention and the fact that this letter did not pass through the jail authorities shows that it had been smuggled out of the jail. Government received dependable information that he was trying to arrange for the escape of Shri B. K. Azad from jail through a relation of his who is a jail contractor.
>
> Again Government have received dependable information which cannot be fully divulged in the public interest that in a secret meeting Shri Ramcharan Sao professed that he could stop the railway communications with the help of a few wrenches and then he proposed that from 10th March 1949, i. e., on the day following the scheduled general strike sponsored by the Communists, the work of the E. O. Railway workshop at Jamalpore should be brought to a standstill by carrying out sabotage of the electric supply on which the running of the workshop depends. The Communists who are active in the Jamalpore area have been instructed by the party to carry out sabotage of important installations and Government have reasons to believe that Shri Ramcharan Sao being one of the secret agents of the party is likely to participate in execution of such plans with a view to achieve the party objective of overthrowing Government by force."

[6] The section to be construed is 2 (1) of the Ordinance which runs as follows:

> "The Provincial Government if satisfied with respect to any particular person that with a view to preventing him from acting in a manner prejudicial to public safety and maintenance of public order it is necessary so to do, may make an order."

[7] In *Kamla Kant* v. *Emperor*, 23 Pat. 252: (A. I. R. (31) 1944 Pat. 354), Shearer J. held that it was not open to a Court of law on an application by a detenu for a writ of habeas corpus or in a suit to recover damages for false imprisonment to enquire into the validity of reasons which led to making of an order by the Provincial Government. In *Basanta Chandra Ghosh* v. *Emperor*, A. I. R. (32) 1945 Pat 44: (23 Pat. 968), a Full Bench of this Court held that it was for the Governor alone to decide in the forum of his own conscience whether he had reasonable cause. In other words the Court cannot apply any objective test to the reasonableness of the Governor's satisfaction and was not entitled to consider whether the materials on which the detention order was passed were sufficient. In *Emperor* v. *Sibnath Banerjia*, A. I. R. (32) 1945 P. C. 156: (I. L. R. (1945) Kar. P. C. 371), the Judicial Committee approved the following passage from the judgment of the Federal Court:

> "It is quite a different thing to question the accuracy of a recital contained in a duly authenticated order, particularly where that recital purports to state as a fact the carrying out of what I regard as a condition necessary to the valid making of that order. In the normal case the existence of such a recital in a duly authenticated order will, in the absence of any evidence as to its inaccuracy, be accepted by a Court as establishing that the necessary condition was fulfilled. The presence of the recital in the order will place a difficult burden on the detenu to produce admissible evidence sufficient to establish even a *prima facie* case that the recital is not accurate."

These cases relate to the construction of R. 26 (1) (b), Defence of India Rules. But the critical phrase of the Bihar Ordinance "if the Provincial Government is satisfied" appears to be a mere replica of R. 26 and the two provisions are in many respects *pari materia* though not *ad idem*. It is manifest that S. 2 (1) must be construed in a similar manner to R. 26 (1) (b), Defence of India Rules. The reasons for adopting this construction is that the powers of this Court are not the powers of a Court of appeal. We cannot compel the Crown to disclose all the materials on which the order was made; and hence we cannot pronounce on their validity or otherwise. Since the Court knows only a fraction of the case, it manifestly cannot judge upon the reasons of the satisfaction unless it were able to place itself in the position of the Government and were put in possession of all the knowledge which Government had. In such cases full legal evidence or proof is impossible, for Government may act on highly confidential information and claim that its disclosure is against public interest, a claim which a Judge has necessarily to admit.

[8] The principles applicable have been fully discussed in two decisions of House of Lords, *Liversidge* v. *Anderson*, (1941) 3 ALL E. R. 338: (110 L. J. K. B. 724) and *Greene* v. *Home Secretary*, (1941) 3 ALL E. R. 388: (58 T. L. R. 53).

The former case arose for decision upon the application of the plaintiff for particulars of the defence in an action claiming damages for false imprisonment, the latter on an application for a writ of habeas corpus. In each case, the decision was based upon the view of the House as to the substantial issue involved, namely, whether it was open to any Court to enquire into the reasonableness of belief of the Secretary of State in matters in which the regulation required him to have reasonable cause to believe, before a detention order could be made. The opinion of the majority of the House upon the substantial issue was that the administrative plenary decision was vested in the Home Secretary and it was for him to decide whether he had reasonable grounds. No outsiders' decision was involved and the issue was not within the competence of any Court.

[9] In *Liversidge* v. *Anderson*, (1941) 3 ALL E. R. 338 : (110 L. J. K. B. 724), even Lord Atkin the dissenting Law Lord drew a vital distinction between "satisfied" and "reasonable cause." He stated that in the former case it was plain that unlimited discretion was given to Secretary of State, but in the latter the discretion was subject to an objective condition to the minister's power to detain, the existence of which would be cognizable in the Court of law. The correct position would appear to be that when the minister is merely "to be satisfied," his bare certificate is enough. When he has "reasonable cause to believe" the majority decision of the House of Lords indicates that the test is subjective and not objective. The administrative discretion is fully vested in Home Secretary and it is for him to decide whether he has reasonable grounds. When the Secretary of State has what appears to him reasonable cause, the Court cannot enquire into the truth of the matters in which he believes or reasonableness of his belief in them. *A fortiori* in any matter where the Secretary of State is merely to be satisfied, no enquiry by a Court is possible.

[10] It is, therefore, impossible to accept the argument of learned advocate that the Court is entitled to apply the objective standard and to examine the adequacy of the grounds on which the Provincial Government have ordered dentention of the applicants.

[11] It is manifest that in these cases orders of detention by the Provincial Government, regular on their face, have been produced. Since their authenticity and good faith are not impugned, the production of these orders constitutes a complete and peremptory answer to the applications filed. In my opinion these applications must be dismissed.

[12] Let a certificate be granted under S. 205 (1), Government of India Act.

Narayan J.—I agree.

V.S.B. *Application dismissed.*

A. I. R. (37) 1950 Patna 43 *[C. N. 16.]*

MANOHAR LALL AND RAMASWAMI JJ.

Kumar Rani Sayeeda Khatoon—Appellant v. *Basdeo Pandey and others—Respondents.*

A. F. A. D. Nos. 1828 and 1826 of 1947, Decided on 18th July 1949, from decision of Addl. Sub-Judge, Gaya, D/-12th May 1947.

Tenancy laws — Landlord and tenant — Rent Reduction Officer assuming rent at certain figure and reducing it — Landlord party to proceedings not making any protest—No question of jurisdiction involved.

When the Rent Reduction Officer assumes the rent at a certain figure and reduces it and the landlord who is a party to the rent reduction proceedings and is actually cognizant of them does not make any protest that the rent which the officer is asked to reduce is the rental at the lower figure and not at the higher figure no question of jurisdiction is involved: A. I. R. (36) 1949 Pat. 139 (F. B.), *Ref.* [Para 1]

A. H. Fakhruddin—for Appellant.

Raj Kishore Prasad—for Respondents.

Judgment.—In these two appeals, the question for decision is whether the reduction of rent by the Rent Reduction Officer in the circumstances narrated below was without jurisdiction.

[2] It appears that the Rent Reduction Officer assumed the rental in one case to be about Rs. 275 and reduced it to Rs. 206-15-0 and in the other case he assumed the rental to be Rs. 124 and reduced it to Rs. 113. It is argued that the Rent Reduction Officer was in error in assuming the rent which he purported to reduce to be at these two figures. In our opinion no question of jurisdiction is involved because on the finding that the landlord-appellant was a party to these proceedings and was actually cognizant of the proceedings, the Rent Reduction Officer was right in assuming when no protest was made before him that the rent which he was asked to reduce was the rental at the lower figure stated above and not at the higher figure alleged in the argument. A number of cases of this Court were reviewed by the Full Bench decision of *Ramranbijaya Prasad Singh* v. *Ramkamal Upadhya*, 26 Pat. 748 : (A. I. R. (36) 1949 Pat. 139) in which the leading judgment was delivered by my learned brother. It is no longer possible to accept the argument advanced before us.

[3] For these reasons the appeals are dismissed but without costs.

D.H. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 44 *[C. N. 17.]*

RAMASWAMI AND NARAYAN JJ.

Suba Chaudhury and others — Appellants v. *The king.*

Criminal Appeal No. 153 of 1949, Decided on 8th June 1949, from decision of Sessions Judge, Darbhanga, D/-11th March 1949.

(a) Criminal Procedure Code (1898), S. 162 — Words "in the course of", meaning explained—First information by one person — Statement of accused recorded before investigation started and another first information instituted on basis of such statement which was exculpatory—Statement is not hit by S. 162—First information report on its basis is admissible.

The words "in the course of" in the context of S. 162 import that the statement must be made as a step in a pending investigation to be used in that investigation, and they do not refer merely to that period of time which elapses between the beginning and the end of the investigation: A. I. R (27) 1940 All. 291, *Foll.* [Para 7]

A first information report about the commission of murder was recorded by a Sub-Inspector of police at the instance of one *G*, the son of the deceased. The Sub-Inspector then started for the hospital where the deceased was removed but before reaching there he was informed that the deceased was dead. He then held an inquest over the dead body and sent the body for post mortem examination. Before the investigation was started the Sub-Inspector was informed by the doctor in charge of the hospital that the accused persons had been admitted as indoor patients; he then recorded the statement of the accused which was exculpatory and instituted another first information report on the basis of this statement:

Held that as the statement of the accused had been recorded by the Sub-Inspector before the investigation was started on the prior first information report it was not hit by S. 162 and therefore the first information instituted on the basis of that statement was admissible in evidence: A. I. R. (23) 1936 Pat. 11, *Foll.* [Para 7]

Annotation: ('49-Com.) Criminal P. C., S. 162 N. 7 Pts. 5 & 6.

(b) Penal Code (1860), S. 96—Deceased constructing *Bhuskar* on his own land—Accused asking to stop construction which deceased refused—Accused then demolishing *nad* belonging to deceased—Deceased protesting—Accused then striking a bhala blow on chest of deceased—*Held* that accused being aggressor had no right of private defence. [Para 7]

Annotation: ('46-Man.) Penal Code, S. 96 N. 1.

(c) Penal Code (1860), Ss. 147, 148, 326/149, 302 —Rioting—Common object to assault deceased not established—One of accused guilty of murder and convicted under S. 302 — Others held could not be convicted under Ss. 147, 148 and 326/149. [Para 8]

S. N. Sahay, Gopal Prasad and Nakuleshwar Prasad—for Appellants.

The Standing Counsel—for the Crown.

Narayan J.—This is an appeal by five persons, one of whom has been convicted under S. 302, Penal Code, and the others under S. 326/149, Penal Code, in connection with a case of rioting which occurred in the afternoon of 13th April 1948, in village Pataili situated within the jurisdiction of Samastipur Police Station and seven miles from the Police station. Appellant 1, Suba Chaudhury, has been convicted under S. 302, Penal Code, and sentenced to transportation for life, and the remaining appellants have been convicted under S. 326/149, Penal Code, and each of them has been sentenced to undergo rigorous imprisonment for a period of eighteen months. Suba and Babu Narayan have further been convicted under S. 148, Penal Code, and the rest under S. 147, but no separate sentence has been passed under these sections.

[2] The prosecution case was that, when Ram Narayan Chaudhury was getting a bhuskar constructed in the compound of his house at about 3 P. M. on 13th April 1948, Suba Chaudhury turned up, and asked him to stop the construction. Ram Narayan refused to stop the construction, and then Suba went away. But Suba came back within a few minutes with a bhala in one hand and a kudal in the other. He placed the bhala on the ground, and began to demolish the nad there with his kudal, and, when Ram Narayan protested, he kept the kudal on the ground, picked up the bhala, and struck Ram Narayan with it on his chest. The remaining accused, who had arrived at the scene of occurrence by that time, assaulted Ram Narayan with lathis. Ram Narayan had fallen on the ground after receiving the bhala injury, and the bhala blade had got stuck up in his chest. Ganga, a son of Ram Narayan, Dhanraj, a co-villager, and Jhapsi, the servant of Ram Narayan, carried Ram Narayan to the dorokha where the blade was pulled out from the chest. On the hulla raised by Ganga and others, several people including one Manog Chaudhury came to the place of occurrence. Manog rebuked these accused persons for what they had done, and one of them struck him with a bhala on the thigh.

[3] Ram Narayan was taken to the Samastipur Hospital where he was admitted as an indoor patient, and his dying declaration was recorded by a Sub-Deputy Magistrate. The first information report had been recorded by the officer in charge of the Samastipur Police Station on the statement of Ganga Chaudhury made before him at 9-30 P. M. on 13th April 1948. The Sub-Inspector started for the hospital after recording the first information report; but, before he could reach the hospital, he was informed that Ram Narayan was dead. He then held inquest on the dead body, and sent it for post-mortem examination.

[4] After the Sub-Inspector had been informed by the Doctor in charge of the Samstipur Hospital that the accused Kirit Narayan Chaudhury, Suba Chaudhury and Siasaran Chaudhury had injuries on their persons and had been admitted as indoor patients, he recorded the statement of Suba Chaudhury, and instituted another

first information report on the basis of his statement. He arrested the three injured persons, and deputed a constable to keep guard on them. He went to the spot at 5 A. M. on 14th April 1948, and made an inspection of the place of the occurrence. After completing the investigation, he submitted charge sheet. In the case that had been instituted on the basis of the fard-beyan of Suba Chaudhury, he submitted final report.

[5] The post-mortem examination on the body of the deceased was held on 14th April 1948, and, besides a small bruise on the left chest bone, the doctor found one pentrating wound below sternum to the right on the upper abdominal wall going obliquely downward towards the left piercing the diaphragm, liver and finally the pyloric end of the stomach. The doctor found a lot of coagulated blood all round this area. On the same date, the doctor examined Manog Chaudhury and the three accused, namely Kirit Narayan Chaudhury, Suba Chaudhury and Siasaran Chaudhury and found injuries on their persons. On the person of Siasaran Chaudhury, he found as many as nine injuries.

[6] When the Sub-Inspector of Police visited the spot, he found blood like marks on the platform of a well and also on the sahan land between the well and the house of Ram Narayan and in the dorokha. The well was six yards west of the house of Ram Narayan, and there was a bhuskar 3½ yards south-west of the well. The Sub-Inspector also found a dismantled nad about 8 years north of the well. He found five holes in the ground round the bhuskar. The condition of things as found by the Sub-Inspector when he visited to the spot lends considerable support to the prosecution case that, the occurrence took place near the houses of Suba and the deceased, and that a nad had been demolished.

[7] The defence version in this case was that at about 2 P. M. on 13th April 1948, Ganga Chaudhury, the son of the deceased Ram Narayan Chaudhury, was demolishing the nad in the land of Suba Chaudhury, and that, when Suba Chaudhury protested against the demolition of the nad, there was an exchange of hot words between him on the one side and Ganga, Manog Chaudhury, Mahabir Chaudhury, Ram Narayan Chaudhury and Saroj Chaudhury on the other side, and that, after the altercation, Ganga Chaudhury brought a bhala from his house, and struck Suba Chaudhury with it. According to the defence version, Kirit Narayan and Siasaran Chaudhury were assaulted after they had come to the rescue of Suba Chaudhury. This version of the defence is clearly stated in the fard-beyan of Suba Chaudhury on the basis of which the second first information was instituted. But Mr. S. N. Sahay, who argued for these appellants on the first day of hearing, thought that this second first information report was inadmissible in evidence, though he asked us to refer to this document just as we refer to the case diary. As the question whether an information given by a person who subsequently figures as an accused arises very often in criminal trials, we propose to consider this question in this case, and express our views with regard to it. This question was considered by a Division Bench of this Court in *Akal Sahu* v. *Emperor*, 26 Pat. 49 : (A. I. R. (35) 1948 Pat. 62 : 48 Cr. L. J. 565) and Das J. with whom Dalziel J. agreed, laid down as follows :

> "The statement of a person, who is subsequently accused of an offence, may be admissible in evidence as an admission provided it is not of the nature of a confession and does not come within the excluding sections of the Evidence Act or is not hit by S. 162, Criminal P. C."

Mr. Sahay thinks that this ruling has got no application in this case, because the fard-beyan of Suba Chaudhury, on the basis of which the second first information report was instituted, was recorded after the statement of Ganga Chaudhury, which was the basis of the first information report, had been recorded, though Mr. Sahay also observed during the course of his argument that investigation had not been taken up by the Sub-Inspector before he recorded the fard-beyan of Suba Chaudhury. The fard-beyan of Suba Chaudhury in this case cannot be taken to be a confession for the simple reason that he did not confess to have committed any crime, much less the crime of murder; his statement rather is entirely an exculpatory statement. The only question which has to be seriously considered, therefore, is whether the statement as made in this fard-beyan is hit by S. 162, Criminal P. C. The first paragraph of S. 162, which is relevant for our present purpose, runs as follows :

> "No statement made by any person to a police-officer in the course of an investigation under this chapter shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made."

We have to consider what is meant by the words "in the course of." A Division Bench of the Allahabad High Court in *Emperor* v. *Aftab Mohd. Khan*, A.I.R. (27) 1940 ALL. 291: (41 Cr. L. J. 647), had to consider what is meant by these words, and their Lordships were of the opinion that the words in the context of S. 162 import that the statement must be made as a step in a pending investigation to be used in that investigation, and that these words do not refer merely to that period of time which elapses between the beginning and the end of the investigation. I respectfully agree with the view taken by their Lordships, and I would quote the following passage from the judgment of Braund J. which, to my mind, makes the position absolutely clear :

> "We take the view that the words 'in the course of' in the context of this section import that the statement must be made as a step in a pending investigation to be used in that investigation. We do not think that the words 'in the course of' refer merely to that period of time which elapses between the beginning and the end of the investigation. We think that the exact shade of meaning of the words 'in the course of' may well vary according to their context. Obviously, if they themselves qualify a period of time (such as 'in the course of the years') they are used to denote a span of time. If on the other hand, they qualify a continuing process (such as 'in the course of the proceedings') they denote, in our view, something more than a mere period of time. It is a dangerous practice to take words from one statute to illustrate the meaning of words in another statute but we nevertheless venture, in order to illustrate our meaning, to point out the words used by Lord Dunedin in *Davison & Co* v. *M'Rabb or Officer*, 1918 A. C 304 at p. 321 : (87 L. J. P. C. 58) in relation to the words 'in the course of employment' used in the English Workman's Compensation Act, 1906. He says : 'In my view "in the course of employment" is a different thing from "during the period of employment". It connotes to my mind, the idea that the workman or servant is doing something which is part of his service his employer or master . . . . . ' "

Their Lordships relied on a decision of this Court in *Emperor* v. *Lalji Rai*, A. I. R. (23) 1936 Pat. 11 : (36 Cr. L. J. 235). This is a decission of a Division Bench of this Court, and in this case as well the view was taken that, where a report about the commission of an offence is given to the police at two different dates by two different persons, and one is earlier in point of time than the other, the latter report is not a statement made to a police officer in the course of an investigation but is an independent first information report, and, therefore, can be used in evidence by the prosecution. The point, therefore, seems to be concluded by authority, and there does not appear to be any doubt that the first information report which was instituted on the basis of the statement made by Suba Chaudhury is admissible in evidence. An investigation starts when the first step towards investigation is taken by the police, and in this case it is common ground that investigation had not started when the Sub-Inspector recorded the statement of Suba Chaudhury. It is clear from the evidence of the Sub-Inspector, Mr. Ahsan Imam (P. W. 14), that, before he had taken up the investigation of the case which had been instituted on the basis of the statement of Ganga Chaudhury, he had been informed that Suba, Kirit and Siasaran had been admitted as indoor patients. As soon as he received this information, he recorded the statement of Suba Chaudhury which is the basis of the second first information report. The appellants want to show with the help of this document, that the occurrence took place not in the manner alleged by the prosecution but in an entirely different manner, and that the prosecution party were the aggressors. Certainly, if the nad, which was found dismantled by the Sub-Inspector of police, belonged to the accused, and Ganga Chaudhury was demolishing it, and struck Suba Chaudhury when the latter protested against the demolition, and struck others when they came to the rescue of Suba Chaudhury, the prosecution party would be deemed to be the aggressors. But it is most significant that, in the fard-beyan of Suba Chaudhuary, there is no mention of an attack on Ram Narayan Chaudhury, on whom the injury described above had been inflicted with a bhala—an injury which was bound to prove fatal, and did prove fatal. This is sufficient for discarding the statement made in the fard-beyan of Suba Chaudhury as an untrustworthy statement. Moreover, no evidence was adduced by the accused in support of the allegations made in this fard-beyan of Suba Chaudhury and as such we would not be justified in rejecting the prosecution version unless we find that the evidence adduced by the prosecution in support of it is not fit to be relied on. Mr. Sahay asked us to hold that the accused had acted in the exercise of the right of private defence, even though there is no evidence in support of the statement made in the fard-beyan of Suba Chaudhury, and the learned counsel was of the opinion that the prosecution evidence in this case showed that the accused had acted in self-defence. But there cannot be any manner of doubt that, if the prosecution story is accepted, the attack on Ram Narayan, of which there is no mention in the fard-beyan of Suba Chaudhury, was absolutely an unprovoked attack, and that his assailant, when he inflicted on him the bhala blow which proved fatal, did not act in the exercise of the right of private defence. The prosecution case has been, and the prosecution witnesses have consistently stated, that, while the bhuskar was being constructed, Suba Chaudhuay came, and asked Ram Narayan not to construct the bhuskar there and that, when Ram Narayan refused to stop the construction, Suba came with a kudal and a bhala, and began to demolish the nad. Ram Narayan is said to have been attacked when he protested against the demolition of the nad. It has been argued by the learned counsel for the appellants that there could not be any dispute about the bhuskar, because it was being constructed by Ram Narayan in his own land, and that hence the witnesses cannot be deemed to have given a true account of the occurrence. We are concerned in this case with two plots, namely, plots No. 5150 and 5139. Plot No. 5150 admittedly lies in a tauzi of which Ram Narayan was the sixteen annas propiretor. The defence asked us to hold that the bhuskar was being constructed in plot No. 5150 only, and hence Suba could not object to its construction. In the absence of a scientific measurement, it is very difficult to fix the position of survey plots in homestead lands. But, for purposes of this case, we may assume, as the appellants asked us to assume, that the bhuskar was being constructed only in plot No. 5150. The question is whether this circumstance alone is sufficient to lead us to reject the testimony of the eye-witnesses that, when Suba first came, he objected to the construction of the bhuskar. In my opinion, there is no good ground for rejecting the prosecution case that, when Suba first came to the spot, he objected to the construction of the bhuskar, and, if this part of the prosecution story is accepted, it is Suba who would be in the position of an aggressor. When the Sub-Inspector visited the spot, he did see a bhuskar there, and he also found five holes on the ground round the bhuskar. From the evidence of the witnesses, it appears that, though the construction of the bhuskar was complete, it could not be fixed at the place which had been kept ready for it, and it would be a legitimate inference that the slight work that had to be done with regard to the bhuskar could not be done because of some obstruction. Thus, the evidence of the prosecution that Suba raised objection to the construction of the bhuskar stands strongly supported by the circumstances and the probabilities. If the trouble had started in the manner alleged by the prosecution, then the defence cannot gain much by stressing the fact that the prosecution have not been able to show that the place where the demolished nad stood belonged to them. The demolished nad was in plot No. 5139, regarding which the deceased Ram Narayan had obtained a deed of exchange and a deed of sale from one Ram Jugal Chaudhury who held one-third share in the tauzi in which this plot lies. There is no clear evidence of the fact that plot No. 5139 had been allotted to the patti of Ram Jugal under a regular partition. But it is not improbable that, for convenience of possession, the cosharers might have been in separate possession of specific portions of lands. Certainly, Ram Jugal, the predecessor of Ram Narayan, had an interest in plot No. 5139, the only question being whether he had exclusive possession over this plot. The defence cannot put their case with regard to plot No. 5139 higher than this that both Suba and Ram Jugal as cosharer proprietors had interest in this plot, and, if both had interest in this plot, the next question which arises is to whom the nad which was demolished on the day of occurrence belonged. In my opinion, there is convincing evidence in this case to show that the nad belonged to Ram Narayan. The evidence of the two chaukidars in this connection appears to me to be quite impressive, and it finds support from the evidence of the Sub-Inspector. When the Sub-Inspector visited the spot, he found one nad in a tatti shed adjoining the eastern wall of Suba Chaudhury. The defence cannot contend, and have not contended, that this nad did not belong to Suba Chaudhury and, therefore, it is very improbable that the other nad which was demolished on the day of occurrence would belong to Suba Chaudhury. As the learned Sessions Judge has pointed out, it was never disputed that Suba Chaudhury had only one bullock and a pari, and, for one bullock and one pari, a nad and guar, which also existed on the spot, were quite sufficient. The learned counsel has argued that the demolished nad is very close to the house of Suba Chaudhury. But we find from the sketch map that it is also very near the verandah of the deceased. In view of the fact that there was a nad in a tatti shed adjoining the eastern wall of Suba Chaudhury, I do not think there is any substance in the contention of the accused that the demolished nad was also his property. It may be noted in this connection that the evidence shows that the well in the sahan land there had been sunk by Ram Jugal Chaudhury, the predecessor of Ram Narayan. The defence never seriously challenged the evidence to the effect that this well had been sunk by Ram Jugal Chaudhury, and this fact also lends support to the contention of the prosecution that Ram Jugal was in separate possession of a portion of the sahan land. To Ganga Chaudhury (P. W. 1), it was suggested that he was never in possession of more than 9 dhurs of plot No. 5139. If it is admitted that Ram Jugal or Ram Narayan was in separate possession of 9 dhurs of land, then the case of the prosecution that, by virtue of a private arrangement, Ram Jugal was in separate possession of a portion of the sahan land gets established. I am afraid the suggestion that has been made to P. W. 1, Ganga Chaudhury, unmistakably goes to show that Ram Jugal and the transferee from him, namely, Ram Narayan, were in separate possession of a portion of plot No. 5139. I have, therefore, no hesitation in rejecting the contention of the appellants that they had acted in the exercise of a right of private defence. The story as told by the prosecution witnesses appears to be quite probable and the evidence with regard to the manner in which the trouble started and with regard to the assault by Suba Chaudhury on the deceased does not appear to be at all suspicious. There was no justification for the attack which was made by Suba Chaudhury on the deceased, and, as already pointed out, it was absolutely an unprovoked attack. Mr. Gopal Prasad, who argued for the appellants on the second day, did not seriously challenge the prosecution evidence that it was Suba who inflicted on the deceased the injury which proved fatal. He, however, asked us to hold that the offence would be an offence under S. 304, Penal Code, and he further asked us to reduce the sentence. I have already said that the question of the exercise of the right of private defence does not arise in this case, and, in this fact, I do not find any extenuating circumstance so far as the charge under S. 302 against Suba is concerned. It is simply lucky that he has escaped the extreme penatly of law. The appeal of Suba Chaudhury must, therefore, be dismissed.

[8] I agree with the learned counsel that the conviction of the other appellants in this case was not justified. The common object mentioned in the charge is "to assault Ram Narayan Chaudhury". But even in the first information report, it was stated that, after the accused Suba Chaudhury had dealt a bhala blow on the chest of Ram Narayan, the other accused persons arrived there from the court-yard of Suba Chaudhury, and dealt lathi blows on Ram Narayan. The statement in the first information report clearly indicates that the other appellants were not present at the scene of occurrence when Ram Narayan was assaulted by Suba. The prosecution witnesses also appear to have clearly stated in the committing Court that the other accused came to the place of occurrence after Suba had assaulted Ram Narayan. As for example, Ganga himself stated before the committing Court that, after his father fell down as a result of the assault on him by Suba Chaudhury, the other seven accused persons, who were in the court-yard of Suba Chaudhury to help Suba Chaudhary came to the scene it cannot, therefore, be held with certainty that the common object of all these accused persons was to assault Ram Narayan Chaudhury. The charges under Ss. 147 and 148 against the other appellants cannot, therefore, be deemed to have been established. They cannot also be convicted under Ss. 326/149, when it is not established that their common object was to assault the deceased Ram Narayan Chaudhury.

[9] The appeal of Suba Chaudhury is dismissed. The appeal of all the remaining appellants, Siasaran Chaudhury, Rameshwar Chaudhury, Kirit Narayan Chaudhury and Babu Narayan Chaudhury, is allowed, and their convictions and sentences are set aside. These four appellants are acquitted and discharged from the bail.

Ramaswami J.—I agree.

K.S. *Order accordingly.*

A. I. R. (37) 1950 Patna 48 [*C. N. 18.*]

IMAM AND RAMASWAMI JJ.

Ramchander Singh and others — Appellants v. *Munshi Mian — Respondent.*

A. F. A. D. No. 470 of 1947, Decided on 5th May 1949, from decision of Sub-Judge, Gaya, D/- 19th December 1946.

(a) Provincial Small Cause Courts Act (1887), Sch. 2, Art. 15 — Suit to enforce award is not one for specific performance.

A suit to enforce an award, namely, for recovery of money payable under an award is not a suit for specific performance of a contract and hence is cognizable by a Small Cause Court. [Para 2]

(b) Arbitration Act (1940), S. 32 — Suit to enforce award — Existence and validity of award challenged by defendant — Suit is barred.

The Act of 1940 was intended to and did alter the law, and one of the main objects of the Act was to provide that claims to set aside arbitration awards or challenge arbitration agreements should be made by application to Court and decided on affidavits or on other evidence if deemed expedient by the Court and not by means of a suit. Where in a suit to recover a sum of money alleged to be due under an award the defendant challenges the existence and also the validity of the award, the suit would be barred under S. 32. [Para 7]

Editorial Note—It is submitted that the question whether S. 32 bars the suit must be determined on the basis of the *plaint* and not on the pleas in the written statement. But a suit to enforce an award is clearly one for a decision on the existence and validity of an award irrespective of the pleas that may be taken in the written statement and as such the suit will be barred under S. 32.

Lakshman Saran Sinha and Lalnarain Sinha — for Appellants.

Kazi Nazrul Hasan and L. M. Ghose — — for Respondent.

Ramaswami J.—In the suit which is the subject of this appeal the plaintiff alleged that he had advanced Rs. 230 to the defendants on the basis of an unregistered ijara, that he obtained possession of the land mortgaged but on a subsequent date the defendants looted the paddy crops which he had grown. The parties referred the matter to arbitrators who made an award. The plaintiff claimed that according to the award he was entitled to recover a sum of Rs. 280 with interest from the defendants. The ground of defence was that there was no reference to arbitration and no award was made by the alleged arbitrators. The defendants alleged that the award even if made was fraudulent and collusive and in any case could not be enforced since there was an agreement to stifle prosecution and the consideration was illegal. The learned Munsif accepted the defence case and dismissed the suit. But in appeal the learned Subordinate Judge held that there was no agreement to stifle prosecution and the plaintiff was entitled to enforce the award. The learned Subordinate Judge accordingly pronounced decree in favour of the plaintiff.

[2] On behalf of the respondent, a preliminary objection was raised that this suit was of the nature cognizable by Small Cause Court and no second appeal was competent under S. 102, Civil P. C. Learned advocate made reference to *Mizaji Lal* v. *Partab Kunwar*, 42 ALL 169: (A. I. R. (6) 1919 ALL. 12, in which the plaintiff had sued to recover money due under the terms of a private award. The suit was tried by a Munsif having Small Cause Court jurisdiction and a decree was passed in favour of the plaintiff. The defendants appealed in revision to the High Court under S. 25 upon the ground that the suit was not one cognizable by Small Cause Court. Lindsay J. held that Art. 24 of the second schedule was not applicable and a suit to recover money payable by the terms of the private award was not a suit which was excepted from the jurisdiction of Small Cause Court. For the appellants reliance was placed upon *Kunja Behary* v. *Gosto Behary*, 22 C. W. N. 66: (A. I. R. (5) 1918 Cal. 899), in which the learned Judges considered that a suit to enforce an award was in essence a suit for specific performance of a contract and was excluded from cognizance of a Small Cause Court under Art. 15. But the other High Courts have held that a suit to enforce an award, namely, for recovery of money payable under an award was not a suit for specific performance of a contract and hence was cognizable by a Small Cause Court (*Mt. Erachshaw* v. *Dinbai*, 45 Bom 318: (A. I. R. (8) 1921 Bom. 399), *Mg. Ni* v. *Mg. Aung Ba*, 4 Rang. 227: (A. I. R. (13) 1926 Rang. 198) and *Simson* v. *McMaster*, 13 Mad. 344). In my opinion, the correct rule is stated in this catena of authorities. The Calcutta decision may, however, be explained on the special facts of that case. For, in that case the learned Judges had held in the alternative that the suit must fail upon the ground that the award which the plaintiff sought to enforce could not be enforced as a whole in a Small Cause Court as it involved the partition of immovable properties. In the present case, I am of opinion that the suit instituted by the plaintiff is not excepted by Art. 15 or Ar. 24; that the Small Cause Court had jurisdiction to try it; that in consequence a second appeal to this Court is not competent.

[3] At the request of the appellants we proceeded to treat second appeal as an application in revision under S. 115, Civil P. C.

[4] The main argument addressed on their behalf was that under S. 32, Arbitration Act, the learned Munsif had no jurisdiction to entertain the suit.

[5] Section 14 (1), Arbitration Act, states that when the arbitrators have made their award, they shall sign it and give notice of the fact in writing to the parties. Sub-section (2) requires that the arbitrators shall, at the request of a party cause the award to be filed in Court, and when this is done, the Court shall give notice of its filing to the parties. Sections 15 and 16 empower the Court to modify the award or to remit it to the arbitrators for further consideration. Section 17 enacts that when the Court sees no cause to remit the award for re-consideration, it shall, after the time for making an application to set it aside has expired, or when such an application has been made and refused, proceed to pronounce judgment according the award, and upon the judgment so pronounced a decree shall follow.

[6] Sections 31 and 32 of the Act are also relevant. Section 31 reads:

> "(1) Subject to the provisions of this Act, an award may be filed in any Court having jurisdiction in the matter to which the reference relates.
>
> (2) Notwithstanding anything contained in any other law for the time being in force and save as otherwise provided in this Act, all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement or persons claiming under them shall be decided by the Court in which the award under the agreement has been, or may be, filed and by no other Court.
>
> (3) All applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings shall be made to the Court where the award has been, or may be, filed, and to no other Court.
>
> (4) Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force, where in any reference any application under this Act has been made in a Court competent to entertain it, that Court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications arising out of that reference and the arbitration proceedings shall be made in that Court and in no other Court."

Section 32 enacts:

> "Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act."

[7] Learned advocate for the respondent made reference to *Kirkwood* v. *Maung Sin*, 30 C. W. N 529: (A. I. R. (12) 1925 P. C. 216), in support of his contention that a suit to set aside an award was maintainable under S. 30, Specific Relief Act. In *E. D. Sassoon & Co.* v. *Ramdutt Ramkissen*, 50 Cal. 1: (A. I. R. (9) 1922 P. C. 374), the Judicial Committee held that a suit

lay to set aside an award on the ground that an arbitrator had acted wholly without jurisdiction. But these decisions were based on the law existing prior to the passing of the Arbitration Act of 1940. Section 30, Specific Relief Act merely states that the provisions of Chap. II as to contracts shall *mutatis mutandis* apply to awards and to directions in a will or codicil to execute a particular settlement. It is manifest that this section cannot override S. 32, Arbitration Act, 1940, which applies "notwithstanding any law for the time being in force." The governing section is S. 32, Arbitration Act. The Act of 1940 was intended to and did alter the law, and one of the main objects of the Act was to provide that claims to set aside arbitration awards or challenge arbitration agreement should be made by application to Court and decided on affidavits or on other evidence if deemed expedient by the Court and not by means of a suit. In the present suit, the question at issue clearly relates to existence and validity of the award made by the arbitrators. In Paras. 8 and 17 of the written statement the defendants specifically asserted that they had never referred the alleged matter in dispute to any arbitrators and that no award was made. The defendants maintained that even if the award was genuine the plaintiff was not entitled to enforce the award since it was illegal, invalid and inoperative. Upon these pleadings, it is manifest that the suit raised the question as to the existence and validity of the award and such a suit is expressly prohibited by S. 32, Arbitration Act. The construction I have adopted is supported by three decisions: *Moolchand Jothajee* v. *Rashid Jamshed Sons & Co.*, A.I.R. (33) 1946 Mad. 346 : (I. L. R. (1946) Mad. 840) ; *Deokinandan* v. *Basantlal*, 45 C. W. N. 881 : (A. I. R. (28) 1941 Cal. 527) and *Ratanji Virpal & Co.* v. *Dhirajlal Manilal*, I.L.R. (1942) Bom. 452 : (A. I. R. (29) 1942 Bom. 101). In the last case it was held that under the Arbitration Act, 1940, till the award had been filed in Court it was not competent to a party to an arbitration to file a petition to set aside the award. Chagla J. states :

> "Further under the present Act no proceedings can be taken on the award till after it has been filed, and I fail to see how a party can possibly be prejudiced by the existence of an award which has not been filed in Court. Under the old Arbitration Act it was competent to a party who obtained an award without filing it to file a suit thereon. Further, the award became enforceable as a decree as soon as it was filed. But under the present Act all proceedings with regard to the arbitration agreement or the award have to be taken as provided by the Act and before the tribunal indicated by the Act. Section 32 specifically provides that no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in the said Act, and under S. 17 of the Act, the Court has to pronounce judgment according to the award and a decree follows. It is only this decree that can be executed."

It is manifest that in view of the bar imposed by S. 32, Arbitration Act the Munsif had no jurisdiction to entertain the suit.

[8] Accordingly, I would allow this application and set aside the decree of the lower appellate Court. The applicants are entitled to their costs. Hearing fee two gold mohurs.

[9] **Imam J.** — I agree to the order proposed. Speaking for myself, it is immaterial whether a second appeal lies or a civil revision in this case, having regard to the fact that in any event the suit was barred and could not be heard by a Court whether of Small Causes or a civil Court, under the provisions of the Arbitration Act, 1940.

S.A.R. *Application allowed.*

A. I. R. (37) 1950 Patna 50 *[C. N. 19.]*

FULL BENCH

AGARWALA C. J., MEREDITH AND RAMASWAMI JJ.

Kishori Lal Potdar — Plaintiff — Appellant v. *Debi Prasad Kejriwal and another — Defendants — Respondents.*

A. F. O. D. No. 201 of 1948, Decided on 29th October 1949, from decision of Addl. Dist. Judge, Bhagalpur, D/- 8th April 1948.

(a) Patna High Court Rules, Chap. 5, R. 3 — Reference to Full Bench — Mixed question of law and fact cannot be referred.

Rule 3 confines a reference to a Full Bench, in the case of an appeal from an original decree or order, to questions of law. To add to the questions of law referred the phrase "in the circumstances of this case" is to suggest that the Full Bench take into consideration the facts of the case. It is not competent for the Division Bench to refer a mixed question of law and fact to the Full Bench [Para 2]

(b) Houses and Rents — Bihar Buildings (Lease, Rent and Eviction) Control Act (III [3] of 1947), S. 1 (3) — Amending Ordinance (VI [6] of 1949), Ss. 2 and 3 — Section 1 (3) of Act is *intra vires* the Provincial Legislature (Per *Full Bench*; *Meredith J.* contra) — Section 2 of the amending Ordinance is intra vires — Section 3 of amending Ordinance is ultra vires (Per *Meredith J.*) — Government of India Act (1935), S. 88.

Held (Per *Full Bench*, *Meredith J.* contra) — That the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, has been validly enacted, that S. 1 (3) of the Act is not ultra vires and that the Ordinance VI [6] of 1949 has validily amended S. 1, sub-s. (3) with retrospective effect. [Para 94]

Section 1 (3) of the Act is not illegal and *ultra vires* on the ground that it is an improper delegation of legislative power to the executive Government. [Para 86]

The section has merely vested executive discretion regarding the application of law to a situation already in existence. The duration of the Act as also the area over which it is to operate has been left to the discretion of the Provincial Government. Such a delegation is permissible and is not in conflict with any constitutional principle: A. I. R. (36) 1949 F. C. 175, *Disting.*; *Case law referred.* [Para 78]

Per *Agarwala C. J.*—Even if S. 1 (3) is *ultra vires*, S. 1 (3) is severable from the rest of the Act, and consequently, in the absence of any valid power to curtail its operation, it would remain in force indefinitely. [Para 20]

Per *Meredith J.*—Section 1 (3) is *ultra vires* the Provincial Legislature: A. I. R. (36) 1949 F. C. 175, *Rel. on.*; *Case law referred.* [Para 49]

But as the provision is severable, its excision does not involve the destruction of the entire Act. Therefore, the Act itself apart from S. 1 (3) is a valid Act and in force. [Para 50]

Per *Full Bench.*—The Bihar Ordinance VI [6] of 1949, issued in exercise of the power conferred by S. 88 (1), Government of India Act, 1935, which Ordinance amends S. 1 (3) of the Act retrospectively so as to limit its operation to a period of 5 years certain, is also *intra vires*: A. I. R. (32) 1945 P. C. 48; A. I. R. (36) 1949 Cal. 1 (F. B.) and A. I. R. (28) 1941 F. C. 16, *Rel. on.* [Paras 17, 52, 88 and 89]

Per *Meredith J.*—Section 3 of the Amending Ordinance is clearly ultra vires. But it is clearly severable and does not affect the validity of S. 2. [Para 54]

(c) Houses and Rents — Bihar Buildings (Lease, Rent and Eviction) Control Act (III [3] of 1947), Ss. 2 and 11 — Definition of tenant is not retrospective (Per *Full Bench*).

Per *Full Bench.* — The definition of the word "tenant" in the Bihar Act (III [3] of 1947) or the Bihar Ordinance II [2] of 1946 which it replaced, is not retrospective in its operation. [Paras 19, 97 and 103]

(d) Houses and Rents — Bihar Buildings (Lease, Rent and Eviction) Control Act (III [3] of 1947), S. 11 —Civil Court — Jurisdiction — Civil Courts have no jurisdiction to decree possession — Civil P. C. (1908), S. 9.

Per *Agarwala C. J., and Ramaswami J.*—The Civil Courts have no jurisdiction in view of the provisions of S. 11 to make a decree for possession. [Paras 21, 103]

Per *Meredith J.* — Section 11, sub-s. (2) bars any suit for the ejectment of a tenant after 15th March 1947, but it does not and cannot bar a suit based on trespass. If the defendants are able to show that they are not trespassers but tenants of some sort, then clearly the suit will fail. But that will be because the plaintiff has failed to establish his allegations, and not because the Court has no jurisdiction. [Para 59]

(e) Precedents — Obiter dicta — Decision based on two grounds — Decision upon one ground is not obiter because decision upon other is itself sufficient. (Per *Meredith J.*)

Per *Meredith J*:— When a Court bases its decision upon a point which it has to decide, upon two separate grounds, it cannot be said that the decision upon one of those grounds is *obiter* merely because the decision upon the other ground would be itself sufficient. [Para 34]

Annotation: ('46-Man.) Interpretation of Statutes, N. 14.

(f) Precedents —Federal Court—Principle in clear terms laid down by Federal Court—Principle must be followed, though obiter.

Per *Meredith J.*— Where the Federal Court has laid down a principle in clear terms, it is for all the subordinate Courts to follow it although observations are obiter. The Federal Court has taken over the functions of the Privy Council. It is the highest Court now existing for India even though the new Constitution has not come into force. It is of the utmost importance at this stage of constitutional development in India, when the foundations are actually being laid for the future sound development of the judiciary, that a tradition should become established of treating the pronouncements of the Federal Court with the utmost respect, so that it may successfully step into the shoes of the Privy Council. [Para 35]

Annotation: ('46-Man.) Interpretation of Statutes, N. 14.

(g) Precedents— Interpretation of Privy Council decision by Federal Court— Interpretation is binding on High Courts.

When the Federal Court places an interpretation upon Privy Council decisions after considering them, the High Courts should accept that interpretation as binding upon them whether it appeals to their reason or not. [Para 49]

Annotation: ('46-Man.) Interpretation of Statutes, N. 14.

(h) Interpretation of Statutes — Invalid portion severable from valid portion — Valid portion may be upheld if different law is not created.

If when the unconstitutional portion is struck out, that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. In other words, the Court may uphold the valid portion if it is severable from invalid portion and if thereby a different law is not created: 29 Com. L. R. 357, *Rel. on.* [Para 93]

Annotation: ('46-Man.) Interpretation of Statutes, N. 2.

(i) Interpretation of Statutes — Retrospective operation — Not to be given unless such construction appears clearly.

No statute shall be construed to have retrospective operation unless such a construction appears very clearly in the terms of the statute or arises by necessary and distinct implication: *Case law relied on.* [Para 96]

Annotation: ('46-Man.) Interpretation of Statutes, N. 4.

Sarjoo Prasad, U. N. Sinha, R. P. Katriar and Bramhadeo Narain— for Appellant.

S. C. Misra, Baidyanath Prasad No. II, B. C. De and Lakshmi Narain Sinha—for Respondents.

Advocate-General and S. C. Chakravarty
— for Province of Bihar.

Agarwala C. J. — This appeal is by the plaintiff, and arises out of a suit to eject the defendants, who are members of a joint Hindu family, from a house belonging to the plaintiff. The shop was let to the defendants at a monthly rental of Rs. 45 by a registered lease dated 19th December 1939. The lease was for a period of three years beginning from the date on which the lessees should take possession of the premises. There was, however, a provision that the defendants should be entitled to three months' notice if they should be required to quit. The lessees' occupation of the premises began on 23rd November 1940. On 9th November 1943, plaintiff served on them a notice stating, "I give you 3 months' notice to quit the premises," calling upon them, "kindly to vacate the same on the receipt of this notice." The lessees not having complied with the notice the plaintiff applied to the House-rent Control Officer to eject them, and an order for eviction was made on 17th January 1945 and was later confirmed by the Commissioner on appeal, who, however, gave the lessees three months' time to vacate the premises. The lessees, however, remained in occupation of the premises and instituted title Suit No. 52 of 1945, in the Court of the Munsif of Bhagalpur for a decision that the eviction order was *ultra vires* the House-rent Control Officer on the ground that the House-rent Control Order applied only to monthly tenancies. This contention was accepted by the Munsif, and the suit was decreed on the ground that the lessees were not monthly tenants. An appeal preferred by the lessor was dismissed. The latter then served on the lessees a notice dated 14th December 1946, calling upon them "to vacate the said holding at once." A further notice calling upon them "to quit the house at once" was served on 14th December 1946. These notices not having been complied with, the lessor instituted the suit out of which this appeal has arisen praying for a decision that the defendants are trespassers and for a decree directing them to deliver the premises to the plaintiff. The suit was dismissed by the Additional District Judge of Bhagalpur. An appeal by the plaintiff came before Sinha and Mahabir Prasad JJ. who made the following order:

> "The main question in controversy between the parties is the application of certain provisions of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, (Bihar Act III [3] of 1947). On this question, the decision of a Division Bench of this Court, consisting of Manohar Lall and Imam JJ. dated sometime in November 1947, *Shiveshwar* v. *Parmeshwar*, 27 Pat. 1 : (A. I. R. (36) 1949 Pat 355) is entirely in favour of the appellant; whereas a later decision of another Division Bench of this Court consisting of Imam and Narayan JJ., *Sant Kuer* v. *Ganesh*, A. I. R. (36) 1949 Pat. 137 : (27 Pat. 695), seems to favour the respondents' contention. There is thus a conflict of decisions on the main question in controversy between the parties, and it is desirable that this conflict should be resolved as early as possible. Another very important question has been raised by Mr. Das on behalf of the appellant, namely, whether the recent decision of the Federal Court in the case of *Jatindra Nath* v. *Province of Bihar*, A. I. R. (36) 1949 F. C. 175 : (50 Cr. L. J. 897), does not render the Act aforesaid *ultra vires*. This is a question of far-reaching importance to people of this Province, and must also be resolved as early as possible. As the questions referred to above arise in a first appeal, we formulate the following two questions for decision by a larger Bench:
>
> (1) Whether the definition of 'tenant' appearing in the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 (Bihar Act, III [3] of 1947), or the Bihar Ordinance II [2] of 1946, which it replaced is retrospective in its operation, and protects the defendants in the circumstances of this case and
>
> (2) Whether the annual extension of the Act aforesaid by the Provincial Government is *ultra vires* of the Legislature.
>
> Another question suggested by Mr. De on behalf of the respondents may also be conveniently referred to the same Bench for an authoritative decision: 'Whether the Civil Courts have jurisdiction, in view of the provisions of S. 11 of the Act aforesaid, to make a decree for possession.'
>
> As this litigation between the parties has been a protracted one, it is desirable, in the interests of justice, that these questions should be decided as early as possible.
>
> As one of the questions referred to the Full Bench is a question of constitutional importance bearing upon the construction of the Government of India Act, 1935, it is desirable that the learned Advocate General should be asked to represent the views of the Provincial Government.
>
> Let the matter be placed before the Hon'ble the Chief Justice."

[2] Before considering these questions I propose to refer to the rule under which this reference has been made. It is R. 3 of Chap. 5 of the Rules of this Court. That rule is as follows:

> "If the case is an appeal from an original decree or order, the question of law shall alone be referred, and the Full Bench shall return the case with an expression of its opinion upon the points of law for final adjudication by the Division Bench which referred it, and in case of necessity in consequence of the absence of any or either of the referring Judges, for the ultimate decision of another Division Bench."

This rule, therefore, confines a reference to a Full Bench, in the case of an appeal from an original decree or order, to questions of law. Questions of fact may not be referred to a Full Bench. To add to the questions of law referred the phrase "in the circumstances of this case", as has been done in the case of the first question referred to us, is to suggest that the Full Bench take into consideration the facts of the case. It is for the Division Bench which makes the reference to find the facts, and for my part, I should have considered it desirable to find the facts before formulating the question or questions of law which arise from them. I propose, therefore, to treat the first question purely as a question of law, and to ignore the words "in the circumstances of this case."

[3] The House-rent Control Order of 1942, which was issued in exercise of powers conferred by R. 81, Defence of India Rules, was replaced on 1st October 1946, by the Bihar Buildings (Lease, Rent and Eviction Control) Ordinance (II of 1946), which was made in exercise of powers conferred by S. 88 (1), Government of India Act, 1935. This was replaced on 15th March 1947, by the Bihar Buildings (Lease, Rent and Eviction) Control Act (III of 1947). The Act is *in pari materia* with the Ordinance. Section 11 (1) of the Act provides that:

> "Notwithstanding anything contained in any agreement or law to the contrary and subject to the provisions of S. 12, where a tenant is in possession of any building, he shall not to be liable to be evicted therefrom, whether in execution of a decree or otherwise, except for some specified reasons."

Sub-section (2) provides,

> "A landlord who seeks to evict his tenant under sub-section (1) shall apply to the Controller for a direction in that behalf . . . . ."

The remainder of the sub-section prescribes the procedure to be followed by the Controller in dealing with such an application. If this section governs the present case, it follows that the plaintiff is not entitled to eject the defendants in execution of a decree, and that the procedure that he should follow in order to evict the defendants is an application under sub-s. (2) of S. 11. On behalf of the plaintiff, however, it is contended that this Act was entirely *ultra vires* the Provincial Government. This contention is founded on sub-s. (3) of S. 1, which declares that the Act shall remain in force for such period as the Provincial Government may, by notification fix, provided that the Provincial Government may, from time to time, by notification, extend such period. By notification No. 6208, dated 15th March 1947, the Provincial Government fixed one year as the period for which the Act should remain in force. By notification No. 5641, dated 1st March 1948, the period was extended for a further year, and by Notification No. 7804, dated 7th March 1949, for a still further period of one year. Sub-s. (3) was repealed by the Bihar Buildings (Lease, Rent and Eviction) Control (Amending and Validating) Ordinance, 1949, and in its place was substituted the following: "(3) It shall remain in force for five years . . . . " The contention on behalf of the plaintiff-appellant is that by sub-s. (3) of S. 1 of the Act of 1947, the Provincial Legislature delegated legislative powers to the Provincial Government, and that the result of this is that the entire Act is *ultra vires*, and, accordingly, that the amendment attempted by the Ordinance of 1949 had nothing to operate upon. In short, the appellant's contention is that the Legislature did not itself fix the period for which the Act was to remain in operation, but left it to the Provincial Government, and this amounted to a delegation of its legislative functions. *Prima facie*, the contention is a surprising one. But for sub-s. (3) the Act would be an Act of indefinite duration which came into force on the date on which assent to it was published in the official gazette. Sub-section (3) of S. 1, conferred on the Provincial Government the power to curtail the period of its duration, and the proviso to that sub-section empowered the Provincial Government to extend the period of duration after having curtailed it by notification. It is a common feature of legislative Acts in this country for it to be provided in a statute that the statute shall come into operation as from a date to be fixed by the Provincial Government. In such cases, the Provincial Government should never fix a date for the statute to come into operation; it would remain a dead letter. The mere fact that the Legislature empowers the Provincial Government to fix the date from which an Act is to come into operation has, so far as I am aware, never been urged as a ground for holding that the Legislature had delegated its functions to the Provincial Government. The present is the converse case. The Act of 1947 came into operation without any act of the Provincial Government, and, if the Provincial Government had not, by notification, 'fixed the period during which it was to remain in force, it would have remained in operation indefinitely.

[4] It has, however, been sought to make a distinction between a case in which the Legislature confers upon the Provincial Government the power to decide that an Act shall come into operation and a case in which the power is conferred on the Provincial Government to decide how long an Act shall remain in operation. The distinction is a fine one. In the case of *The Queen* v. *Burah*, 5 I. A. 178: (4 Cal. 172 P. C.), the Legislature (in that case the Governor-General in Council) enacted legislation for the removal of a particular area from the jurisdiction of the ordinary Courts and Officers and to place it under the new Courts and Officers to be appointed by and responsible to the Lieutenant Governor of Bengal. It was left to the Lieutenant Governor to decide at what time the change should take place. He was also empowered, by public notification, to apply to the area in question any law or part of a law which was already in force in other territories subject to his Government, or which might, from time to time be brought into force in those territories by proper legislative authorities. The validity of the Act was challenged on the ground that the Governor-General in Council had created a new legislative authority, namely, the Lieutenant Governor, which was not created or authorised by the Indian Councils Act, 1861. Their Lordships of the Privy Council repelled this contention, observing that the proper Legislature, namely, the Governor-General in Council had exercised its judgment as to place, persons, laws and powers, and that the result of that judgment had been to legislate conditionally as to all those things, the condition being that the Lieutenant Governor of Bengal was to determine the date on which the change should take place. That condition having been fulfilled, the legislative function had been completely performed. In the course of their judgment in that case their Lordships observed:

> "Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a

Provincial Legislature, they may be well exercised either absolutely or conditionally; in the latter case leaving to the discretion of some external authority the time and manner of carrying its legislation into effect as also the area over which it is to extend."

[4a] The matter was carried somewhat further in the case of *Russell* v. *Queen*, (1882) 7 A.C. 829 : (51 L. J. P. C. 77). The Act under consideration in that case was the Canada Temperance Act, 1878, the preamble of which declared :

> "It is very desirable to promote temperance in the Dominion, and that there should be uniform legislation in all the provinces respecting the traffic in intoxicating liquors."

The Act was divided into three parts, the first of which related to proceedings for bringing the second part of the Act into force, the second part to "prohibition of traffic in intoxicating liquor"; and the third to penalties and prosecutions for offences against the second part. The method of bringing the second part into force was stated thus :

> "On a petition to the Governor in the Council, signed by not less than one-fourth in number of the electors of any county or city in the Dominion qualified to vote at the election of a member of the House of Commons, praying that the second part of the Act should be in force and take effect in such county or city, and that the votes of all the electors be taken for or against the adoption of the petition, the Governor-General after certain prescribed notices and evidence, may issue a proclamation, embodying such petition, with a view to a poll of the electors being taken for or against its adoption. When any petition has been adopted by the electors of the county or city named in it, the Governor-General in Council may, after the expiration of sixty days from the day on which the petition was adopted, by Order in Council published in the Gazette, declare that the second part of the Act shall be in force and take effect in such county or city, and the same is then to become of force and take effect accordingly. Such Order in Council is not to be revoked for three years, and only on like petition and procedure."

This Act, therefore, conferred upon the Governor-General, on being petitioned to do so, not by the Legislature, but by the electors of any county or city in the Dominion, not only to bring the second part of the Act into force, but also, at the end of three years, to revoke it. The effect of this was to leave it to an authority, other than the Legislature, to determine the period for which the Act should remain in force in any county or city, subject to the restriction that when it had once been brought into operation it had to remain in force for at least three years. The validity of the Act was challenged on the ground that the Legislature had delegated its powers to the electors of counties and cities. Their Lordships of the Privy Council dealt with this contention in the following language :

> "The short answer to this objection is that the Act does not delegate any legislative powers whatever. It contains within itself the whole legislation on the matters with which it deals. The provision that certain parts of the Act shall come into operation only on the petition of a majority of electors does not confer on these persons power to legislate. Parliament itself enacts the condition and everything which is to follow upon the condition being fulfilled. Conditional legislation of this kind is in many cases convenient, and is certainly not unusual, and the power so to legislate cannot be denied to the Parliament of Canada when the subject of legislation is within its competency.... If authority on the point were necessary, it will be found in the case of *Queen* v. *Burah*, (1878) 3 A. C. 889 : (4 Cal. 172 P. C.) lately before this Board."

[5] The Act which we are considering, namely, the Act of 1947, deals with a subject-matter on which the Provincial Legislature is competent to legislate, and it contains within its provisions the whole legislation on the matters with which it deals, and, but for any notification which might be issued by the Provincial Government under sub-s. (3) of S. 1, it would remain in force indefinitely. How, the mere fact that the Provincial Government has been authorised to curtail its period amounts to a delegation of its legislative functions, it is difficult to understand. It seems to follow from the case of *Russell* v. *Queen*, (1882) 7 A. C. 829 : (51 L. J. P. C. 77) that if the Provincial Government had been authorized to determine the date from which the Act should cease to operate in a particular area, this would not have amounted to a delegation of the function of the Legislature.

[6] The next case to be considered is *Powell* v. *Apollo Candle Co. Ltd.*, (1885) 10 A. C. 282 : (54 L. J. P. C. 7). The Act under consideration in that case was an Act of the Australian Legislature—The Customs Regulation Act of 1879 — and the question was whether S. 133 of that Act was *ultra vires* the Colonial Legislature. The section provided :

> "Whenever any article of merchandise then unknown to the collector is imported, which, in the opinion of the collector or the commissioners, is apparently a substitute for any known dutiable article, or is apparently designed to evade duty, but possesses properties in the whole or in part which can be used or were intended to be applied for a similar purpose as such dutiable article, it shall be lawful for the Governor to direct that a duty be levied on such article at a rate to be fixed in proportion to the degree in which such unknown article approximates in its qualities or uses to such dutiable article."

[7] The section went on to describe the manner of publication of the rate so fixed. The article in question in that case was stearine, which was an article of merchandise unknown to the collector, but which, in his opinion, was apparently a substitute for a known dutiable article, namely, candles, and was apparently designed to evade the duty on candles, and possessed properties in fact which could be used and were intended to be applied for a similar purpose as candles. The Governor-General, with the advice of his Executive Council, directed

that a duty of one penny per pound weight should be levied on stearine on its importation into the colony. In pursuance of this direction, a collector of customs realised £92 1s. 9d. as duty on a consignment of stearine imported into the colony. The plaintiff paid this under protest, and the suit was to recover this sum. The defendant objected that Section 133 of the Act was beyond the competence of the Legislature to enact. The Chief Justice, in delivering the judgment of the Supreme Court, said :

> "When the collector says that any article is unknown to him, and that some of its properties can be used in the production of a dutiable article, such as candles, and the Governor in Council ascertains how much it would be necessary to use in the making of a pound of candles, he then fixes the amount of duty to be paid on it, having ascertained this, the new article is thereupon saddled with a duty. That is neither more nor less than the Legislature delegating the power to impose taxes. The Imperial Parliament may so delegate, but it has not given the same power to our Legislature. To make this legislation legal there should have been express power given by the Imperial Parliament, not only to impose taxes on the people of this Colony but also to confer on others the power to levy duties. It appears to me, without going into the other points, that under these circumstances the imposition of the duty on stearine was erroneous, and on that ground the demurrer should be sustained."

[8] The revenue authorities appealed to His Majesty in Council. Before the Privy Council the validity of the duty was challenged on the same grounds as in the Supreme Court, namely, that the colonial Legislature had defined and limited powers which they could not exceed, that the power given to them to impose duties was to be executed by themselves only, and could not be entrusted by them wholly or in part to the Governor or any other person or body. It was further argued that a provision in the Constitution that all money bills were to originate in the Legislative Assembly of the colony was an indication that the Imperial Legislature assumed that all legislation in the colony with respect to taxation should be by a bill passed through both houses. Their Lordships observed :

> "It is argued that the tax in question has been imposed by the Governor, and not by the Legislature, who alone had power to impose it. But the duties levied under the Order-in-Council are really levied by the authority of the Act under which the Order is issued. The Legislature has not parted with its perfect control over the Governor, and has the power, of course, at any moment, of withdrawing or altering the power which they have entrusted to him. Under these circumstances, their Lordships are of opinion that the judgment of the supreme Court was wrong in declaring S. 133, Customs Regulation Act of 1879 to be beyond the power of the Legislature."

This, then, is an instance, not of an external authority being authorized by the Legislature to declare that a statute shall come into operation at a particular time, but an instance of an external authority being authorized by the Legislature to determine whether a particular article or merchandise was dutiable, and to assess the duty on it, although, of course, in accordance with the principles laid down by the Legislature.

[9] The next case to which I propose to refer is *Hodge* v. *Queen*, (1884) 9 A. C. 117 : (53 L. J. P. C. 1). The statute thereunder consideration was the Liquor License Act of 1877 of the Province of Ontario in the Dominion of Canada. Two questions were raised : first, whether the Legislature of the Province of Ontario had power by legislation to define the conditions and qualifications requisite for obtaining tavern licences for sale by retail of spirituous liquor within a municipality; for limiting the number of licenses; for declaring that a limited number of persons are qualified to have tavern licences, without having all the tavern accommodation required by law, and for regulating licensed taverns and shops, for defining the duties and powers of license inspectors, and to impose penalties for infraction of their resolutions. The second question was whether, if it had such power, the Provincial Legislature could delegate those powers to a Board of Commissioners. The question arose on conviction of a tavern keeper for infringement of a resolution passed by the Commissioners. Their Lordships of the Privy Council observed :

> "Assuming that the local Legislature had power to legislate to the full extent of the resolutions passed by the License Commissioners and to have enforced the observance of their enactments by penalties and imprisonment with or without hard labour, it was further contended that the Imperial Parliament had conferred no authority on the local Legislature to delegate those powers to the License Commissioners, or any other persons. In other words, that the power conferred by the Imperial Parliament on the local Legislature should be exercised in full by that body, and by that body, alone. The maxim *delegatus non potest delegare* was relied on.
>
> It appears to their Lordships, however, that the objection thus raised by the appellants is founded on an entire misconception of the true character and position of the Provincial Legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a legislature for Ontrio and that its legislative assembly should have exclusive authority to make laws for the Province and for Provincial purposes in relation to the matters enumerated in S. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by S. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make bye-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect. . . . .

> It was argued at the bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into his own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for Courts of law, to decide."

[10] Applying these observations to the Act of 1947, what is it that the Legislature entrusted to the Provincial Government by sub s. (3) of S. 1 ? To read that sub-section is to answer the question. What was entrusted to the Provincial Government was merely a limited discretion to decide how long the provisions of the Act, which were obviously designed to deal with an unusual state of affairs, would be necessary. The entire legislation for controlling the lease, rent and eviction from buildings in Bihar is contained in the Act itself. No power has been conferred on the Provincial Government to alter the provisions of the Act in any way with regard to these matters. All that the Provincial Government has been empowered to do is to decide when the unusual provisions of this Act shall no longer operate because the changed circumstances no longer require their enforcement.

[11] There is one more decision of the Privy Council relevant to this discussion, *Emperor* v. *Benoarilal Sarma*, 72 I A. 57 : (A. I. R. (32) 1945 P. C. 48 : 46 Cr. L J. 589), which raised the question of the validity of the Special Criminal Courts Ordinance (II [2] of 1942). Section 72, Government of India Act, 1935, authorized the Governor-General, in cases of emergency, to make and promulgate ordinances for the peace and good government of British India or any part thereof, and declared that any Ordinance so made should have the like force of law as an Act passed by the Indian Legislature. In exercise of the power thus conferred, the Governor-General promulgated the Special Criminal Courts Ordinance of 1942. The Ordinance recited that an emergency had arisen which made it necessary to provide for the setting up of Special Criminal Courts, and the body of the Ordinance contained the necessary frame-work of Courts of criminal jurisdiction consisting of Special Judges, Special Magistrates and Summary Courts, the provisions as to their respective limits of jurisdiction and procedure, together with restrictions on appeal. The Ordinance did not itself, however, set up any of these Courts. Section 1 (3) provided that the Ordinance

> "shall come into force in any Province only if the Provincial Government, being satisfied of the existence of an emergency arising from any disorder within the Province or from a hostile attack on India or on a country neighbouring on India or from the imminence of such an attack, by notification in the official Gazette, declares it to be in force in the Province, and shall cease to be in force when such notification is rescinded."

The case went to the Privy Council on appeal by a person convicted by one of the Special Courts constituted by the Government of Bihar under the Ordinance. The validity of the Ordinance was challenged on two grounds : first, because, it was contended, the language of S. 1 (3) showed that the Governor-General, notwithstanding the preamble, did not consider that an emergency existed but was making provision in case one should arise in future, and secondly, because the section amounted to what was called "delegated legislation" by which the Governor-General without legal authority sought to pass the decision whether an emergency existed to the Provincial Government instead of deciding it for himself. Their Lordships rejected both these contentions. With regard to the second, they observed :

> "It is undoubtedly true that the Governor-General, acting under S. 72 of Schedule 9, must himself discharge the duty of legislation there cast on him, and cannot transfer it to other authorities. But the Governor-General has not delegated his legislative powers at all .... Their Lordships are unable to see that there was any valid objection, in point of legality, to the Governor-General's ordinance taking the form that the actual setting up of a Special Court under the terms of the ordinance should take place at the time and within the limits judged to be necessary by the Provincial Government specially concerned This is not delegated legislation at all. It is merely an example of the not uncommon legislative arrangement by which the local application of the provision of a statute is determined by the judgment of a local administrative body as to its necessity."

[12] On the basis of the decisions of the Privy Council to which reference has been made there would appear to be no escape from the view that sub-section (3) of S. 1 of the Act is *intra vires* the Provincial Legislature. But it has been strenuously contended that the decision of the Federal Court referred to in the order of reference *Jatindra Nath* v. *Province of Bihar*, A. I. R. (36) 1949 F. C. 175 : (50 Cr. L. J. 897) has taken a different view of provisions of this kind in Acts of the Provincial Legislatures in this country. The cases of *Queen* v. *Burah*, 5 I. A. 178 : (4 Cal. 172 P. C.) and *Russell* v. *Queen*, (1882) 7 A. C. 829 : (51 L. J. P. C. 77) are both referred to in the judgments in this case, and there is no indication in those judgments of any intended departure from the principles enunciated in the decisions of the Privy Council. It is, therefore, necessary to examine the Federal Court case carefully in order to ascertain exactly and precisely what that case decided. The facts of that case were that certain persons were arrested in the Chotanagpur Division of Bihar in February, 1949, in consequence of orders for their detention made by the Provincial

Government purporting to act under S. 2 (1) (a) of the Bihar Maintenance of Public Order Act, 1947, as amended in 1949. The Chotanagpur Division is a partially excluded area. Therefore Acts of the Bihar Legislature do not apply to it *proprio vigore*. In order that such an Act shall apply to it, it is necessary for the Governor to issue a direction under S. 92 (1), Government of India Act. The Governor-General's assent to the Act of 1947 was published in the Bihar Gazette on 16th March 1947, and, on the same date the Governor issued Notification No. 900 directing the application of the Act to the Chotanagpur Division.

[13] Section 1 (3) of the Act of 1947 declared that it should remain in force for one year only. To this, however, there was the following proviso:

> "Provided that the Provincial Government may, by notification, on a resolution passed by the Bihar Legislative Assembly and agreed to by the Bihar Legislative Council, direct that this Act shall remain in force for a further period of one year with such modifications, if any, as may be directed in the notification."

By S. 1 (3) and its proviso, therefore, the Bihar Legislature enacted (1) that the operation of the Act should be limited to one year certain, and (2) that in certain circumstances its operation could be extended in its original form, or with modifications for a further period of one year. The circumstances required for the operation of the Act to be continued for a second year were: (a) a resolution passed by the Bihar Legislative Assembly directing that the Act should remain in force for a further period of one year; (b) agreement with the resolution by the Bihar Legislative Council; and (c) a notification by the Provincial Government giving effect to the resolution. There having been such a resolution of the Bihar Legislative Assembly, agreed to by the Bihar Legislative Council, that the Act should extend for a further year from 16th March 1948, the Provincial Government issued Notification No. 8734 on 11th March 1948, extending the operation of the Act until 16th March 1949.

[14] So far as the Chotanagpur Division was concerned, however, no further notification was issued by the Governor until 7th March 1949, when Notification No. 3430 was issued directing that the Act "shall apply, and shall always be deemed to have applied, to the Chotanagpur Division" with effect from 16th March 1948, that is to say, the Governor, purporting to exercise his powers under S. 92 (1), Government of India Act, directed that the Act of 1947 should be deemed to have applied to the Chotanagpur Division from 16th March 1948, although from that date until 7th March 1949, the Act was not in force in that Division. On a rule issued under S. 491, Criminal P. C., at the instance of the detenus it was contended before a Division Bench consisting of myself and Nageshwar Prasad J., (1) that despite the proviso to S. 1 (3) the Provincial Government had no power to extend the operation of the Act beyond the period of one year provided in that section; (2) that consequently the Governor also could not so extend it to the Chotanagpur Division; and (3) that the Notification issued by the Governor on 7th March 1949, did not validate detention orders made in February 1949. The Division Bench was unanimous in negativing the first two of these contentions. With regard to the third contention there was a difference of opinion, I holding that as the Federal Court had held in *Chatturam* v. *Commissioner of Income-tax*, 26 Pat. 442 at p. 447: (A. I. R. (34) 1947 F. C. 32), that the Governor's function under S. 92 (1) is legislative, and in *United Provinces* v. *Mt. Atiqa Begum*, 1940 F. C. 110 at p. 133 : (A. I. R. (28) 1941 F. C. 16), that Indian Legislatures are not prohibited from enacting retrospective legislation, the effect of the notification of 7th March 1949, was to validate the orders under which the applicants were detained. Nageshwar Prasad J. took the contrary view. On this difference of opinion, the applications were referred to a Special Bench of three Judges. The Special Bench upheld the validity of the detentions, but each of the Judges based his decision on a different ground. Meredith J. held: (1) that a notification of the Governor under S. 92 (1) cannot operate restrospectively; but (2) that, as a result of the Governor's Notification No. 900 of 16th March 1947, the Act was in operation continuously in the Chotanagpur Division from that date, and therefore, it was not necessary to issue any further notification under S. 92 (1) for the purpose of keeping it in operation on the expiry of one year from that date; (3) that the direction of the Provincial Government in Notification No. 8734 of 11th March 1948, was not a legislative act, but merely a fulfilment of a condition by executive order which had been prescribed by the proviso to S. 1 (3) of the Act. For this conclusion he relied on *Burah's case*, 5 I. A. 178 : (4 Cal. 172 P. C.), *Russell's case*, (1882) 7 A. C. 829 : (51 L. J. P. C. 77) and *Benoarilal Sarma's case*, 72 I. A. 57: (A. I. R. (32) 1945 P. C. 48: 46 Cr. L. J. 589). He considered that the decision of the Federal Court in *Chatturam's case*, 26 Pat. 442 : (A. I. R. (34) 1947 F. C. 32), was not a binding authority with respect to the construction of this proviso as it was a decision with respect to the construction of S. 92 (1), Constitution Act. Shearer and Imam JJ. agreed with Meredith J. with regard to the first and second points, with the result that the detention of the applicants was upheld although for reasons different from those given by me in the Division Bench.

[15] On appeal by the detenus the Federal Court held the detentions to be illegal. There appears to have been no dispute that the power conferred on the Governor by S. 92 (1), Government of India Act is legislative power. Their Lordships, therefore, were not called upon to discuss their own decision in *Chatturam's case*, 26 Pat. 442: (A.I.R. (34) 1947 F. C. 32). Kania C. J. and Mahajan and Mukherjea JJ., held first, that the power contained in the proviso to S. 1 (3), Bihar Maintenance of Public Order Act, 1947, to extend the operation of the Act beyond the period of one year was legislative power, (2) that the Bihar Legislature, consisting of His Majesty represented by the Governor and the Legislative Assembly and the Legislative Council, was incompetent to delegate to another authority, viz., the Assembly and Council, the power to extend the period of operation of the Act; and (3) that consequently the Act ceased to operate after 15th March 1948. The proviso to S. 1 (3) was held to be an example of delegated legislation and not of conditional legislation.

[16] Kania C. J. did not deal with, and Mahajan and Mukherjea JJ. left open, the question whether a notification by the Governor under S. 92 (1), may operate retrospectively. Sastri J. based his decision on the absence of a notification under S. 92 (1), extending the operation of the Act beyond 15th March 1948, holding that the notification of 7th March 1949, was ineffective for this purpose as the Governor was not empowered, by a notification under S. 92 (1), to apply the Act to an excluded or partially excluded area retrospectively. Fazl Ali J. held that, even though the power to modify the Act conferred by the proviso to S. 1 (3), might be invalid, the power to extend the period of its operation on a resolution of the two Houses of the Legislature was valid. He agreed with the Special Bench on the other two questions raised which included the view that the Governor cannot legislate retrospectively under S. 92 (1). As that case arose out of detentions in the Chota-nagpur Division, a partially excluded area, it would have been sufficient for the disposal of the application to hold that the Governor has no power to legislate retrospectively under S. 92 (1), Government of India Act. But only two of the learned Judges of the Federal Court, Sastri J. specifically, and Fazl Ali J. by implication, took this view. Shortly stated, what the majority of the learned Judges of the Federal Court decided is that the Bihar Legislature, by the proviso to S. 1 (3) of the Act, purported to empower a body other than the Legislature to modify the provisions of the Act, and that this amounted to a delegation of its authority which it had no power to make. We are bound by that view, which, however, cannot but have far-reaching repercussions. For example, in enacting the Code of Civil Procedure the Legislature prescribed the rules of procedure in Sch. I of the Code. By S. 122, however, the High Courts are empowered to "annul, alter, or add to" any of the rules in Sch I. Most of the High Courts have in fact exercised the powers conferred by S. 122, and modified the provisions of Sch. I very considerably. There are other provisions in the Statute Book of instances in which the Legislature has conferred on an external authority the power to make, modify and rescind rules. However that may be, it is quite clear that the three learned Judges of the Federal Court, who took the view that the proviso to S. 1 (3) of the Act of 1947 was *ultra vires* the Legislature, based their decision on the fact that the Provincial Government had been empowered to modify the Act itself. Kania C. J. observed:

> "The power to modify an Act of a Legislature, without any limitation on the extent of the power of modification, is undoubtedly a legislative power. It is not a power confined subject to any restriction, limitation or proviso (which is the same as an exception) only. It seems to me therefore that the power contained in the proviso is legislative."

Mahajan J. said:

> "It may be asked what does the proviso purport to do in terms and in substance? The answer is that it empowers the Provincial Government to issue a notification saying that the Provincial Act shall remain in force for a further period of one year with such modifications, if any, as may be specified in the notification. As stated in the earlier part of this judgment, unless the power of the Provincial Government is co-extensive with the power of the Provincial Legislature, it is difficult to see how it can have the power to modify a statute passed by that Legistature. Modification of statute amounts to re-enacting it partially."

Mukherjea J. observed, with regard to the Act of 1947:

> "It is not a conditional statute which is to take effect on the determination of some fact or condition by an extraneous authority. The Act is to take effect at once, and what is left to the outside authority is to determine at some future date whether the Act should be extended for one year further with or without modifications. . . In the present case the Act does not lay down the condition and everything which is to follow upon the fulfilment of the same. It provides for the determination of the duration as well as the contents of the legislation itself by some external authority at a future date."

In another passage His Lordship said:

> "The Provincial Government is authorised to decide at the end of the year not merely whether the Act should be continued for another year but whether the Act itself should be modified in any way or not. To modify a statute is certainly to perform a legislative act. No restrictions have been laid down regarding the nature of the modifications that could be made."

The Act now under consideration does not confer on the Provincial Government any power to modify any of the provisions of the Act. The present case, therefore, is distinguishable from the case that was decided by the Federal Court.

[17] The Ordinance of 1949 has now amended the sub-section retrospectively so as to limit its operation to a period of five years certain. This Ordinance was issued in exercise of the power conferred by S. 88 (1), Government of India Act. Sub-s. (2) of that section declares that an Ordinance issued under sub-s. (1), shall have the same force and effect as an Act of the Provincial Legislature. It is not disputed that the latter could amend S. 1 (3) in the manner in which it has been amended by the Ordinance. It follows that an ordinance issued under sub-s. (1), may also do so, even retrospectively—see *Jnan Prosanna Das Gupta* v. *The Province of West Bengal*, 53 C. W. N. 27 : (A. I. R. (36) 1949 Cal. 1 : 50 Cr. L. J. 1 F. B.), in which it was held that an Ordinance issued under S. 88 (1), may amend or repeal an Act of the Legislature and may operate retrospectively even for the period during which the Legislature was in session.

[18] I would answer the questions referred to us as follows:

1st Question.

[19] I must confess that I do not understand the purport of this question. Obviously the definition of "tenant" in the Ordinance of 1946 and the Act of 1947 did not apply to the House-rent Control Order of 1942. Neither the Ordinance nor the Act purports to amend the definition of "tenant" in the Order of 1942, either retrospectively or otherwise. Whether the definition in the Ordinance was a protection for the defendants from eviction otherwise than in accordance with S. 11 (2), while the Ordinance was in force, and whether the Act of 1947 similarly protects the defendants, must necessarily depend on whether the defendants are "tenants", a matter which the Division Bench has neither decided nor referred to us.

2nd Question.

[20] What this question is intended to mean is whether the power conferred on the Provincial Government by S. 1 (3) is *ultra vires* the Provincial Legislature. For the reason stated above, I would answer this question in the negative. If I had felt constrained to take the contrary view, I would also have held that S. 1 (3) is separable from the rest of the Act and, consequently, in the absence of any valid power to curtail its operation, it would remain in force indefinitely.

3rd Question.

[21] As S. 11 is quite clearly a bar to the tenants being ejected otherwise than by an application to the Controller, and as a Court of law cannot be expected to make an order to which it is prohibited from giving effect, I would answer this question in the negative.

[22] **Meredith J.**—On 19th December 1939, the appellant (plaintiff) gave a lease of certain property to the respondents on the terms that it was to run for three years from the date of occupation of the premises, but subject to the condition that the landlord must give three months' notice before evicting the tenants. On 23rd November 1940, the tenants took possession, so that the three years would expire on 22nd November 1943. Shortly before that date, on 9th November 1943, the appellant served a notice to quit on the respondents. This notice contained a statement that three months' notice was being given. But it contained a further inconsistent demand that the premises be vacated directly upon receipt of the notice. Moreover, a fresh notice was served on 3rd February 1944, calling attention to the fact that the first notice had not been obeyed, and calling on the tenants to vacate at once.

[23] Next day, the 4th of February, the appellant made an application before the Rent Controller under the House Rent Control Order of 1942 for eviction of the tenants as he required the premises for his own purposes. On 17th January 1945, an eviction order was passed, and on 2nd March 1945, the tenants, appeal was dismissed by the Commissioner.

[24] Then the tenants brought a title suit (T. S. 52 of 1945) for a declaration that the order of the Rent Controller was *ultra vires*, it being contended *inter alia* that this was not a case of a monthly tenancy as the lease had not been validly terminated, whereas the Rent Control Order applied only to monthly tenancies, and, secondly, it had no application as the landlord had treated the tenants as trespassers. On 19th September 1946, this suit was decreed on the view that the lease had not been terminated and it was not a case of a monthly tenancy. Meanwhile, on 1st October 1946, Ordinance No. II [2] of 1946 replaced the House Rent Control Order, 1942. It contained new provisions, amongst others a wide definition of "tenant". On 29th January 1947, the decree just spoken of was upheld in appeal. Then, on 15th March 1947, which was the very date that the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 (Bihar Act III [3] of 1947) replaced Ordinance No. II [2] of 1946, the landlord brought an ejectment suit based on the contention that the defendants were trespassers. The defendants claimed that they were not trespassers but tenants under the wide definition I have referred to, which is contained in S. 2 (h) of the Act of 1947, and, moreover, that the Act of 1947 barred the jurisdiction of the civil Court. The defendants' case

succeeded, and the suit was dismissed. Hence the present first appeal.

[25] The appeal came before a Division Bench, and that Bench has referred three questions to this Full Bench. These questions are as follows:

> (1) Whether the definition of 'tenant' appearing in the Bihar Bulidings (Lease, Rent and Eviction) Control Act, 1947 (Bihar Act, III of 1947), or the Bihar Ordinance II of 1946, which it replaced, is retrospective in its operation, and protects the defendants in the circumstances of this case?
>
> (2) Whether the annual extension of the Act aforesaid by the Provincial Government is *ultra vires* of the Legislature?
>
> (3) Whether the Civil Courts have jurisdiction, in view of the provisions of section 11 of the Act aforesaid, to make a decree for possession?

[26] The second question is the most important, and I shall deal with it first. The Act received the assent of the Governor-General on 14th March 1947 and the assent was first published in the Bihar Gazette (Extraordinary) of 15th March 1947. The Act specifies no date on which it is to come into force, and, therefore, under the General Clauses Act, it came into force on 15th March 1947. Nor did the Act specify how long it was to remain in operation. Section 1 (3), however, of the Act was as follows:

> "It shall remain in force for such period as the Provincial Government may, by notification fix: Provided that the Provincial Government may, from time to time, by notification, extend such period:"

There is a further proviso with which we are not concerned.

[27] By Notification No. 6208 P. C., dated 15th March 1947, the Bihar Government fixed one year as the period for which the Act was to remain in force. By Notification No. 5641 P. C. of 1st March 1948, it fixed a further period of one year for the Act to remain in force, and by Notification No. 7804 Misc. 22/49 P. C. of 7th March 1949 it fixed a second one year's period of extension.

[28] The contention that the Act was *ultra vires* of the Provincial Government is based on the decision of the Federal Court in *Jatindra Nath Gupta* v. *Province of Bihar*, 3 A. I. Cr. D. 566 : 1 U. L. J. 274 : (A.I.R. (36) 1949 F. C. 175 : 50 Cr. L. J. 897). In that case the Federal Court considered the question whether the Bihar Maintenance of Public Order Act, 1947 (Bihar Act, V [5] of 1947) had ceased to operate after one year because the provision under which it had been extended was *ultra vires*. Section 1 (3) of that Act said :

> "It shall remain in force for a period of one year from the date of its commencement; Provided that the Provincial Government may, by notification, on a resolution passed by the Bihar Legislative Assembly and agreed to by the Bihar Legislative Council, direct that this Act shall remain in force for a further period of one year with such modifications, if any, as may be specified in the notification"

[29] The Federal Court by a majority held that this proviso was *ultra vires*, being a delegation of legislative power by the Provincial Government, such a delegation not being constitutionally permissible.

[30] The respondents and the learned Advocate-General, who has appeared for the Government, have attempted to avoid the application of this ruling on three grounds : first, that it is distinguishable; second, that it should not be followed because it is inconsistent with numerous decisions of the Privy Council, and, third, because the observations which would be applicable to the present case were *obiter dicta*.

[31] Having carefully considered the judgments of the Federal Court, I have come to the conclusion that the ruling cannot be distinguished. The ruling is sought to be distinguished because it was based on the provision for modifications in the provision in Act 5 [V] of 1947, whereas in the present case there was merely a provision for fixing duration without modifications. It is quite true that the learned Judges did rely strongly on that provision for introducing modifications as making the provision *ultra vires*. But in fact the Provincial Government had extended the Act without any modifications, and three of the learned Judges, that is to say, a majority of the Court, expressly held that, apart from any question of modifications, the provision for extension in time was *ultra vires*, as being in itself a delegation of legislative power. Kania C. J. expressed himself on this point in very clear terms. He said :

> "The power to extend the operation of the Act beyond the period mentioned in the Act *prima facie* is a legislative power. It is for the Legislature to state how long a particular legislation will be in operation. That cannot be left to the discretion of some other body. . . . . Even keeping apart the power to modify the Act, I am unable to construe the proviso, worded as it is, as conditional legislation by the Provincial Government. . . . . For its continued existence beyond the period of one year it had not exercised its volition or judgment but left the same to another authority, which was not the legislative authority of the Province."

These observations appear to me directly applicable to the present matter.

[32] Mahajan J. said :

> "They (legislative authorities) are not allowed to transfer to others the essential legislative functions with which they are invested. It has therefore to be determined whether the proviso offends against the maxim *delegatus non potest delegare*. . . . The proviso which has been assailed in this case, judged on the above test, comes within the ambit of delegated legislation and is thus an improper piece of legislation and void. . . . . A modified statute is not the same original statute. It is a new Act and logically speaking, it amounts to enacting a new law, . . . In my opinion, no external body can be delegated with the duty of making modifications in a statute, but that is what the proviso has done. This novel device of defeating the Constitution Act

adopted by the Provincial Legislature cannot have the approval of this Court . . . I am further of the opinion that the power given to extend the life of the Act for another year in the context of the language of S. 1 (3) also amounts to an Act of Legislation and does not fall under the rule laid down in *Queen* v. *Burah*, 5 I. A. 178 : (4 Cal. 172 P. C.). The Act in a mandatory form stated that it shall be in force for one year only. That being so, the power given in the proviso to re-enact it for another year is legislative power and does not amount to conditional legislation. . . . The Legislature in doing so acted beyond the powers conferred on it by the Act of Parliament."

[33] Mukherjea J. in the course of his judgment says :

> "The matter, I think, may be considered generally, for if there is actually any delegation of legislative powers, the clause would be invalid whatever the legislative authority might be. Now it is one of the settled maxims of constitutional law that the power conferred on legislative authority to make laws cannot be delegated by it to any other body or department. The authority must remain where it is located and the power to which the prerogative has been entrusted cannot relieve itself from the responsibility by choosing other organs upon which it shall be devolved. . . . In my opinion, the validity of the proviso to S. 1 (3), Bihar Maintenance of Public Order Act, cannot be upheld on the ground of its being a piece of contingent legislation. It cannot also be supported on the ground that what it delegates is a mere non-legislative function. *The duration of a statute is a matter for determination by the Legislature itself*."

These observations also are surely directly applicable to the present case.

[34] As for the contention that the observations are *obiter*, I cannot accept it. When a Court bases its decision, upon a point which it has to decide, upon two separate grounds, it cannot be said that the decision upon one of those grounds is *obiter* merely because the decision upon the other ground would be itself sufficient. Apart from the question of the power to modify, the Federal Court has in clear terms laid down the principle that it is for the Legislature to state how long a particular legislation will be in operation, and that cannot be left to the discretion of some other body. That principle has been laid down in direct connection with the actual point which arose for decision.

[35] Even had it been possible to regard the observations as *obiter*, I still think that, where the Federal Court has laid down a principle in clear terms, it is for all the subordinate Courts to follow it. The Federal Court has taken over the functions of the Privy Council. It is the highest Court now existing for India even though the new Constitution has not come into force. It is of the utmost importance at this stage of constitutional development in India, when the foundations are actually being laid for the future sound development of the judiciary, that a tradition should become established of treating the pronouncements of the Federal Court with the utmost respect, so that it may successfully step into the shoes of the Privy Council. The Privy Council has in several cases said that, where it has laid down a principle in clear terms, that principle must be followed. It will suffice to refer to *Mata Prasad* v. *Nageshar Sahai*, 52 I. A. 398 : (A.I R. (12) 1925 P.C. 272), where at p. 417 their Lordships said:

> "It is desirable to point out that it is not open to the Courts in India to question any principle enunciated by this Board, although they have a right of examining the facts of any case before them to see whether and how far the principle on which stress is laid applies to the facts of the particular case."

Section 212, Government of India Act, which is still in force, says:

> "The law declared by the Federal Court and by any judgment of the Privy Council shall, so far as applicable, be recognised as binding on and shall be followed by all Courts in British India."

The words are not "the decisions," but "the law declared."

[36] But it is strongly contended that the principle in question enunciated by the Federal Court is wholly inconsistent with the decisions of the Privy Council, and, therefore, cannot be followed. Section 212, which, as I have said, is still in force, makes the law declared both by the Privy Council and the Federal Court equally binding. If they do not declare the same thing, what are the Courts to do? The argument is that the Privy Council being the superior Court, the Privy Council view must be preferred, since in certain circumstances an appeal could lie, at the time the pronouncement was made, from the Federal Court to the Privy Council.

[37] It is argued in the first place, that the Privy Council has plainly said, that the maxim *delegatus non potest delegare* has no application to sovereign bodies, even when their sovereignty is limited as in the case of Indian and Colonial Legislatures, and that there is no double delegation since the Legislatures are in no sense delegates; yet one of the Federal Court Judges at least has expressly applied the maxim *delegatus non potest delegare*. And the danger is strongly emphasised of relying upon American constitutional decisions and American constitutional writers since under the American Constitution the Legislature is a delegate from the people, as it is provided that sovereignty resides only in the people; and moreover, the American Constitution, based as it is on an exaggeration of Montesquieu's mistaken views as to the nature of the British Constitution, provides for a rigid separation of the legislative, executive and judicial powers, whereas in the British Constitution delegated legislation is common—some people think all too common. And it is pointed out that such subordinate legislation or *quasi* legislation, as it may be called, is a common feature of

Indian Statutes also; as for example, in S. 122, Civil P. C., wherein it is provided that the High Courts, through the Rule Committee, may annul, alter or add to all or any of the rules in the rule portion of that Code.

[38] Our attention has been invited to the thorough examination of this question of delegated legislation under the British Constitution, its history and growth, in "Law and Orders" by C. K. Allen (Stevens and Sons Limited, 1947) wherein that learned author sets out the bewilderment and dismay on the part of constitutional writers and the numerous impotent protests of the Courts which the developments of the past century have evoked.

[39] Dealing first with the maxim *delegatus non potest delegare*, the learned Advocate-General and counsel for the respondents have drawn our attention to a number of clear pronouncements, the first in *Burah's case*, 5 I. A. 178 : (4 Cal. 172 P. C.). At p. 193 their Lordships have said:

> "The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, *plenary powers of legislation, as large, and of the same nature, as those of Parliament itself.*"

[40] Moreover, in *Hodge* v. *The Queen*, (1883) 9 A. C. 117: (53 L. J. P. C. 1), occurs this conclusive passage (at pp. 131-32):

> "Assuming that the local legislature had power to legislate to the full extent of the resolutions passed by the License Commissioners, and to have enforced the observance of their enactments by penalties and imprisonment with or without hard labour, it was further contended that the Imperial Parliament had conferred no authority on the local legislature to delegate those powers to the License Commissioners, or any other persons. In other words that the power conferred by the Imperial Parliament on the local legislature should be exercised in full by that body, and by that body alone. The maxim *delegatus non potest delegare* was relied on.
>
> It appears to their Lordships, however, that the objection thus raised by the appellants is founded on an entire misconception of the true character and position of the provincial legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in S. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by S. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make bye-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.
>
> It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail. The very full and very elaborate judgment of the Court of Appeal contains abundance of precedents for this legislation, entrusting a limited discretionary authority to others, and has many illustrations of its necessity and convenience. It was argued at the bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into its own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for Courts of Law, to decide."

[41] This Canadian case was one in which it was held that the local Legislature had power under the British North America Act, 1867, to entrust to a Board of Commissioners authority to enact regulations in the nature of police or municipal regulations of a local character for the good government of taverns.

[42] We have also been pressed with *Powell* v. *Apollo Candle Co. Ltd.*, (1885) 10 A. C. 282 : (54 L. J. P.C. 7), in which their Lordships referred to *Burah's case*: (5 I. A. 178 : 4 Cal. 172 P. C.), and *Hodge* v *The Queen*, (1884-9 A. C. 117 : 53 L. J. P. C. 1), and said :

> "These two cases have put an end to a doctrine which appears at one time to have had some currency, that a Colonial Legislature is a delegate of the Imperial Legislature. It is a Legislature restricted in the area of its powers, but within that area unrestricted, and not acting as an agent or a delegate."

[43] This was an Australian case where their Lordships had to consider the Custom Regulation Act of 1879 which contained a section authorising the Governor to direct that a duty be levied on unspecified articles to be selected by him, and it was argued that the tax on certain articles had been imposed by the Governor, and not by the Legislature, who alone had power to impose it. But their Lordships said the duties levied under the Order in Council were really levied by the authority of the Act under which the order was issued. The Legislature had not parted with its perfect control over the Governor, and had the power, of course, at any moment, of withdrawing or altering the power which they had entrusted to the Governor. They held that the provision was not *ultra vires*.

[44] On these cases and the other well-known cases of *Russell* v. *The Queen*, (1882) 7 A. C. 829: (51 L. J. P. C. 77) and *Benoari Lal Sarma*, 72 I. A. 57 : (A. I. R. (32) 1945 P. C. 48 : 46 Cr. L. J. 589), it is argued that the Privy Council has laid down in express terms that these subordinate Legislatures within their own spheres

are absolutely sovereign, and can do anything Parliament itself can do, and, therefore, if Parliament can delegate the power of subordinate legislation, these bodies can also do so within their own limit spheres. That Parliament can and does habitually make such delegations cannot be for a moment doubted. Nor indeed can it be doubted that the Indian Legislatures also habitually do so without question, as in every case where, under a statute, some subordinate body is empowered to make rules under an Act or bye-laws, such rules and bye-laws becoming as good law and of the same authority as if they had been enacted in the Act itself.

[45] Reliance is placed on the observations of Patanjali Sastri J., in the Federal Court decision which we are considering. That learned Judge did not hold that there had been a delegation of legislative power, and observed further that the question whether the power delegated was legislative was not the true test of *ultra vires.* He said that neither in *Burah's case*, (5 I.A. 178: 4 Cal. 172 P. C.), nor in subsequent decisions referred to was there any clear indication discernible as to the true dividing line between a "limited discretion" whose delegation is permissible and a legislative power which cannot constitutionally be delegated. "It is not easy," he said,

> "nor perhaps wise, to attempt to define the limits beyond which the one broadens into the other. While it may be a satisfactory working test in many cases to see whether the power delegated is a legislative power, it may not always be a conclusive test. The trend of modern legislative practice has been in favour of conferring on administrative authorities the power of making rules and bye-laws which may, in a certain sense, be said to be legislative."

It is argued that, wherever those limits may actually lie, there can be no doubt that delegation of the power to modify a statute does not exceed them; because for that, the highest possible authority exists in S. 310, Government of India Act, 1935, itself. In that section power is delegated, where transitional difficulties may arise, to direct by an Order in Council that the Act during such limited period as may be specified in the Order, shall have effect subject to such adaptations and modifications as may be specified.

[46] If this then can be done by Parliament, it is urged that, since the subordinate Legislatures have within their own spheres all powers of Parliament, it can be done by them also within those spheres, and, when the Privy Council has clearly said that it can be done, it is not open to the Federal Court to say that it cannot.

[47] Thus it is urged that the power to delegate legislative authority does exist to a limited extent, but an extent which undoubtedly includes the power to modify a statute, and it is further strongly argued that the mere fixation of the duration of a statute, the time of its coming into force and going out of force, is not only fully within those powers, but is in fact not a delegation of legislative power at all. Attention is drawn to the fact that in S. 310, Government of India Act, just referred to, the power is delegated not only to "modify" by Order in Council, but also to fix the limits of the periods during which the modifications and adaptations are to have effect, and also to make such other temporary provisions as may be thought fit, for such a period as may be specified in the Order. It is further said that the Privy Council in *Burah's case*: (5 I. A. 178 : 4 Cal. 172 P. C.), has expressly and in plain terms placed extension in space and extension in time on exactly the same basis, and has taken care to emphasise that what applies to the spatial ambit of the legislation applies equally to the temporal ambit. For S. 2 of Act XXII [22] of 1869, which their Lordships were considering, provided that the Act was to come into operation on such day as the Lieutenant-Governor of Bengal should by notification in the Calcutta Gazette direct, and S. 9, which was challenged, not only provided that the Lieutenant-Governor could extend all or any of the provisions of the Act to the Jaintia Hills and the Naga Hills, but could also do so "from time to time"; and their Lordships said in speaking of the argument that S. 9 was a delegation of legislative power:

> "Their Lordships cannot but observe that, if the principle thus suggested were correct, and justified the conclusion drawn from it, they would be unable to follow the distinction made by the majority of the Judges between the power conferred upon the Lieutenant-Governor of Bengal by the 2nd and that conferred on him by the 9th section. If, by S. 9, it is left to the Lieutenant-Governor to determine whether the Act, or any part of it, shall be applied to a certain district, by S. 2 it is also left to him to determine at what time that Act shall take effect as law anywhere. Legislation which does not directly fix the period for its own commencement, but leaves that to be done by an external authority, may with quite as much reason be called incomplete, as that which does not itself immediately determine the whole area to which it is to be applied, but leaves this to be done by the same external authority. If it is an act of legislation on the part of the external authority so trusted to enlarge the area within which a law actually in operation is to be applied, it would seem *a fortiori* to be an act of legislation to bring the law originaly into operation by fixing the time for its commencement."

[48] But, it is replied, the Privy Council deals expressly only with fixing time of commencement, not time of ending. To this it is said that there is obviously no distinction of principle between coming into operation by fiat at one time and going out of operation by fiat at another; and the Privy Council must be taken to have laid down that the determination of the time factor

generally is no more delegated legislation than the determination of the space factor. And it is further argued, and very strenuously, by the respondents' learned counsel, that in *Russell* v. *The Queen*, 1882-7 A. C. 829: (51 L. J. P. C. 77), the Privy Council expressly approved not only of a delegation of power to bring the law into operation, but also to determine the duration, and put out of operation. The Canada Temperance Act, 1878, with which they were dealing, was held to be within the legislative competence of the Dominion Parliament even though it provided that, on a petition to the Governor-in-Council, signed by not less than one-fourth in number of the electors of any county or city qualified to vote praying that the second part of the Act should be in force and take effect in such county or city and that the votes of all the electors be taken for or against the adoption of the petition, the Governor-General might issue a proclamation with a view to a poll of the electors being taken, and, after the petition had been adopted by the electors, after the expiration of 60 days, he could by Order in Council declare the second part of the Act in force, and could at any time, after the expiry of three years, *revoke* the Order in Council only on the *like petition and procedure*. The provision for such action by the Governor on adoption of a petition by the voters is said to be essentially similar to the provision in the Bihar Maintenance of Public Order Act, 1947, for action by the Government on a resolution of the Legislative Assembly agreed to by the Legislative Council. It is pointed out further that in *Benorari Lal Sarma's case*: 72 I. A. 57: (A. I. R. (32) 1945 P. C. 48: 46 Cr. L. J. 589), the fact of duration equally entered into the picture. Section 1, sub-s. (3) of the Special Criminal Courts Ordinance No. II [2] of 1942 which their Lordships held was not *ultra vires* ran as follows:

> "It shall come into force in any Province only if the Provincial Government, being satisfied of the existence of an emergency arising from any disorder within the Province or from a hostile attack on India or on a country neighbouring on India or from the imminence of such an attack, by notification in the official Gazette, declares it to be in force in the Province, *and shall cease to be in force when such notification is rescinded*."

Thus the power was delegated not only to bring it into force, but also to fix the duration and put an end to it when the Provincial Government thought it was no longer necessary, exactly as the power was delegated to fix the duration in Bihar Act V [5] of 1947 and Bihar Act III [3] of 1947.

[49] I must confess that these arguments have placed me in a most embarrassing position. As I have already said, it seems to me of vital importance at this stage of India's constitutional development that nothing should be done which might impair in any way the authority or the prestige of the Federal Court. It is essential, if the legal institutions of this country are to develope upon sound lines, and fissiparous tendencies to be avoided, that the Federal Court decisions, even when not unanimous, should be treated with the utmost respect. I am of opinion, therefore, that I should not myself consider or express any opinion upon the validity of the contentions put forward by the learned Advocate-General and counsel for the respondents. It is true that S. 212, Government of India Act, will remain in force for a further short period, but the jurisdiction of the Privy Council has now been taken away, and the Federal Court has already become the final Court of appeal. Therefore, when the Federal Court places an interpretation upon Privy Council decisions after considering them, I think we should accept that interpretation as binding upon us whether it appeals to our reason or not. But then, it is urged, the Federal Court has not even considered *Hodge* v. *The Queen*, 9 A. C. 117: (53 L. J. P. C. 1) and *Powell* v. *Apollo Candle Co.*, 10 A. C. 282: (54 L. J. P. C. 7). It cannot, in my opinion, be imagined that the Federal Court was ignorant of these important constitutional decisions, and, therefore, if it did not refer to them, it can only have been because in its wisdom it did not consider it necessary to do so. In my opinion, the principle laid down by the Federal Court must be accepted, and, in accordance with that principle, I would hold that S. 1, sub-s. (3), Bihar Buildings (Lease, Rent and Eviction) Control Act 1947, must be regarded as *ultra vires*.

[49a] I will make only one observation of my own which, I think, I may and should put forward. The complexities of modern life appear to necessitate some degree of delegation by the Legislatures of *quasi*-legislative powers to subordinate agencies: to some extent the state bodies have to confine themselves to laying down general principles, and leaving the details to others. Otherwise they would become so involved in detail as to have no time for policy. But if the Courts can succeed in India in stemming the tide of departmental legislation—frequently arbitrary—which is causing so much anxiety to Constitutionalists in England, then, in my humble opinion, it will be a very good thing for this country. The battle will of course have to be fought out in reference to the Provisions of the new Indian Constitution.

[50] Having held that S. 1 (3) is *ultra vires* what is the effect of so holding? It is, in my judgment, very far from what the appellant appears to expect. The provision is, in my opinion,

quite clearly severable and its excision does not involve the destruction of the entire Act. The test is—can the Act stand without it? Unquestionably it can. If this provision be deleted, it means that the Act is, like many other Acts, one in which there is no provision either for commencement or ending. It does not come into force by order of the Provincial Government. It comes into force independently under the General Clauses Act, and it is to be particularly noticed that this was clearly the intention of the Legislature, because it has not said that it shall *be* in force for such period as the Provincial Government may fix, but that it shall *remain* in force for such period. The use of the word "remain" clearly implies that the Act is to be regarded as being in force not under that provision but otherwise. The notification by the Provincial Government does not bring the Act into operation. Suppose the Provincial Government had never made any notification, the Act would still have come into force on 15th March 1947, and would remain in force until repealed. If S. 1, sub-s. (3) be deleted, the Act remains as complete as any other Act of unspecified duration such being the form of all Acts where it is contemplated that they shall remain in force indefinitely unless and until repealed.

[51] I am, therefore, of opinion that the Act itself, except for the provision in question, is a valid Act, and is in force.

[52] Independently of that, a recent Ordinance of the Bihar Governor has been placed before us, namely, Ordinance No. 6 of 1949, published by Notification No. 1715-Leg., dated 12th October 1949. This Ordinance was made and promulgated by the Governor of Bihar under sub-s. (1) of S. 88, Government of India Act, 1935, on 11th October 1949, the Legislature not being in session. It contains the necessary statements in the Preamble to give the Governor jurisdiction under S. 88. The first material provision is cl. 2 which says:

> "For sub-s. (3) of S. 1, Bihar Buildings (Lease, Rent and Eviction) Control Act 1947, (hereinafter referred to as the said Act), the following sub-section shall be substituted and shall be deemed always to have been substituted, namely: '(3) It shall remain in force for five years':"

There are provisos with which we are not concerned. Certainly the jurisdiction under S. 88 cannot be questioned, and has not been questioned. It has been argued first that, as the Ordinance has limited duration and ceases to operate at the expiration of six weeks from the reassembly of the Legislature unless replaced by an Act, it cannot provide for the duration of the Act for five years. That argument, in my opinion, is not correct, and ignores the provision in S. 88 (2) that an Ordinance promulgated under this section shall have the same force and effect as an Act of the Provincial Legislature assented to by the Governor. It is clearly open to the Governor by such Ordinance to repeal and amend an existing Indian law. For this the Full Bench decision of the Calcutta High Court in *Jnan Prosanna Das Gupta* v. *Province of West Bengal* 53 C. W. N. 27 at pages 70-71: (A. I. R. (36) 1949 Cal. 1: 50 Cr. L. J. 1 F. B.) is a clear authority. Secondly, it is argued that the Ordinance cannot amend retrospectively. But the case just cited is an authority to that effect also. In my opinion, this Ordinance being valid, the Act must now be treated as having been enacted for a period of five years.

[53] There is another clause in the Ordinance, cl. 3, which runs as follows:

> "Notwithstanding anything contained in sub-s. (3) of S. 1 of the said Act, the said Act shall not be deemed to be invalid on the ground that the duration of the Act was fixed or extended otherwise than by an Act of the Provincial Legislature; and all penalties incurred, orders or rules made, actions or proceedings taken, directions issued or jurisdictions exercised by any authority under or in accordance with the provisions of the said Act during the period from 15th March 1947, up to the commencement of this Ordinance shall be deemed to be as good and valid in law as if such penalties, orders, rules, actions, proceedings, directions and jurisdictions had been incurred, made, taken, issued or exercised under the said Act as amended by this Ordinance."

[54] This provision is, in my opinion, quite clearly *ultra vires*. But it is also severable, and does not affect the validity of cl. 2. It is *ultra vires* because the Legislature itself could not have made such a provision. Neither Ordinance nor the Legislature can debar the Courts from examining the limits of the Legislature's jurisdiction. In the case of a Legislature whose powers are limited by statute or a written constitution, the question of *ultra vires* can be determined in the Courts alone. It is patent that the Legislature cannot make something, which is *ultra vires* of its powers, *intra vires* merely by the exercise of its own legislative powers. The principle might be loosely expressed by saying that it cannot be a judge in its own case. But that, in my view, savours too much of exploded doctrines regarding separation of powers. The true reason why such a provision is *ultra vires* is, in my opinion, that when a Legislature enacts something outside its constitutional powers, then a fresh enactment saying that such provision shall be valid is clearly and for the very same reasons outside its constitutional powers; for, if it is outside its powers to make the provision in question, it is *a fortiori* outside its powers to make a provision validating that provision.

[55] So much for question (2), to which my answer is in the affirmative. The remaining two questions may be briefly dealt with.

[56] *Question (1)*—I find nothing in the definition of "tenant" or anywhere in the Act to make the definition retrospective. The wide definition, in my opinion, only comes into force with the Act. Section 11 of the Act is relied on. The first sub section provides that:

> "Notwithstanding anything contained in any agreement or law to the contrary and subject to the provisions of S. 12, where a tenant is in possession of any building, he shall not be liable to be evicted therefrom, whether in execution of a decree or otherwise, except,"

in certain specified cases. I do not think this should be taken to enact anything more than it expressly says, and what it says in effect is that from 15th March 1947, the tenant cannot be evicted, except under the Act, even in execution of a decree. That is to say, if a landlord has obtained a decree before that date, he cannot execute it after that date. If he has a suit pending on that date, then the Act will be retrospective in this sense only that the Court cannot give a decree for eviction except under the conditions specified in sub-s. (1). That follows from the use of the words "he shall not be liable to be evicted," which may be taken to mean that no decree for eviction shall be passed. If any decree is passed, it is useless because it cannot be executed.

[57] It is to be noted that the jurisdiction of the civil Court to terminate the suit and pass a decree for costs and so on, is not taken away, because the only provision which takes away the jurisdiction of the civil Court is sub-s. (2) which says that "a landlord who seeks to evict his tenant under sub-s. (1) shall apply to the Controller for a direction in that behalf." The word used is "shall", and not "may". Therefore, in my opinion, under this provision after 15th March 1947, the landlord must go to the Controller, and cannot go to the civil Court and file a fresh suit. But there is nothing in the words to take away the jurisdiction of a Court already in seisin of the suit to conclude that suit and make such orders for costs as justice may require.

[58] In this question we are also asked to say whether the definition of "tenant" protects the defendants in the circumstances of this case. I do not understand why we are asked to say whether it is retrospective, for it appears to me that, independently of whether it is retrospective or otherwise, it does protect the defendants if they can show that they come within its terms, because, as I have already noticed, the suit was only filed on 15th March 1947, the very day the Act of 1947 came into force, and the Ordinance of 1946, which had been in force for some time previously, contained the same definition of "tenant."

[59] The last question can be simply answered. Section 11, sub-s. (2), in my opinion, bars any suit for the ejectment of a tenant after 15th March 1947, but it does not and cannot bar a suit based on trespass. If the defendants are able to show that they are not trespassers but tenants of some sort, then clearly the suit will fail. But that will be because the plaintiff has failed to establish his allegations, and not because the Court has no jurisdiction.

[60] I do not think that this Bench can go further in answering questions (1) and (3) because to do so would involve expressing something on questions of fact which are still sub judice and which have to be determined not by us, but by the Division Bench.

[61] **Ramaswami J.**—It is advisable at the outset to state the material facts which have led to the reference to this Full Bench. The plaintiff brought the suit for ejectment of the defendants from a shop situated in Sujaganj on the ground that the latter continued to be in possession after the period of lease had expired. It is admitted that defendant 1 had on 19th December 1939 obtained a registered lease of the shop from the plaintiff. The lease stipulated that the period was to be three years from the date when the defendants occupied the premises. The date of occupation was 23rd November 1940. The plaintiff gave on 9th November 1943 a notice which required the defendants to give up possession of the shop upon the receipt of the notice. The plaintiff gave a second notice on 3rd February 1944, which required the defendants to give up possession of the shop at once. On the next day, the plaintiff applied to the House Rent Control Officer for eviciting the defendants. The application was filed under the Bihar House Rent Control Order, 1944. The application was granted. An appeal preferred to the Commissioner was dismissed. The defendants still refused to vacate the shop. On the contrary, they filed a title suit (No. 52 of 1945) for a declaration that the order of eviction made by the House Rent Control Officer was without jurisdiction and ultra vires. The suit was decreed. An appeal preferred against the decree was dismissed. The plaintiff gave a third notice dated 14th December 1946, requiring the defendants to vacate the premises at once. As the defendants still refused to vacate, the plaintiff has instituted the present suit.

[62] The main ground of defence was that under the registered lease the tenancy was to continue till the plaintiff had given three months' notice to quit. As the notices served by the plaintiff were insufficient, the defendants continued to be tenants of the house, and there was no valid termination of the lease. The defendants further asserted that the civil Court had no jurisdiction to entertain the suit.

[63] Upon these rival contentions the learned trial Judge held that the defendants continued to be tenants of the plaintiff, and there was no termination of the tenancy created by the registered lease. The learned Judge further held that the civil Court had no jurisdiction, and accordingly dismissed to suit.

[64] The plaintiff preferred an appeal which was heard by Sinha and Mahabir Prasad JJ. In view of certain conflicting decisions of this Court the Bench has referred three questions for being decided by the Full Bench.

[65] The first question to be determined is the constitutional validity of the Bihar Buildings Control Act, 1947 (Act III [3] of 1947).

[66] The validity of the Act is challenged in this appeal on the ground that in enacting it the Bihar Legislature has exceeded its legislative competence. On behalf of the appellant Mr. Sarjoo Prasad contended that S. 1 (3) of the Act was tantamount to an improper delegation of legislative power to the Executive Government, and hence the entire statute was void and illegal on that account.

[67] The Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, was passed by the Provincial Legislature, and received assent of the Governor-General on 14th March 1947. The assent was published in the Bihar Gazette on the next date. Section 1 (2) of the Act declares that

"it applies to the local areas specified in the schedule and such other areas as may be notified by the Provincial Government in the official Gazette or by an authority empowered in this behalf by the Provincial Government."

Section 1 (3) enacts that

"it shall remain in force for such period as the Provincial Government may, by notification fix : Provided that the Provincial Government may, from time to time, by notification, extend such period :"

[67a] By Notification No. 6208 P. C, dated 15th March 1947, the Provincial Government fixed one year as a period for which the Act shall remain in force. By second Notification No. 5641 P. C., dated 1st March 1948, the Provincial Government fixed a further period of one year as a period for which the Act shall remain in force. A third Notification No. 7804 Misc. 22/49 P. C., dated 7th March 1949, was issued by the Provincial Government to a similar effect.

[68] The main argument on behalf of the appellant is that S. 1(3) was an improper delegation of legislative power, and the successive notifications of the Provincial Government were illegal and *ultra vires.* Learned advocate stressed the argument that the Legislature is not permitted to abdicate or transfer to other agencies the essential legislative functions with which it is invested under the Constitution Act.

[69] In my opinion, this argument is untenable. In the present case the legislature has determined the legislative policy and its formulation as a rule of conduct. The Legislature has not delegated any authority or power to make the law, but has merely conferred upon the Provincial Government authority or discretion as to execution of the law enacted. The Legislature has only vested executive discretion regarding application of the law to a situation already in existence. Such a delegation is permissible in the sense that it is not in conflict with any constitutional principle of delegation of legislative powers.

[70] The principle has been recognised in a catena of leading authorities.

[71] In *Queen* v. *Burah,* 5 I. A. 178 : (4 Cal. 172 P. C.), the Governor-General in Council had passed an Act (Act XXII [22] of 1869) purporting to remove a district called Garo Hills from the jurisdiction of the High Court. Section 2 of that Act conferred upon the Lieutenant Governor of Bengal the power to determine, by notification, when the Act shall come into operation. By S. 9 the Lieutenant Governor was empowered from time to time by notification in the Calcutta Gazette to extend all or any of the provisions to the Jaintia Hills, the Naga Hills and to a portion of the Khasi Hills. The majority of the Judges of the High Court held that S. 9 which purported to authorise the Lieutenant Governor of Bengal to extend the Act to the Khasi and Jaintia Hills was in excess of the legislative powers of the Governor-General in Council. The ground of the decision was that S. 9 was not legislation but was a delegation of legislative power; that the Indian Legislature was an agent or delegate acting under a mandate from the Imperial Parliament which must in all cases be executed directly by itself. On appeal the Judicial Committee held that there was no distinction between the power conferred upon the Lieutenant Governor of Bengal by Ss. 2 and 9 of the Act. If it was an act of legislation on the part of the Lieutenant Governor to enlarge the area within which a law actually in operation was to be applied, it was *a fortiori* an act of legislation to bring the law originally into operation by fixing the time for its commencement. The Judicial Committee expressly held that the doctrine of the High Court was erroneous, and that the Indian Legislature was not in any sense an agent or delegate of the Imperial Parliament, but had or was intended to have plenary powers of legislation as large and of the same nature as those of Parliament itself :

"Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a Provincial Legislature, they may be well exercised.

either absolutely or conditionally : in the latter case leaving to the discretion of some external authority the time and manner of carrying its legislation into effect, as also the area over which it is to extend."

At p. 194 Lord Selborne also states :

> "The Legislature determined that, so far, a certain change should take place: but that it was expedient to leave the time, and the manner, of carrying it into effect to the discretion of the Lieutenant Governor; and also, that the laws which were or might be in force in the other territories subject to the same Government were such as it might be fit and proper to apply to this district also; but that, as it was not certain that all those laws, and every part of them, could with equal convenience be so applied, it was expedient, on that point also, to entrust a discretion to the Lieutenant Governor."

[72] The same opinion was expressed by the Judicial Committee in *Russell* v. *The Queen*, (1882) 7 A. C. 829 : (51 L. J. P. C. 77). In that case the mode of bringing the second part of the Canada Temperance Act, 1878, into force was as follows :

> "On a petition to the Governor in Council, signed by not less than one-fourth in number of the electors of any county or city in the Dominion qualified to vote at the election of a member of the House of Commons, praying that the second part of the Act should be in force and take effect in such county or city, and that the votes of all the electors be taken for or against the adoption of the petition, the Governor-General, after certain prescribed notices and evidence, may issue a proclamation, embodying such petition, with a view to a poll of the electors being taken for or against its adoption. When any petition has been adopted by the electors of the county or city named in it, the Governor-General in Council may, after the expiration of sixty days from the day on which the petition was adopted, by Order in Council published in the Gazette, declare that the second part of the Act shall be in force and take effect in such county or city, and the same is then to become of force and take effect accordingly. Such Order in Council is not to be removed for three years, *and only on like petition and procedure*."

It was contended in that case that assuming the Parliament of Canada had authority to pass a law for prohibiting and regulating the sale of intoxicating liquors, it could not delegate its powers, and that it had done so by delegating the power to bring into force the prohibitory and penal provisions of the Act (the second part of the Act) to a majority of the electors of counties and cities. This contention was rejected on the ground that the Act did not delegate any legislative powers, that it contained within itself the whole legislation and that the provisions that certain parts of the Act shall come into operation on the petition of a majority of electors did not confer on these persons power to legislate.

[73] The same doctrine has been laid down by the Judicial Committee in a later case, *Hodge* v. *The Queen*, 9 A. C. 117:(53 L. J. P. C. 1), where the question arose whether the Legislature of Ontario had or had not the power of entrusting to a local authority a Board of Commissioners the power of enacting regulations with respect to the Liquor Licence Act of 1877, of creating offences for the breach of those regulations, and annexing penalties thereto. The Judicial Committee held that they had that power. It was argued that the local legislature was in the nature of an agent or delegate, and on the principle *delegatus non potest delegare*, the local legislature must exercise all its functions itself, and could delegate or entrust none of them to other persons or parties. But the judgment, after reciting that such had been the contention, goes on to say :

> "It appears to their Lordships, however, that the objection thus raised by the appellants is founded on an entire misconception of the true character and position of the Provincial Legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in S. 92, it conferred powers, not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample, within the limits prescribed by S. 92 as the Imperial Parliament in the plenitude of its power possessed or could bestow. Within these limits of subjects and areas the local legislature is supreme, and has the same authority as the Imperial Parliament."

[74] In *Powell* v *Apollo Candle Co. Ltd.*, (1885) 10 A. C. 282: (54 L. J. P. C. 7), the legislature of New South Wales had enacted a Customs Regulation Act which professed to authorise the Governor to impose and levy customs duties. It was objected that the Legislature had not the power to enact the clause in question. It was argued that the Colonial Legislature had defined and limited powers which they could not exceed; that the power given to the Colonial legislature to impose duties was to be executed by themselves and could not be entrusted by them wholly or in part to the Governor or any other person or body. But the Judicial Committee overruled the contention on the ground that the Colonial Legislature was not a delegate but had plenary powers of legislation. It was a legislature restricted in the area of its powers, but within that area unrestricted and not acting as agent or delegate. At page 291, the Judicial Committee state:

> "It is argued that the tax in question has been imposed by the Governor, and not by the legislature, who alone had power to impose it. But the duties levied under the Order in Council are really levied by the authority of the Act under which the order is issued. The legislature has not parted with its perfect control over the Governor, and has the power, of course, at any moment of withdrawing or altering the power which they have entrusted to him. Under these circumstances their Lordships are of opinion that the judgment of the Supreme Court was wrong in declaring S. 133, Customs Regulation Act of 1879, to be beyond the power of the Legislature."

[75] In the important Australian case, *Baxter* v. *Ahway*, (1909) 8 Com. L. R. 626, the Governor-General had issued a proclamation under the authority of the Customs Act, 1901, prohibiting the importation of opium. It was claimed in that case that the proclamation was invalid. The importation of opium, suitable for smoking, was prohibited as being included among a class described as "all goods, the importation of which may be prohibited by proclamation." It was claimed that the power to prohibit was a power that must be exercised by the legislature directly and could not be delegated by the Governor-General in Council. With respect to this argument, Griffith C. J. said at page 632:

> "It is of course obvious that every legislature does in one sense delegate some of its functions. It is too late in the day to say that the legislature cannot create, for instance, a municipal authority and give it power to make bye-laws, or create a public authority with power to make regulations having the force of law, or confer upon the Governor in Council power to make regulations having the force of law, or upon the Judges of the Court power to make Rules of Court having the force of law. Nor is it to the purpose to say that the legislature could have done the thing itself. Of course it could. In one sense this is a delegation of authority because it authorises another body which it specifies to do something which it might have done itself. It is too late in the day to contend that such a delegation, if it is a delegation, is objectionable in any sense."

[76] Again in *Victorian Stevedoring Contracting Co.* v. *Dignan*, 46 Com. L. R. 73, the Australian Court decided that an Act of 1828 entitled an Act relating to employment in trade and commerce under other countries which prescribed no rule in relation to such employment but remitted the whole matter to the regulation of Governor-General in Council "extraordinary though this form of legislation is" was not beyond the power of Parliament. At page 114 Evatt J. said:

> "In dealing with the doctrine of 'separation' of legislative and executive powers, it must be remembered that, underlying the Commonwealth frame of Government, there is the notion of the British system of an Executive which is responsible to Parliament. That system is not in operation under the United States Constitution. Nor, indeed, had it been fully developed in England itself at the time when Montesquieu first elaborated the doctrine or theory of separation of Governmental powers. But, prior to the establishment of the Commonwealth of Australia in 1901, responsible Government had become one of the central characteristics of our policy. Over and over again, its existence in the constitutional scheme of the Commonwealth has been recognised by this Court."

[77] On behalf of the Provincial Government the learned Advocate-General placed reliance upon *Emperor* v. *Benoari Lal Sarma*, 72 I. A. 57 : (A. I. R. (32) 1945 P. C. 48: 46 Cr. L. J. 589). In this case an Ordinance issued under S. 72 of Sch. 9, Government of India Act, 1935, made by the Governor-General, was impugned on the ground that the legislative authority could not be delegated. The Ordinance recited "that "an emergency has arisen which makes it necessary to provide for the setting up of special criminal Courts." The Ordinance contained the necessary frame work for Courts of criminal jurisdiction, provisions as to the respective limits of their jurisdiction and procedure together with restrictions on appeal. But the Ordinance did not itself set up any of these Courts but provided by S. 1 (3) that the Ordinance

> "shall come into force in any Province only if the Provincial Government, being satisfied of the existence of an emergency arising from any disorder within the Province or from a hostile attack on India or on a country neighbouring on India or from the imminence of such an attack, by notification in the official Gazette, *declares it to be in force in the Province, and shall cease to be in force when such notification is rescinded.*"

It was contended that the Ordinance was invalid as the Governor-General had illegally delegated to the Provincial Government the authority to decide whether the emergency existed instead of deciding it for himself. Upon this contention the Judicial Committee observed:

> "It is undoubtedly true that the Governor-General acting under S. 72 of Schedule IX, must himself discharge the duty of legislation there cast on him, and cannot transfer it to other authorities. But the Governor-General has not delegated his legislative powers at all. His powers in this respect, in cases of emergency, are as wide as the powers of the Indian Legislature which, as already pointed out, in view of the proclamation under S. 102, had power to make laws for a Province even in respect of matters which would otherwise be reserved to the Provincial Legislature. Their Lordships are unable to see that there was any valid objection, in point of legality, to the Governor-General's ordinance taking the form that the actual setting up of a special Court under the terms of the Ordinance should take place at the time and within the limits judged to be necessary by the Provincial Government specially concerned. This is not delegated legislation at all. It is merely an example of the not uncommon legislative arrangement by which the local application of the provision of a statute is determined by the judgment of a local administrative body as to its necessity. Their Lordships are in entire agreement with the views of the Chief Justice of Bengal and of Khundkar J. on this part of the case."

[78] From this review of the authorities it is manifest that S. 1 of the impugned Act in the present case does not improperly delegate legislative power to the Provincial Government. The section has merely vested executive discretion regarding the application of law to a situation already in existence. The duration of the Act as also the area over which it is to operate has been left to the discretion of the Provincial Government. Such a delegation is permissible and is not in conflict with any constitutional principle.

[79] On behalf of the appellant Mr. Sarjoo Prasad referred to the passage quoted in

Cooley's Constitutional Limitations, volume I, at page 224, to the following effect:

> "The power conferred upon the Legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed."

This American doctrine is founded upon the theory that the powers of government are derived from the authority of the people of the Union and hence no agency to whom the people have confided a power may delegate its exercise. In *Hampton & Co.* v. *United States,* 276 U. S. at p. 405, Chief Justice Taft states:

> "The well-known maxim '*Delegata potestas non potest delegari*' applicable to the law of agency in the general and common law, is well understood and has had wider application in the construction of our Federal and State Constitutions than it has in private laws."

But no such doctrine has existed in respect of British Colonial Legislatures whether erected in virtue of the prerogative or by Imperial statute. It is hence doubtful if the American doctrine quoted in Cooley volume I, p. 224, is applicable to the Legislatures which function under the Government of India Act. In *Phillips* v. *Eyre,* (1870) 6 Q. B. 1 : (40 L. J. Q. B. 28), Willes J. delivering the judgment of the Exchequer Chamber emphatically stated :

> "A confirmed act of the local Legislature. . . . . . whether in a settled or a conquered colony, has, as to matters within its competence and the limits of its jurisdiction, the operation and force of sovereign legislation, though subject to be controlled by the Imperial Parliament."

Reference has already been made to *R.* v. *Burah,* (1878) 3 A. C. 889: (4 Cal. 172 P. C.), *Hodge* v. *The Queen* (1884) 9 A. C. 117 : (53 L. J. P. C. 1.) and *Powell* v. *Apollo Candle Co.,* (1885) 10 A. C. 282: (54 L. J. P. C. 7), where the Judicial Committee rejected the doctrine of '*delegata potestas non potest delegari*'. On the contrary, the Judicial Committee emphasised that neither the Indian nor Colonial Legislatures were delegates of the Imperial Parliament, but that they had plenary and absolute powers of legislation.

[80] It is of great importance to notice that even in the United States the Supreme Court though paying lip service to the supposed constitutional doctrine has in fact sustained each new delegation of powers by the Congress. In the *United States* v. *Brig Aurora,* (1812) 7 Cr. 382, the relation of the legislative power of the Congress to national executive power was for the first time considered by the Supreme Court. The Act of 1809, in forbidding trade with Great Britain and France authorised the President to suspend its provisions when in his judgment certain events had taken place, and likewise to revive them upon the occurrence of certain other events, of which also he was to be the judge. The Aurora was seized for attempting to trade contrary to the provisions of the Act after it had been revived by presidential proclamation. Counsel for claimant argued: "To make the revival of a law dependent upon the presidential proclamation is to give that proclamation the force of a law;" and that "Congress cannot transfer the legislative power to the President." The Court, nevertheless, upheld the Government, saying:

> "We see no sufficient reason why the legislature should not exercise its discretion in reviving the Act of 1809 either expressly or conditionally as its judgment should direct."

[81] The precedent thus established was followed in 1891 in the case of *Field* v. *Clark,* (143 U. S. 649), in which the point at issue was the validity of a provision of the Tariff Act of 1890 empowering the President to suspend certain other provisions of the Act in described contingencies to be ascertained by him. The Court concluded that both on the basis of precedent and of principle the provision in question was unassailable. "That Congress cannot delegate legislative power to the President", Harlan J. asserted,

> "is a principle universally recognised as vital to the integrity and maintenance of the system of government ordained by the constitution. The Act of 1st October 1890, in the particular under consideration is not inconsistent with that principle. It does not in any real sense invest the President with the power of legislation. Nothing involving the expediency or just operation of such legislation was left to the determination of the President. Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress."

[82] In the recent case, *Opp Cotton Mills* v. *Administrator,* (1941) 312 U. S. 126, the Supreme Court sustained the Fair Labour Standard Act of 1938 against the objection that Congress had delegated its legislative function. In the course of the judgment Stone C. J., observed :

> "In an increasingly complex society Congress obviously could not perform its function if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy in fixing, for example, a tariff rate, a railroad rate or the rate of wages to be applied in particular industries by a minimum wage law. The constitution, viewed as a continuously operative charter of Government, is not to be interpreted as demanding the impossible or the impracticable. The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct. Those essentials are preserved when Congress specifies the basic conclusions of fact upon ascertainment of which, from relevant data by a designated administrative agency, it ordains that its statutory command is to be effective."

[83] In *Norwegian Nitrogen Products Co. v. United States*, 298 U. S. 294, Cadozo J., frankly recognised that executive and administrative officers and boards are in substance exercising a delegated legislative power in exercising their discretionary and rule-making powers but that the delegation involved therein is permissible in the sense that it is not in conflict with the constitutional priniple against the delegation of legislative powers.

[84] In this context it should be observed that the maxim *delegatus non potest delegare* is traced to a gloss on a passage in *Justinian's Digest*, (D. 1. 21. 25 and also D. 2. 1. 5). The maxim was introduced into English law through a misreading of Bracton (*vide* the learned article by Patrick Duff and H. E. Whiteside 14 Cornell Law Quarterly 168). It was developed as a doctrine of agency and established by Coke in decisions forbidding the delegation of judicial powers. In his second treatise on Civil Government Chap. XI, Locke applied the maxim to forbid the transference of the "power of making laws to any other hands." Under Locke's influence the maxim found its way into the writing of American publicists in the guise of a fundamental principle of free Government. In the United States partly because of the doctrine that all governmental powers are delegated by sovereign people, partly because of its logical affiliation with the dogma of separation of powers, the maxim became identified with the problem of delegation by legislature or governmental bodies. Appearing as corollary of this fundamental dogma it received the sanction of the constitutional writers and the problem of delegation has been obscured by the doctrine of the trinity of governmental powers.

[85] As regards the limit to which legislative discretion may be delegated a learned writer has said :

> "The fundamental limitation has to do with the scope of the discretion that may be delegated. All students of the subject will admit that Congress could not, if it would, transfer in toto to the President or any other agency all or any of its enumerated powers. Thus a statute in general terms that the President be given authority to pass regulations regarding inter state or foreign commerce, would without doubt be held invalid. Nor can Congress delegate the power to regulate even one whole field of inter State commerce. Surely it would not be legitimate for it to authorise the President to pass reasonable regulations with reference to the inter-state railroad problem. Yet Congress has granted the Inter-State Commerce Commission the power to fix maximum railroad rates, provided they be reasonable; and all admit that this is constitutional. What is the distinction ? Essentially the quantitative one of the scope of the discretion." (James Hart, "The Ordinance Making Powers of the President of the United States," p. 146.)

[86] The mainstay of the appellant's argument is a recent judgment of the Federal Court, *Jatindra Nath Gupta v. Province of Bihar*, 53 C.W.N. (F.R.) 91 : (A.I.R. (36) 1949 F. C. 175 : 50 Cr. L. J. 897). But the facts of that case are clearly to be distinguished. In that case the question before the Federal Court related to the validity of the Bihar Maintenance of Public Order Act (Act V [5] of 1947). Section 1 (2) of that Act declared that the Act extended to the whole of the Province of Bihar. Section 1 (3) enacted that it shall remain in force for a period of one year from the date of its commencement. There was a proviso to the following effect :

> "Provided that the Provincial Government may, by notification, on a resolution passed by the Bihar Legislative Assembly and agreed to by the Bihar Legislative Council, direct that this Act shall remain in force for a further period of one year with such modifications, if any, as may be specified in the notification."

The majority of the Federal Court held that the sub-section was ultra vires of the Bihar Legislature on the ground that there was improper delegation of legislative power to Executive Government. But it should be noticed in the first place that the Act was a temporary Act and by vitrue of S. 1 (3), the Provincial Government had been delegated the power not only to extend but to *modify* the Act on the resolution of the two Houses of the Bihar Legislature. To quote the words of Mahajan J. :

> "What modifications are to be made in a statute or whether any are necessary is an exercise of law-making power and cannot amount merely to an act of execution of a power already conferred by the statute. The extent of change is left to external authority, i. e., the Provincial Government. Nothing is here being done in pursuance of any law. What is being delegated is the power to determine whether a law shall be in force after its normal life has ended and if so what that law will be, whether that what was originally enacted or something different. The body appointed as a delegate for declaring whether a penal Act of this character shall have longer life than originally contemplated by the legislature and if so, with what modification, is a new kind of legislature than entrusted with this duty under the Government of India Act, 1935 . . . . . This novel device of defeating the Constitution Act adopted by the Provincial Legislature cannot have the approval of this Court. It is a dangerous device to defeat the clear and unambiguous provisions of the Constitution Act and if encouraged, may lead to the substitution of new law making bodies under cover of so-called conditional legislation."

In the present case, however, the material facts are different. The Bihar Buildings Control Act, 1947, which the Legislature had enacted, is not a temporary Act. Since no time is fixed, the statute is a perpetual Act and continues in force unless it is repealed (*vide* the definition of Perpetual Act at p. 345 in Craies on Statute Law, Edn. 4). It should be noticed that the Act received the assent of the Governor-General on 14th March 1947, and the assent was published in the Gazette on the next date. Since the statute does not fix a date from which it shall operate, S. 6, Bihar General Clauses Act, would apply and the Act would come into operation on 15th March 1947, when the Governor-General's assent was published in the Gazette. As already remarked, S. 1 (3) merely enacts that "it *shall remain* in force for such period as the Provincial Government may, by notification, fix." It is manifest that the Act had already come into force on 15th March 1947. The Provincial Government was only empowered to restrict the time for which it would *remain* in force. Even if the Provincial Government have not exercised their powers under S. 1 (3), the Act would obviously remain in force till it is repealed by the Provincial Legislature. It should also be stated that under S. 1 (3) the Provincial Government has not been empowered to *modify* the provisions of the statute. The Provincial Government has only been given discretion to *restrict* the duration of the statute for such period as they thought fit. No power is granted to the Provincial Government to *extend* the operation of the Act beyond the period fixed by the legislature. Since the material facts are different, the ratio of the Federal Court decision in *Jatindra Nath Gupta* v. *Province of Bihar*, (A. I. R. (36) 1949 F. C. 175 : 50 Cr. L. J. 897), will not, in my opinion, apply to the present case. It cannot (for the reasons already fully stated) be held that S. 1 (3) of the Act is illegal and *ultra vires* on the ground that it is an improper delegation of legislative power to the executive Government.

[87] The learned Advocate-General then referred to the fact that on 12th October 1949, the Government of Bihar had promulgated an ordinance amending the Bihar Buildings Control Act, 1947. Section 2 of the Ordinance states:

> "For sub-s. (3) of S. 1, Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 (hereinafter referred to as the said Act), the following sub-section shall be substituted and shall be deemed always to have been substituted, namely:
>
> '(3) It shall remain in force for five years : Provided that the expiration of this Act under the operation of this sub-section shall not—
>
> (a) render recoverable any sum which during the continuance thereof was irrecoverable or affect the right of a tenant to recover any sum which during the continuance of this Act was recoverable by him thereunder; or
>
> (b) affect any liability incurred under this Act or any punishment incurred in respect of any contravention of this Act or any order made thereunder; or
>
> (c) affect any investigation or legal proceeding in respect of any such liability or punishment as aforesaid; and any such investigation or legal proceeding may be instituted, continued or enforced and any such punishment may be imposed, as if this Act had not expired'."

[88] For the appellant the learned advocate maintained that in making the ordinance the Governor of Bihar had acted beyond his legislative competence. It was argued that under S. 88, Government of India Act, the Governor could not promulgate an ordinance for repealing or amending a Provincial Act. The question was explicitly considered by the Judicial Committee in *Emperor* v. *Benoarilal Sarma*, 72 I. A. 57 : (A. I. R. (32) 1945 P. C. 48 : 46 Cr. L. J. 589). In that case the Governor-General by ordinance had repealed or amended a number of sections in the Criminal Procedure Code. Nevertheless the Judicial Committee held that the ordinance was valid. At p. 68, Viscount Simon observed:

> "Previous to 1935 the High Court had revisional jurisdiction over the Magistrate's Courts in the relevant area. The argument advanced was that this jurisdiction could not be taken away by an ordinance made by the Governor-General under S. 72, as the Governor-General's ordinance was not an 'Act of the appropriate legislature.' 'Legislature,' it was said, means only the Central Legislature consisting of the two Houses and the Governor-General, or the Provincial Legislature consisting of the two Houses and the Governor, and the Governor-General when making an ordinance in cases of emergency under S. 72 was not either of these legislatures. The argument, as Sir Harold Derbyshire pointed out in his judgment, overlooked the provision in S. 311, sub-s. (6) of the Act, which says, 'Any reference in this Act to . . . . Acts or laws of the Federal or a Provincial Legislature, shall be construed as including a reference to an Ordinance made by the Governor-General. . . .' There is, thus, no substance in this objection. Assuming that the condition as to emergency is fulfilled, the Governor-General acting under S. 72 may repeal or alter the ordinary law as to the revisional jurisdiction of the High Court, just as the Indian legislature itself might do."

In *Jnan Prosanna* v. *Province of West Bengal*, 53 C. W. N. 27 : (A. I. R. (36) 1949 Cal. 1 : 50 Cr. L. J. 1), a Full Bench of the Calcutta High Court has likewise expressed the opinion that an existing legislative Act can be expressly amended or repealed by the Governor by legislation by ordinance. In my opinion, the Governor is competent in the present case to amend or repeal existing Provincial legislation by promulgating an ordinance under S. 88, Government of India Act.

[89] The argument was stressed that even if the Governor could amend the existing Provincial legislation by ordinance, he could not give retrospective effect to the Ordinance. It was pointed out that S. 2 of the Ordinance was clearly retrospective. This section provides that:

> "For sub-s. (3) of S. 1, Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 (hereinafter referred to as the said Act), the following sub-section shall be substituted and shall be deemed always to have been substituted, namely :
>
> "(3) It shall remain in force for five years :
>
> Provided that the expiration of this Act under operation of this sub-section shall not. . . . . ."

[90] The argument on behalf of the appellant must fail. For, in *United Provinces* v. *Mt. Atiqa Begum*, 1940 F. C. R. 110 : (A. I. R. (28) 1941 F. C. 16), the Federal Court held that the right to legislate retrospectively is inherent in

the right to legislate. That being so, if the Governor has a right to legislate, and if such legislation is to have the same effect as if passed by the legislature (as enacted by S. 88 (2)), then, it is manifest that the Governor has right to give retrospective effect to an ordinance he promulgates. This was the view of the Full Bench of the Bombay High Court in *Prabhakar Kondaji* v. *Emperor*, A. I. R. (31) 1944 Bom. 119 : (45 Cr. L. J. 604), and of a Full Bench of the Calcutta High Court in *Jnan Prosanna* v. *Province of West Bengal*, 53 C. W. N. 27 : (A. I. R. (36) 1949 Cal. 1 : 50 Cr. L. J. 1). The same view has been expressed by the Judicial Committee in *Kumar Singh* v. *Emperor*, 73 I. A. 199 : (A. I. R. (33) 1946 P. C. 169 : 47 Cr. L. J. 933).

[91] On behalf of the appellant the argument was stressed that S. 3 of the ordinance was ultra vires in any case. Section 3 of the ordinance is to the following effect :

> "Notwithstanding anything contained in sub-s. (3) of S. 1 of the said Act, the said Act shall not be deemed to be invalid on the ground that the duration of the Act was fixed or extended otherwise than by an Act of the Provincial Legislature ; and all penalties incurred, orders or rules made, action or proceedings taken, directions issued or jurisdiction exercised by any authority under or in accordance with the provisions of the said Act during the period from 15th March 1947, up to the commencement of this Ordinance shall be deemed to be as good and valid in law as if such penalties, orders, rules, actions, proceedings, directions and jurisdictions had been incurred, made, taken, issued or exercised under the said Act as amended by this Ordinance."

[92] It was contended that the Legislature cannot compel the Courts to adopt a particular construction of a statute which the Legislature permits to remain in force. It was argued that the Legislature cannot issue a mandate to Court which leaves the law unchanged but seeks to compel the Courts to construe it not according to the judicial but the legislative judgment. But it is not necessary in this case to decide the question whether S. 3 of the Ordinance is invalid, for, in my opinion, S. 3 is clearly severable from the rest of the ordinance which would still retain its original character and be *intra vires* and valid.

[93] It is a well established rule of construction that, where the valid provisions are not severable from the ultra vires provisions, the whole statute must be held to be bad. In *Re: The Initiative and Referendum Act*, 1919 A. C. 935 : (A. I. R. (6) 1919 P. C. 145) and in *Attorney General for Commonwealth* v. *Colonial Sugar Refining Co. Ltd.*, 1914 A.C. 237 : (83 L.J.P.C. 154) the Judicial Committee held that the offending provisions were so interwoven into the scheme of legislation that they were not severable, and that in each instance the whole Act was invalid—an Act of the Province of Manitoba purporting to establish the Initiative and Referendum and an Act of the Commonwealth Parliament purporting to empower Royal Commissions to conduct enquiries of an unlimited scope. On the other hand, severable portions may be good. In the case of *Brooke Bidlake* v. *Attorney General for British Columbia*, 1923 A. C. 450 : (92 L. J. P. C. 124), the appellants claimed the right to employ Chinese and Japanese labour, in spite of a statute to the contrary. It was argued that the statute was ultra vires of a Dominion statute ratifying the treaty of 1911 between Great Britain and Japan. This argument failed on the ground that the provisions were separable, and that at any rate as regards the Chinese the statute could not be questioned.

But the test of severability may not be adequate. In the Australian case *R.* v. *Commonwealth Court of Conciliation*, 11 Com. L. R. 1, Griffith C. J. suggested a different test :

> "I venture to doubt the accuracy of this test. What a man would have done in a state of facts which never existed is a matter of mere speculation, which a man cannot certainly answer for himself, much less for another. I venture to think that a safer test is whether the statute with the invalid portion omitted would be substantially a different law as to the subject matter dealt with by what remains from what it would be with the omitted portions forming part of it."

The point is whether the provisions are essentially and unseparably connected in substance. If when the unconstitutional portion is struck out, that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. In other words, the Court may uphold the valid portion if it is severable from invalid portion and if thereby a different law is not created. To adopt a mataphor (from the *Navigation Act case*, 29 Com. L. R. 357) the test enables the Court to uphold provisions, however interwoven, but it cannot separate the woof from the warp and manufacture a new web.

[94] Upon the first question, therefore, I am of opinion that the Bihar Buildings Control Act, 1947, has been validly enacted, that S. 1 (3) of the Act is not ultra vires and that the Ordinance No. VI [6] of 1949 has validly amended S. 1, sub-s. (3) with retrospective effect.

[95] The next question to be decided is whether the definition of the word 'tenant' appearing in the Bihar Buildings Control Act, 1947, or Bihar Ordinance II [2] of 1946, which it replaced, is retrospective in its operation and protects the defendants in the circumstances of the case.

[96] For the appellant learned advocate referred to *Shiveswar* v. *Parmeshwar*, 27 Pat. 1: (A.I.R. (36) 1949 Pat. 355), in which Manohar

Lall and Imam JJ., held that the provisions of the Bihar Buildings Control Act, 1947, or the Bihar Buildings Control Ordinance, 1946, were not retrospective. But in a later case, *Sm. Sant Kuer* v. *Ganesh Choudhary*, A. I. R. (36) 1949 Pat. 137 : (27 Pat. 695), Imam and Narayan JJ. held that the Act must be construed to have retrospective effect. Narayan J., laid stress in particular upon S. 11 (1), which says that a tenant shall not be liable to be evicted even in execution of a decree. The learned Judge referred to circumstance that a different meaning was given to the word 'tenant' in the Act. The learned Judge also referred to the preamble which said that it was expedient to regulate the letting of buildings, to control the rent of such buildings and to prevent unreasonable eviction of tenants therefrom. For these reasons, Narayan J. thought that the Act was retrospective. Imam J., concurred in a separate judgment. But with the greatest respect, I am constrained to hold, for reasons which I shall shortly state, that neither the Bihar Act III (3) of 1947, nor the Bihar Ordinance II (2) of 1946, which it replaced, is retrospective in its effect. I consider that the decision of the Division Bench in *Shiveshwar* v. *Parmeshwar*, 27 Pat. 1 : (A. I. R. (36) 1949 Pat. 355), is correct. It is a fundamental rule that no statute shall be construed to have retrospective operation unless such a construction appears very clearly in the terms of the statute or arises by necessary and distinct implication. In *Young* v. *Adams*, (1898) A. C. 469 : (67 L. J. P. C. 75), Lord Watson stated :

> "In the present case the learned Chief Justice was right in saying that the retrospective operation ought not to be given to the statute, unless the intention of the Legislature that it should be so construed is expressed in a plain and unambiguous language, because it manifestly shocks one's sense of justice that an act legal at the time of doing it should be made unlawful by some new enactment. The ratio is equally apparent when a new enactment is said to convert an act wrongfully done at the time into a legal act and to deprive the person injured of the remedy which the law then gave him."

Again, in *James Gardner* v. *Edward A. Lucas*, (1878) 3 A. C. 582, Lord O'Hagan said:

> "Unless there is a declared intention of the legislature clear and unequivocal or unless there are some circumstances rendering it inevitable that we should take the other view, we are to presume that an Act is prospective and not retrospective."

In re Athlumne, (1898) 2 Q. B. 547 : (67 L. J. Q. B. 935), Wright J. restated the rule :

> "A retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."

[97] In the present case upon a proper construction of the provisions of the Act it is plain that the definition of the word "tenant" in S. 2 is not retrospective in its operation.

[98] It is manifest that the question whether the Bihar Act III [3] of 1947 or Bihar Ordinance II [2] of 1946 "protects the defendants in the circumstances of this case" involves in investigation of facts. It is not competent for the Division Bench to refer such a mixed question of law and fact for the decision of the Full Bench. Rule 3 of Chap. 5 of High Court Rules at page 25 is relevant in this context :

> "If the case is an appeal from an original decree or order the questions of law shall alone be referred, and the Full Bench shall return the case with an expression of its opinion upon the points of law for final adjudication by the Division Bench which referred it, and in case of necessity in consequence of the absence of any or either of the referring Judges for the ultimate decision of another Division Bench."

It is, therefore, for the Division Bench to examine and decide this question.

[99] The third question to be determined is whether the civil Courts have jurisdiction in view of S. 11 of the Act to make a decree for possession in this case. It is well-known rule of construction that in the case of an Act which creates a new jurisdiction, new procedure or new remedies, the procedure, or remedies thus prescribed and no others must be followed *until* altered by subsequent legislation (Esher M. R., in *R.* v. *Judge of Essex County Court*, (1887) 18 Q. B. D. 704 : (56 L. J. Q. B. 315). There is also the cognate rule that where the two Acts are inconsistent or repugnant, the later will be read as having impliedly repealed by the earlier. Thus in *Dart* (1893) Probate 33 : (69 L. T. 251), the Court of Appeal held that S. 45, Supreme Court of Judicature Act, 1873, as to appeal from County Courts was repealed by S. 10, County Courts Act, 1875, which came into operation on the day after the Act of 1873, and that the subsequent repeal of the 1875 Act by S. 188, County Courts Act, 1888, did not revive the repealed provisions of the Act of 1873.

[100] Where the Summary Jurisdiction Act, 1848, S. 27, empowered justices to enforce the payment of costs given by the Queen's Bench on appeal against convictions, except where the party liable was under recognisances to pay such costs, and the Quarter Sessions Act, 1849, authorised the Quarter Sessions to give costs in 'any appeal', to be recovered in the manner provided by the first Act, it was held that the exception in that Act was impliedly repealed, and that a distress warrant had been properly issued against the party liable, though he was under recognisances, *Freeman* v. *Read*, (1860) 30 L. J. M. C. 123 : (9 W. R. 141). In another

case an order made under the authority of the Judicature Act, 1875, enacting that the costs of all proceedings in the High Court shall be in the discretion of the Court and that where an action is tried by a jury the costs shall follow the event unless the Judge at the trial, or the Court, otherwise orders, was held to repeal so much of the Limitation Act, 1623, as deprived a successful plaintiff of costs in an action of a slander when he did not recover as much as 40 shillings damages, *House of Lords in Garnett* v. *Bradley*, (1878) 48 L. J. Ex. 186: (3 A. C. 944).

[101] In the present case S. 11 (1) of the Act enacts:

> "Notwithstanding anything contained in any agreement or law to the contrary and subject to the provisions of S. 12, where a tenant is in possession of any building, he shall not be liable to be evicted therefrom whether in execution of a decree or otherwise, except—
>
> (a) in the case of a month to month tenant, for non-payment of rent or breach of the conditions of the tenancy, or for sub-letting the building or any portion thereof without the consent of the landlord, or if he is an employee of the landlord occupying the building as an employee, on his ceasing to be in such employment; and
>
> (b) in the case of any other tenant, on the expiry of the period of the tenancy, or for non-payment of rent, or for breach of the conditions of the tenancy:
>
> Provided that nothing contained in this section shall apply to a tenant whoes landlord is the Provincial or the Central Government or any local authority constituted under any enactment for the time being in force."

Section 11 (2) of the Act states:

> "A landlord who seeks to evict his tenant under sub-s. (1), *shall apply* to the Controller for a direction in that behalf. If the Controller, after giving the tenant a reasonable opportunity of showing cause against the application, is satisfied that the tenant is liable to be evicted under the provisions of sub-s. (1), he shall make an order directing the tenant to put the landlord in possession of the building and if the Controller is not so satisfied, he shall make an order rejecting the application."

[102] It is manifest that the Bihar Buildings Control Act, 1947, creates a new jurisdiction and provides new remedies. Upon a proper construction of S. 11 of the Act in its context it is plain that the civil Courts have no jurisdiction to grant a decree for possession in cases covered by the Act.

[103] To conclude, I am of opinion (1) that the Bihar Act III [3] of 1947 is validly enacted; that S. 1 (3) of the Act is intra vires; that it has been legally amended by Bihar Ordinance VI [6] of 1949; (2) that the definition of the word "tenant" in the Bihar Act III [3] of 1947, or the Bihar Ordinance II [2] of 1946 is not retrospective in its operation; (3) that the civil Courts have no jurisdiction in view of the provisions of S. 11 of the Act (Act III [3] of 1947) to make a decree for possession.

[104] Such are the answers I should give to this Reference to the Full Bench.

[105] **Per Full Bench**: — Let a certificate issue under S. 205 (1), Government of India Act.

V.B.B. *Reference answered.*

A. I. R. (37) 1950 Patna 75 *[C. N. 20.]*

AGARWALA C. J.

Bilas Rai Bohit Ramla — *Petitioner* v. *The King.*

Criminal Revn. No. 365 of 1948, Decided on 18th May 1948, against order of Sessions Judge, Santal Parganas, D/- 24th February 1948.

Cotton Cloth and Yarn Control Order (1945), S. 23—Sanction for prosecution for contravention of Order — Sanction signed by Additional Under-Secretary on behalf of Provincial Government — Sanction is not properly authenticated—Conviction must be set aside—Government of India Act (1935), S. 59 — Notification No. 2094-A dated 1-5-1937 issued under.

A sanction for prosecution for contravening S. 18 (2) of the Cotton Cloth and Yarn Control Order, 1945, was purported to be signed on behalf of the Provincial Government by an "Additional Under-Secretary to Government" who was not one of the persons referred to in Notification No. 2094A, dated 1-5-1937 issued under S. 59, Government of India Act, 1935. The accused was tried and convicted upon such sanction:

Held that the sanction was not properly authenticated and therefore the conviction must be set aside. [Para 2]

S. R. Ghosal — for Petitioner.

K. P. Varma — for the Crown.

Order. — The petitioner has been sentenced to three months' rigorous imprisonment under R. 81 (4), Defence of India Rules, for contravening S. 18 (2), Cotton Cloth and Yarn Control Order, 1945.

[2] The first point taken on his behalf is that there has never been any valid sanction for the prosecution. Section 23 of the Cotton Cloth and Yarn Control Order declares that no prosecution for the contravention of any of the provisions of the Order shall be started without the previous sanction of the Provincial Government, or such officer of the Provincial Government not below the rank of the District Magistrate, as the Provincial Government may, by a general or special order in writing, authorize in this behalf. It has not been contended on behalf of the Provincial Government that any of its officers has been authorized by a general or special order to sanction prosecutions under this order. What is to be seen, therefore, is whether the prosecution was sanctioned by the Provincial Government. The sanction relied upon by the prosecution in this case is Ex. 5, which is addressed to the Additional Deputy Commissioner of Santhal Parganas and sanctions the prosecution of Bilas Roy Bohit Ramla, which is the name of the appellant. It purports to be signed "By order of the Governor of Bihar" "for" somebody described as "Additional Under-Secretary to Government." It is

contended on behalf of the petitioner that this is not a properly authenticated document. Reliance is placed on S. 59, Government of India Act, 1935, which requires that all executive action of the Government of a Province shall be expressed to be taken in the name of the Governor, and that orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor. Under this section Notifn. No. 2094A, dated 1st May 1937, and published in the Bihar Gazette, 1937, Part II, page 321, was issued. It states that all orders or instruments made or executed by or on behalf of the Governor of Bihar shall be expressed to be made by, or by order of, the Governor of Bihar, and save in cases where the officer has been specially empowered to sign an order or instrument of the Government of Bihar, every such order or instrument shall be signed by either the Secretary, the Additional Secretary, the Joint Secretary, the Deputy Secretary, the Under Secretary or the Assistant Secretary to the Government of Bihar. As I have already stated, the so-called sanction in the present case does not purport to be signed by any of these persons but to be signed for an Additional Under-Secretary to the Government. Even an Additional Under-Secretary is not one of the persons referred to in the Notification I have quoted above, but still less is anybody else authorized to sign on behalf of any of those persons. The sanction in the present case, therefore, has not been proved to be properly authenticated. The conviction, therefore, must be set aside and the order for forefeiture of the cloth is set aside.

K.S. *Conviction set aside.*

A. I. R. (37) 1950 Patna 76 [*C. N. 21.*]

AGARWALA C. J. AND MEREDITH J.

Ram Ranbijaya Prasad Singh—Petitioner v. *Province of Bihar—Opposite Party.*

Misc. Judicial Case No. 146 of 1948, Decided on 16th September 1948.

(a) Bihar Agricultural Income-tax Act (VII [7] of 1938), S. 2 (a)—Agricultural income—Sale in execution of rent decree — Purchase price is receipt of income—Mere fact that landlord assessee is himself purchaser makes no difference.

Where in execution of his rent decrees the assessee put the tenants' holdings up to sale and purchased them himself, setting off the purchase price against the decretal dues, the effect of this transaction is not merely to increase his capital assets but amounts to a receipt of income. If the purchaser at the execution sale had been a stranger, and the assessee had received the purchase price through the Court, it could not have been contended that he had not received the decretal dues. The mere fact that he himself was the auction-purchaser makes no difference. The essence of the transaction is that, notionally, the assessee received the purchase price of the holdings and with that money purchased the holdings. Not the whole of it, however, is agricultural income. Interest on arrears of rent does not fall within the definition of agricultural income. [Para 2]

(b) Bihar Agricultural Income-tax Act (VII [7] of 1938), S. 2 (a) — Assessee himself raising crops but not selling them in year of assessment—Value of crops — Determination of—Produce to be appraised at average market rate and not at controlled rate prevailing at the time of harvest.

Where a farmer retains his crops and does not sell them, and the market price of the crops varies from time to time during the period that he retains them owing to changes in the market rate, their value will vary from time to time throughout the year. In these circumstances, it is legitimate for the assessing authority to take the average rate for the purpose of determining the value of the crops. The value of the crops should not be determined by the controlled rate which prevailed at the time the crops were harvested. [Para 3]

Sarjoo Prasad and N. K. Prasad II—for Petitioner.

The Advocate General—for Opposite Party.

Agarwala C. J.—This is a reference under S. 25 (3), Bihar Agricultural Income-tax Act, 1938. The assessee is a landlord, the Maharaja of Dumraon. The reference arises out of the assessment on him in respect of agricultural income for the Fasli year 1351. The assessment was on a total agricultural income of Rs. 11,82,094-4-2 pies which included a sum of Rs. 13,177-8-2 pies which the assessee realised by the execution of decrees for arrears of rent, cess and interest. This amount comprised Rs. 11,793-12-1 pie arrears of rent and cess, and Rs. 1,373-12-1 pie for interest thereon.

[2] Two questions have been referred to us for decision:

> "(1) Whether the amount of Rs. 13,177-8-2 pies realised in the shape of lands purchased in execution of rent decrees could be assessed or whether it was a capital asset not liable to assessment, and (2) Whether the controlled rate prevailing at the time of the harvest should be taken in lieu of the average rate from the Gazette in absence of sale of the crops by the petitioner assessee."

Neither of these questions is very happily worded, but the points they intend to raise are clear. The first question really to be decided is whether, in the circumstances of the case, the assessee can be said to have received the sum of Rs. 13,177-8-2 and whether this sum was taxable as agricultural income. What actually happened with regard to this sum is that in execution of his decrees the assessee put the tenant's holdings up to sale and purchased them himself, setting off the purchase price against the decretal dues. On his behalf it is contended that the effect of this transaction is merely to increase his capital assets and not to amount, to a receipt of income. There is no substance whatsoever in this contention. If the purchaser at the execution sales had been a stranger, and the assessee had received the purchase price through the Court it could not have been contended that he had not received the decretal dues. The mere fact that he himself was the auction purchaser makes no difference. The essence of the transaction was that the holdings were sold in execution of the decrees, and the purchase price satisfied the assessee's demands on account of rent, cess and interest, that is to say, notionally, the assessee received the purchase price of the holdings and with that money purchased the holdings. In these circumstances, the entire sum must be held to be income received by the assessee. Not the whole of it, however, is agricultural income. Rupees 1 373-12 1 pie was received on account of interest on rent, and the Privy Council has recently held that interest on arrears of rent does not fall within the definition of agricultural income. The answer to the first question must, therefore, be that out of the sum of Rs. 13,177-8-2 pies Rs. 11,793-12-1 pie is assessable as agricultural income and Rs. 1,373-12-1 pie is not so assessable.

[3] With regard to the second question, the facts were that the assessee himself cultivated the land and raised crops on it, which were not sold in the year of assessment. It is not disputed that he is assessable in respect of the value of these crops. But he contends that the value of the crops should be determined by the controlled rate which pravailed at the time the crops were harvested. The Agricultural Income-tax Department, however, contends that, in order to ascertain the value of the crops, the average controlled rate for the whole year should determine the question. This is not very clearly brought out in the second question, because the word "controlled" has been omitted before the words "average rate." But from the statement of the case it is clear that this is what the Department intended, for the Board says: Assuming that the assessee had sold his entire produce (which he did not certainly) his sale would not have been confined to the harvesting season only, but it would have been spread over a considerable period of the year according to his convenience. In that view of the matter, the Board was of opinion that his agricultural produce was correctly appraised at the *average controlled rate* by the assessing officer, to the advantage of the assessee, at a time when the market price of the commodities was appreciably higher. By 'market price" the Board apparently meant what is called 'black market price," as there could be no legitimate market price in the case of products the price of which is controlled, except the controlled rate. As the Board states that the adoption of the average controlled rate operated to the advantage of the assessee, it is obvious that this rate was lower than the rate prevailing at the time of the harvesting, and therefore, that the assessee has no grievance in respect of the rate fixed. As the question has been referred to us for decision, however, it must be decided. It is obvious that, when a farmer retains his crops and does not sell them, and the market price of the crops varies from time to time during the period that he retains them owing to changes in the market rate, their value will vary from time to time throughout the year. In these circumstances, it appears to me to be legitimate for the assessing authority to take the average rate for the purpose of determining the value of the crops and I would, therefore, answer the second question in the negative. As this reference fails, the assessee must pay the costs, which we fix at Rs. 250, including the sum of Rs. 100 which he deposited for the reference.

Meredith J.—I agree.

V.B.B. *Answer accordingly.*

A. I. R. (37) 1950 Patna 77 *[C. N. 22.]*

MANOHAR LALL AND MAHABIR PRASAD JJ.

Sukhdeo Singh and another—Appellants v. *Radhika Singh and others—Respondents.*

A. F. A. D. No. 2583 of 1947, Decided on 25th April 1949, from decision of Addl. Dist. Judge, Chapra, D/- 30th August 1947.

(a) Registration Act (1908), S. 35—Arbitration—Award — One arbitrator not admitting execution before Registrar — Effect — Award containing his signature and executed by him—Award is binding on parties.

The Registering Officer has jurisdiction under S. 35 to register the document so far as regards the persons who appeared and admitted execution. [Para 6]

An award is binding on the parties even though one of the arbitrators accidentally, inadvertently or deliberately does not admit execution of that award before the Registrar, when it has been found that the award contains his signature and was executed by him: A. I. R. (32) 1945 Pat. 140, *Rel. on.* [Para 6]

Annotation: ('45-Com.) Registration Act, S 35 N 12.

(b) Arbitration Act (1940), Ss. 31 and 32—Applicability to awards pronounced before Act—(*Quære.*)

Quære: It is doubtful if the provisions of the new Arbitration Act can be invoked in aid of or against the validity of an award which was pronounced before this Act came into force. [Para 8]

Annotation: ('46-Man) Arbitration Act, S 31 N 12; S 32 N 1.

B. C. De and A. N. Chatterji—for Appellants.

B. N. Mitter and A. K. Ray—for Respondents.

Manohar Lall J. — In this appeal by the plaintiffs the only question for determination is whether the registration of an award which is signed by all the arbitrators is invalid by reason of the fact that one of the arbitrators did not appear at the time of the registration.

[2] The plaintiffs' case was that the lands in suit are the entire khata 35 and 1/4 of khata 46, and were originally in the possession of Kali Prasad Singh, Radhika Singh and Kishun Singh as ryots under the Bettiah Raj, and the remaining 3/4ths belonged to Rameshwar Singh and Mt. Anurago Kuer as ryots under the Raj. In the year 1933, the Raj instituted a suit for arrears of rent for the lands of khata 35 and 1/4th land of khata 46, and impleaded as defendants the ryots of both the khatas. In execution of the rent decree the Raj became the auction-purchaser on 27th April 1934, and took dakhaldehani and possession on 15th April 1935. On 17th February 1936, the Raj settled the lands of khata 35 and 1/4th of the land of khata 46 with the plaintiffs at an annual rental of Rs. 29-11-6, and since then the plaintiffs have continued in possession. In the meantime in the year 1938, a criminal proceeding under S. 107, Criminal P. C., was started between the plaintiffs on the one hand and Radhika Singh, Kalika Singh and others on the other hand which terminated under an order of the Deputy Magistrate dated 24th June 1938, in which he wrongly held that the Bettiah Raj notwithstanding the dakhaldehani could not obtain direct possession against the original tenants who continued in possession and that the plaintiffs also did not succeed in getting possession from the tenants. It was suggested in that order that the parties might have their rights decided by the civil Court. The plaintiffs averred in the plaint that within three weeks of this order the panchanama dated 15th July 1938 came into existence by which the parties, namely, the plaintiffs and the original ryots agreed to have their dispute settled by arbitrators. But as none of the punchas whose names are found in the panchnama were appointed by the plaintiffs, nor had the punchas ever assembled or heard the parties, the so-called award dated 20th July 1938, of which the plaintiffs had no knowledge whatsoever till some years later was not at all binding on them. The plaintiffs alleged that notwithstanding S. 107, Criminal P. C., proceedings or the award, they have continued in possession of the entire 10 bighas of lands, and the cause of action for the suit was a recent interference by the defendants with the possession of the plaintiffs on 27th August 1944. Accordingly, the suit giving rise to this appeal was instituted on 5th September 1944,

[3] The case of the defendants was that the parties deliberately executed the punchanama, referred to above, and the punchas named therein were appointed with the approval and consent of the parties, that the punchas heard the parties, received their evidence and then pronounced their award on 20th July 1938, and on the document being presented for registration on 5th September 1938, it was registered by the Registering Officer on 21st November 1938, when four of the punchas appeared and admitted their execution, but fifth punch, Sheo Dayal Chaudhuri, did not appear for some reason or other. It was, therefore, pleaded that the parties are bound by the award of the punchas which allotted only five plots recorded in khata 35 with an area of 3 bighas 7 kathas 11 dhurs to the plaintiffs, and the remaining plots of this khata as also the 1/4th of the interest in khata 46 were awarded to be retained by the original ryots in their possession. The defendants further pleaded that since the date of the award the defendants have a right to remain in possession of the lands awarded to them and in which they are actually in possession and that the present suit is merely a device to get rid of the valid award. One of the grounds urged by the plaintiffs against the validity of the award is that one of the punchas did not appear and admit execution, as stated already.

[4] The Courts below have concurrently found that the plaintiffs' story that they were in peaceful possession of the entire land up to the date of S. 107, Criminal P. C., proceedings cannot be believed and that the plaintiffs, just like their landlord, were unable to oust the original ryots from possession, and further that the plaintiffs have been able to establish their possession over 3 bighas 7 kathas 11 dhurs of lands to which they have obtained title as against the defendants by virtue of the award of the arbitrators. The Courts below have also held that the award is not invalid on the ground that one of the arbitrators did not admit execution before the Sub-Registrar. On these findings the suit of the plaintiffs has been dismissed after it has been made clear that the title and possession of the plaintiffs in respect of the lands given to them under the award are not being affected, as they are in possession thereof. Hence, the appeal by the plaintiffs.

[5] Mr. De argues that the Courts below were wrong in holding that the award gave a valid title to the defendants regarding a portion of the land which was settled by the Raj with the plaintiffs in 1938. His argument is that the Registering officer had no jurisdiction to register the award when one of the parties did not appear and admit execution, and he drew attention to the provisions of S. 35, Registration Act, which provides that the registering officer shall refuse to register the document as to the persons so denying, appearing or dead or not appearing.

[6] In my opinion, this argument is not sound. The registering officer has jurisdiction to register the document so far as regards the persons

who appeared and admitted execution. What then is the effect when one of the co-executants of an award does not appear and admit execution? In my opinion, the position is exactly the same as was pointed out by a Division Bench of this Court in *Raghubir Pandey* v. *Kaulesar Pandey*, 23 Pat. 719 : (A.I.R. (32) 1945 Pat. 140). In that case it was held that an award which contains the unanimous decision of the arbitrators is binding on the parties even though one of the arbitrators accidentally, inadvertently or deliberately does not sign the award. The position is exactly the same when one of the arbitrators accidentally, inadvertently or deliberately does not admit execution of that award before the Registrar, when it has been found that the award contains his signature and was executed by him.

[7] The argument of Mr. De, founded upon the analogy that where two persons have transferred their interest in the property to the vendee by a document requiring registration the title cannot pass to the extent of the share of the vendor who has not admitted execution cannot apply in this case because the arbitrators' award like the judgment of the Judges does not transfer any interest of any arbitrator in the property, but merely decides the dispute between the parties. Further more, the parties have accepted the position under the award, and the defendants are entitled to rely upon the provisions of S. 53A, T. P. Act, as they are in possession validly since the date of the award of that portion of the land which had been allotted to them by the arbitrators. It is no fault of the defendants that one of the arbitrators did not appear and admit his execution of the award.

[8] Mr. B. N. Mitter for the respondents submitted that the decree of the Courts below can be supported upon a consideration of the relevant sections of the Arbitration Act (Act X [10] of 1940) and relied upon the case of *Chaturbhuj Mohanlal* v. *Bhicam Chand*, 53 C. W. N. 410 and the case of *Moolchand Jothajee* v. *Rashid Jamshed Sons & Co.*, I.L.R. (1946) Mad. 840: (A. I. R. (33) 1946 Mad. 346). In these cases it has been held that the provisions of Ss. 31 and 32, Arbitration Act of 1940, are mandatory and that no objections regarding the validity, effect or existence of an award can be decided by a Court other than the Court in which the award may be filed. I fail to see how this argument can be of any help to the respondents; because in this case the award has not been filed and made a decree of any Court. Moreover, it is doubtful if the provisions of the new Arbitration Act can be invoked in aid of or against the validity of an award which was pronounced before this Act came into force.

[9] In the result for the reasons given earlier, I would dismiss this appeal with costs.

[10] **Mahabir Prasad J.** — I agree. The effect of the non-registration of the award by one of the arbitrators cannot be in any event any thing more than that the signature of the non-registering arbitrator not having been admitted before the Registrar has to be ignored. In other words, the award is to be treated as not containing the signature of the arbitrators. As held in *Raghubir Pandey's case*, 23 Pat. 719: (A. I. R. (32) 1945 Pat. 140), an award is not invalid for the reason that it does not contain the signature of one of the agreeing arbitrators.

V.B.B. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 79 *[C. N. 23.]*

REUBEN AND NARAYAN JJ.

The King v. *Jagdish Tewari and another*—*Accused.*

Jury Reference No. 5 of 1949, Decided on 26th April 1949, Reference made by Asst. Sessions Judge, Arrah, D/- 23rd February and 3rd March 1949.

(a) Criminal P. C. (1898), S. 144—Order under — Is not by itself proof of possession.

Decision in a proceeding under S. 144, Criminal P. C., is not by itself proof of possession. But it is an important circumstance supporting an inference that the person in whose favour the proceeding terminated would not likely allow his possession to be disturbed from any part of the property. [Para 5]

Annotation : (49-Com.) Criminal P. C., S. 144, N. 8.

(b) Criminal P. C. (1898), S. 307—Mere fact that evidence did not bring out offence is not enough — Verdict must be "unreasonable" or "manifestly wrong" — Jury admitting inadmissible evidence— High Court can go into question whether remaining evidence justifies verdict.

In a reference under S. 307, the High Court wants something more than that the evidence does not bring out the offence against the accused. The High Court must be satisfied that the verdict is one which no reasonable body of men could have reached. Where in spite of the fact that the Sessions Judge had placed before the jury in forceful language his reasons for rejecting certain evidence, the jury felt that they could safely act upon that evidence, the verdict arrived at by them could not be called to be one which no reasonable body of men could have come to : A. I. R. (33) 1946 P. C. 151, *Ref.* [Para 7]

Reasons against the verdict must be of such a compelling nature that the High Court can say that the verdict is "unreasonable" or "manifestly wrong" : *English and Indian Case law relied.* [Para 8]

There is, however, another ground upon which the verdict of the jury is open to question. Under sub-s. (3) of S. 307, the High Court is in the position of a Court of appeal, and therefore, may interfere with the verdict on a point of law (sub-s. (1), S. 418). Where there has been a serious mistake of law, namely, the admission of two inadmissible pieces of evidence, the verdict would be liable to be set aside : 19 Bom. 749 ; A. I. R. (6) 1919 Cal. 514 and A.I.R. (18) 1931 Bom. 311, *Rel. on.* [Para 11]

The appellate Court must apply its own mind to the evidence and after discarding what has been improperly admitted decide whether what is left is sufficient to justify the verdict. If the appellate Court does not think that the admissible evidence in the case is sufficient to justify the verdict then it will not affirm the verdict, and may adopt the course of ordering a new trial or take whatever other course is open to it. But the appellate Court, if satisfied that there is sufficient admissible evidence to justify the verdict, is plainly entitled to uphold it. But it is not in all cases where inadmissible evidence has been admitted that the High Court may adopt this course. It can do so only if the evidence wrongly admitted is material. What is meant by material is that the evidence is such that it appears to the Court to be likely to have affected the decision of the jury: A. I. R. (33) 1946 P. C. 82, *Expl.*; A. I. R. (35) 1948 Pat. 79, *Commented.* [Para 13]

Annotation: ('49-Com.) Criminal P. C., S. 307, N. 11.

Government Advocate — for Reference.
S. N. Sahay and B. B. Sen — for Accused.

Reuben J.—This is a reference by the Assistant Sessions Judge, Arrah, under S. 307, Criminal P. C, against a verdict by a majority of four to one, finding accused Jagdish Tewari guilty under S. 436, Penal Code, and accused Dipan Singh guilty under S. 436/109, Penal Code.

[2] The prosecution case is that, on 18th November 1947, at village Katkinar, police station Nawanagar, accused Jagdish Tewari, abetted by Dipan Singh, committed mischief by setting fire to and destroying a hut belonging to the first informant Pati Ram Das and occupied by his servants. The land on which the hut was standing is recorded in the *khatian* in the name of one Mahanth Gobardhan Das deceased. The case of the first informant is that he was the *chela* of Gobardhan Das and succeeded to him as *mahanth* and is in possession of this hut in his capacity of *mahanth*. That the hut in question has been destroyed by fire is not disputed. The defence of the accused persons is that Pati Ram Das is not the *mahanth* and was not in possession of the hut. According to them, the *mahanth* is Sarju Das, *guru* of the accused Jagdish Tewari, and the hut belonged to him and was in his possession. From the evidence adduced, it appears that there is a dispute between Pati Ram Das and Sarju Das relating to the *mahanthship*, and that Sarju Das is in possession of the bulk of the properties. Pati Ram's account is that, after being installed as *mahanth*, he left Sarju Das in charge of all the *mathia* properties and went out on pilgrimage in Baisakh, 1943 (sic). He returned about two and a half years later in Asin, 1946 (sic), but Sarju Das is not giving up possession. He admits that Sarju Das is in possession of the main *mathia* house, which is in the *basti*, but claims to have got possession of this hut and a small *samadhi* room, which are outside the *basti*.

[3] It is clear from the above statement of the case that an important point for consideration was the possession of this hut. If, in fact, this hut is not in the possession of Pati Ram Das, the motive alleged by the prosecution for the commission of the offence disappears. The evidence on the point consists of the statements of Pati Ram Das and of three witnesses, who are residents of the village, Ram Singhasan Singh (P. W. 2), Ajgaib Koeri (P. W. 3) and Markat Koeri (P. W. 4). There are also some documents, which I shall refer to later. On the factum of the arson, the evidence is confined to the statements of the last three named witnesses, who claim to be eye-witnesses to the alleged occurrence.

[4] The witnesses whom I have named above were examined in connection with this occurrence on two previous occasions, once in the Court of the committing Magistrate, and again in the Court of Session in a trial which could not be completed as one of the jurors absented himself at the final stage.

[5] On the question of possession, the Assistant Sessions Judge is very strongly of the opinion that Sarju Das, and not Pati Ram Das, was in possession of the hut. He points out that, on Pati Ram Das's own admission, Sarju Das was in possession of all the property for at least two and a half years and is still in possession of the bulk of the property; that, several years back, Sarju Das got his name recorded in respect of these lands in the Canal Department and, in April 1947, Pati Ram Das's application to get his name substituted for that of Sarju Das was rejected; that a proceeding under S. 144, Criminal P. C., instituted by Pati Ram Das in respect of the *mathia* property, was decided against him on 20th May 1947, and on 19th October 1947, the police submitted a report under S. 107, Criminal P. C., against Pati Ram Das. The Assistant Sessions Judge rightly considers that these proceedings are not, by themselves, proof of the possession of Sarju Das, but he correctly regards them as important circumstances supporting an inference that, with these proceedings in his favour, it is unlikely that Sarju Das and his men would allow Pati Ram Das to recover possession of any part of the disputed property. Even on 18th November 1947, the day of the alleged occurrence there seems to have been some trouble between the parties and the Sub-Inspector of Police on going to the spot, found injured persons on the side of Sarju Das and actually saw one Ramchandra being assaulted in the field, Pati Ram Das being among the assailants. This incident suggests that the fight over possession was still in progress and is inconsistent with the prosecution story that Pati Ram Das had obtained possession of this portion of the property and had constructed the hut in

question for the occupation of his servants. The Assistant Sessions Judge, also, relies on the Sub-Inspector's failure to find at the spot signs of occupation, such as *nad*, *charan*, *chulha*, *ghur*, etc. No certain inference, however, can be drawn from this circumstantial evidence, because it does not appear if the Sub-Inspector specially directed his attention to a search for these signs of habitation.

[6] Coming to the occurrence, he points out certain improbabilities in the prosecution story and certain circumstances affecting the weight attaching to the evidence of the prosecution witnesses. First of all, there is the delay that occurred in the lodging of a first information report. The occurrence took place on 18th November 1947, but the first information report was lodged in the village at 1.30 P. M. on 23rd November 1947. The explanation given by Pati Ram Das is that he was himself arrested by the Sub-Inspector on 18th November 1947 before the occurrence took place, and came back to the village only on the 22nd evening after having been released on bail. He did not lodge a first information report that day because he was given to understand that the police would be visiting the village the next day. More serious is what appears to be an alteration in the time at which the occurrence is said to have taken place. In the first information report, the time is stated to be at night, whereas the witnesssss in Court say that it took place in the evening towards sunset. The explanation given by Pati Ram Das is that the time was wrongly recorded by the Sub-Inspector in the first information report. The Assistant Sessisons Judge conjectures that the change has been deliberately made, because the three eye-witnesses live some distance away from the hut and their presence at the spot would have been difficult to account for if the occurrence was stated to have occurred at night. There is much weight in the conjecture of the Assistant Sessions Judge, but it was a conjecture which was placed before the jury and the jury were entitled to come to their own finding of fact. The statement in the first information report was, at best, a statement of a person who was not an eye-witness. It was available to contradict him, but not to contradict the eye witnesses. Regarding the witnesses themselves, the Assistant Sessions Judge relied on certain circumstances affecting their credit. Ram Singhasan Singh, for instance, did not hesitate to deny falsely that he had deposed on behalf of Pati Ram Das on a former occasion, and there is reason to believe that Ajgaib Koeri is not well disposed towards both the accused and falsely denied knowledge that accused Jagdish Tewari had once deposed in a criminal case against Rajesh Koeri, uncle of the witness. Similarly, Markat Koeri falsely denied knowledge of the proceeding under S. 144 and of having given evidence in that case on behalf of Pati Ram Das. He also notices a discrepancy as to a detail of the occurrence between the statements of the witness at the first and the second trials. There is, however, no necessary contradiction between the two statements. His statement at the second trial was:

> "I did not try to throw any water on the flames. I did not state at the time of the first trial that I tried to throw water on the flames."

On the first occasion, he had deposed:

> "We had tried to throw some water on the hut (viz. half a bucket), but the flame was very strong."

[7] I have read with care the evidence adduced by the prosecution. It is such as carries little conviction, and the reasons given by the Assistant Sessions Judge are, in my opinion, reasons of weight for holding that the offences charged have not been proved against the accused persons. In a reference under S. 307, however, we want something more than this. The test has been recently laid down by the Privy Council in *Ramanugrah Singh* v. *King-Emperor*, 73 I. A. 174 : (A. I. R. (33) 1946 P. C. 151). The High Court must be satisfied that the verdict is one which no reasonable body of men could have reached. Here, there are three eye-witnesses and four witnesses to possession. The Assistant Sessions Judge has placed before the jury in forcible language all the above reasons for rejecting their evidence. Nevertheless, the jury felt that they could safely act upon their evidence. The jury saw the witnesses for themselves and were entitled to rely upon the impression which the witnesses created on them. In the circumstances, I find it difficult to say that the verdict at which they arrived is one which no reasonable body of men could have come to.

[8] Mr. S. N Sahay has urged that the test laid down by the Privy Council does not require that there should be an entire absence of evidence in support of the conclusion arrived at by the jury. I agree, but I do think that the reasons against the correctness of the verdict must be of such a compelling nature that the High Court can say that the verdict is "unreasonable" or "manifestly wrong". This is the effect of all the Indian decisions which have been approved by their Lordships of the Privy Council in *Ramanugrah Singh's case*, (73 I. A. 174 : A I R. (33) 1946 P. C. 151). In *Queen* v. *Sham Bagdi*, 13 Beng. L. R. App. 19 : (20 W. R. Cr. 73), the verdict of guilty was passed on the evidence of the prosecutrix alone. Nevertheless, their Lordships refused to interfere, observing that the evidence though not very strong, was "quite sufficient, if believed". They expressed the view that inter-

ference is justified only if the High Court finds the verdict of the jury to be clearly and undoubtedly wrong. In *Queen-Empress* v. *Dada Ana*, 15 Bom. 452, Charles Sargent C. J. and Jardine J. adopted the test laid down by Nanabhai Haridas J. in *Queen-Empress* v. *Mania Dayal*, 10 Bom. 497. Is the verdict clearly and manifestly wrong? In *Emperor* v. *Har Mohan Das*, 54 Cal. 708 : (A. I. R. (14) 1927 Cal. 848 : 28 Cr. L. J. 903), Suhrawardy J. laid down the test : "Whether any reasonable man on the materials before him can hold it (the opinion expressed in the verdict)". Reliance has been placed by Mr. Sahay on the decision of Mitter J. in this case. His decision is not in conflict with the other decisions. His Lordship, on a review of the evidence, relying on certain undeniable circumstances pointing conclusively to a finding contrary to the verdict of the jury, held that the verdict of the jury was "clearly wrong". In *In re Veerappa Goundan*, 51 Mad. 956 : (A.I.R. (15) 1928 Mad. 1186 : 30 Cr. L. J. 317), the Full Bench observed :

> "The jury is clearly made primarily the tribunal to find the facts; and when they have found them in one direction or the other, it is not for us to interfere unless the verdict is unreasonable."

and they cited with approval the test laid down in the English authorities "that the verdict was such as no reasonable men could have come to". In *Emperor* v *Bai Lali*, 34 Bom. L. R. 896 : (33 Cr. L. J. 745) which was a reference against a verdict of acquittal, Beaumont C. J. (as he then was) observed that the High Court cannot interfere unless it is satisfied that the verdict is perverse and "no jury could really have entertained any reasonable doubt as to the guilt of the accused", and Broomfield J. applied the test whether the verdict is one which could not be arrived at by a reasonable body of men.

[9] In *Queen Empress* v. *Dada Ana* (15 Bom. 452) (supra) and *In re Veerappa Goundan*, (51 Mad. 956 : A.I.R. (15) 1928 Mad. 1186 : 30 Cr.L.J. 817 F. B.) (supra), there are references to the English practice in proceedings to set aside a verdict on the ground that it is "against the weight of the evidence"—a test approved by their Lordships of the Privy Council in *Ramanugrah Singh's case*, (73 I. A. 174 : A. I. R. (33) 1946 P. C. 151). This does not mean that the weighing of the evidence by the High Court is substituted for the weighing of the evidence which has been made by the jury in arriving at its verdict. The test is not really different from that expressly laid down by the Privy Council. In *Metropolitan Railway Co.* v. *Wright*, ((1886) 11 A. C. 152 : (55 L. J. Q. B. 401)) Lord Fitzgerald stated the question for consideration to be "whether the evidence so preponderates against the verdict as to shew that it was unreasonable and unjust" and Lord Halsbury observed :

> "If their finding is absolutely unreasonable, a Court may consider that that shews that they have not really performed the judicial duty cast upon them; but the principle must be that the judgment upon the facts is to be the judgment of the jury and not the judgment of any other tribunal."

The same test was formulated by the Court of appeal in *Solomon* v. *Bitton*, (1881) 8 Q. B. D. 176, in which a rule for a new action was rejected on the ground that the grant of a new trial

> "ought not to depend on the question whether the learned Judge who tried the action was or not dissatisfied with the verdict, or whether he would have come to the same conclusion as the jury, but whether the verdict was such as reasonable men ought *not* to have come to."

Some confusion was caused by the omission of the word "not" (italicised) in the report as originally printed. In actual fact there was no doubt as to the correct test to be applied, and the missing word was inserted by the Court of appeal in *Webster* v. *Friedeberg*, (1886) 17 Q. B. D. 736 : (55 L. J. Q. B. 403). The incorrectness of the test as originally printed was noticed by Lord Halsbury in *Metropolitan Railway Co.* v. *Wright*, (1886) 11 A. C. 152 : 55 L. J. Q. B. 401) (supra), and he formulated a positive test: "whether the verdict was such as reasonable men might have come to."

[10] This finishes with all the decisions which have been expressly approved by the Judicial Committee in the case of *Ramanugrah Singh*, (73 I. A. 174 : A. I. R. (33) 1946 P. C. 151). Mr. S. N. Sahay has also referred to *Emperor* v. *Dagadu Kondaji*, A. I. R. (20) 1933 Bom. 144 : (34 Cr. L. J. 660). In this decision, their Lordships did not lay down any new test but drew a distinction between a reference against a verdict of conviction and one against a verdict of acquittal, and expressed the opinion that the weight and volume of evidence in the two cases differs because of the presumption of innocence. In the case with which they were dealing, there was a very serious misdirection, namely, that the Judge, in his heads of charge, did not tell the jury that it was their duty to give the accused the benefit of the doubt. He has also referred to three unreported decisions of this Court subsequent to *Ramanugrah Singh's case*, (73 I. A. 174 : A. I. R. (33) 1946 P. C. 151). In *King-Emperor* v. *Jamuna Thakur* (Jury Ref. No. 3 of 1948, decided on 28th April 1948), my learned brother, sitting with Imam J., accepted a reference against a verdict of guilt, proceeding on an examination of the evidence in the case. He was very careful, however, to follow the test

laid down in *Ramanugrah Singh's case,* 73 I. A. 174 : A. I. R. (33) 1946 P. C. 151), and observed:

> "We cannot say that the jury were wrong in accepting the evidence of the witnesses simply because it appears that they had animus or bias against the accused; nor can we say that the jury were not justified in acting on the evidence of the witnesses who came forward to prove the prosecution case simply because other persons, who could have been examined in the case, were not examined. The charge that the witnesses are biassed may afford a legitimate ground of criticism of their evidence and for rejecting it in the absence of corroboration, but it was essentially a matter for the jury to decide whether they will accept the evidence of the interested witnesses. But if the evidence unmistakably leads to the conclusion that no katchery was in existence and no servant of the landlord was in occupation of it, then the conclusion arrived at by the jurors would be deemed to be one which could not be arrived at by any reasonable body of men."

Applying this test, he came to the conclusion that the verdict was manifestly wrong and perverse. This conclusion was not arrived at on a mere consideration of discrepancies and improbabilities, but was based on circumstances which, in the words of Imam J., "precluded all possibility of doubt". In *King-Emperor* v. *Parmeshwar Singh,* (Jury Ref. No. 5 of 1948, decided on 6th May 1948), the same two learned Judges, applying the test of *Ramanugrah Singh's case,* (73 I. A. 174 : A. I. R (33) 1946 P. C. 151) came to the conclusion that the verdict was not unreasonable. The decision in *King-Emperor* v. *Dil Bahadur,* (Jury Ref. No 2 of 1948, decided on 19th April 1948) was, again, of the same two learned Judges. There were three accused persons in the case against all of whom the jury had returned a majority verdict of guilty under S. 307 and against one of whom, Dil Bahadur, there was also a verdict of guilty under S. 304, Part I. The reference related to the verdict under S. 307. Their Lordships, in setting aside the verdict proceeded on the finding as regards two of the accused persons that there was not "any evidence worth the name" to prove that either of them fired a shot that night, and that there was no evidence at all to prove that they fired in circumstances bringing them within the mischief of S. 307. As regards the remaining accused, they held that it was impossible to say exactly who fired the shot in question. The evidence, therefore, was of the kind where it was possible to say that the verdict of the jury was manifestly wrong.

[11] From the above discussion, it follows that, if the reference before us depended only on the grounds stated by the Assistant Sessions Judge, I would have rejected it. There is, however, another ground upon which the verdict of the jury is open to question. Under sub-s. (3) of S. 307, we are in the position of a Court of appeal and, therefore, may interfere with the verdict on a point of law (sub-s. (1) of S 418, Criminal P. C.). Here, there has been a serious mistake of law, namely, the admission of two inadmissible pieces of evidence. One of these is a certified copy of an order of the Sub-Divisional Officer, dated 23rd December 1947, in a case under S. 144, Criminal P. C., between Sarju Das and Ram Gobind Das. The Sub-Divisional Officer visited the spot and made the following note in the order-sheet:

> "I visited the village on 21/12 in presence of the parties and their pleaders. There are two 2 (sic) mathias were shown one in possession of Sarju Das and others and the other in possession of Patiram Dass and others.
>
> There is no apprehension as there have been substantive cases between the parties.
>
> Proceedings dropped."

For one thing, the order-sheet relates to something which happened subsequent to the occurrence, and, secondly, it reproduces a statement made by some unknown persons to the Sub-Divisional Magistrate. Next, there is, Ex 7, a certified copy of an order of the Executive Engineer dated 13th August 1948, by which assessment of Canal dues was directed to stand in the name of Pati Ram Das. This order was passed long after the occurrence and had no relevance whatever. It should not have been admitted into evidence. In this connection, it is relevant to reproduce the observations of Jardine and Fulton JJ., in *Queen-Empress* v. *Ramchandra Govind,* 19 Bom. 749 regarding the opinion of a District Judge wrongly admitted in a case in which a clerk of his office was being prosecuted for abetment of criminal breach of trust:

> "Juries usually give weight to the opinion of Judges. They know that Judges are used to deal with conflicting evidence, to question, to sift, to weigh it impartially; to test it by the presumptions based on general experience which are now settled rules of law."

To the jury here, it may well have appeared that the Executive Engineer who, in the course of his official work, would have to deal with applications of this kind, was an officer competent to come to a finding as to the facts of possession, and, therefore his order was entitled to weight.

[12] The learned Government Advocate has urged that the jury were duly warned that these items of evidence were not entitled to much weight. A warning of this kind is not always sufficient to remove the harm done by the wrongful admission of evidence, and we are entitled to consider the possibility that the warning did not suffice for the purpose. A case in point is *Ramesh Chandra Das* v. *Emperor,* 46 Cal. 895 : (A. I. R. (6) 1919 Cal. 514 : 20 Cr. L. J. 324), where their Lordships set aside a verdict

on the ground of the admission of inadmissible evidence, observing:

> "No doubt the learned Sessions Judge told the jury to put the evidence out of their minds entirely and discard it. But the evidence was very prejudicial to the appellant, and 'whatever directions to be given to the jury, it is almost impossible for them to dismiss such evidence entirely from their minds: *Rex* v. *Norton*, (1910-2 K. B. 496 : 79 L. J. K. B. 756)."

[12a] A verdict was set aside on a similar ground in *Emperor* v. *Issuf Mohamad*, 55 Bom. 435 : (A. I. R. (18) 1931 Bom 311 : 32 Cr. L. J. 1077), in which their Lordships said:

> "It is very difficult to say what effect any particular evidence may have had on the jury. But having regard to the fact that this is a case which was rather near the line, the jury evidently felt a difficulty about it because they took an hour in considering their verdict. I think it would be unsafe to say that the effect of improperly letting in evidence which in substance went to show that the statements of the accused before the jury were an afterthought had no effect on the minds of the jury."

[13] The learned Government Advocate has further contended that, even conceding that this evidence has been wrongly admitted, the correct course for this Court to follow is not to examine and consider for itself whether the remaining evidence justifies the vervict, but to consider whether, excluding this evidence, there was sufficient evidence on which the jury could have based its verdict. I do not think that this contention is supported by the authority relied upon by him, *Abdul Rahim* v. *Emperor*, 73 I. A. 77: (A. I. R. (33) 1946 P. C. 82 : 47 Cr. L. J. 616). Their Lordships of the Judicial Committee there laid down in the following words the duty of the High Court where material evidence has been improperly admitted:

> "The appellate Court must apply its own mind to the evidence and after discarding what has been improperly admitted decide whether what is left is sufficient to justify the verdict. If the appellate Court does not think that the admissible evidence in the case is sufficient to justify the verdict then it will not affirm the verdict, and may adopt the course of ordering a new trial or take whatever other course is open to it. But the appellate Court, if satisfied that there is sufficient admissible evidence to justify the verdict, is plainly entitled to uphold it."

The headnote to the report is somewhat misleading. It is not in all cases where inadmissible evidence has been admitted that the High Court may adopt this course. It can do so only if the evidence wrongly admitted is material. What is meant by material is illustrated by *Ramesh Chandra Das* v. *Emperor*, (46 Cal. 895 : A. I. R. (6) 1919 Cal. 514 : 20 Cr. L. J. 324), (supra) and *Emperor* v. *Issuf Mohamad*, 55 Bom. 435 : A. I. R. (18) 1931 Bom. 311 : 32 Cr. L. J. 1077) (supra), namely, that the evidence is such that it appears to the Court to be likely to have affected the decision of the jury.

[14] Our attention has been drawn to the following observation of Dalziel J., in *Emperor* v. *Ramadhar Kurmi*, A. I. R. (35) 1948 Pat. 79: (48 Cr. L. J. 391):

> "Under S. 307 the High Court is to consider all the evidence but it goes without saying that it is only admissible evidence that can properly be considered. If after excluding the inadmissible evidence the remaining evidence is such that the jury would probably not have given the verdict of guilty, or that, if they had it would have been an entirely unreasonable verdict, the proper order for this Court to pass is one of acquittal."

His Lordship lays down two alternative tests:

> "(1) Is the verdict one which the jury would probably not have returned on the admissible evidence alone?
>
> (2) On the admissible evidence would the verdict be entirely unreasonable?

The learned Government Advocate relies on the first test. With all respect, I must say that I find the meaning of this test somewhat obscure. Assuming it to mean what the learned Government Advocate says, it is merely an *obiter*, for the case was disposed of by his Lordship on the second test. Further, Das J., did not associate himself with it. According to him, the correct test is the one just derived by me from *Abdul Rahim* v. *King-Emperor*, (73 I. A. 77 : A. I. R. (33) 1946 P. C. 82 : 47 Cr. L. J. 616) (supra).

[15] In the case before us, the admissible evidence of possession is extremely weak, and it appears to me very probable that the decision of the jury in favour of Pati Ram Das was influenced by the admission of these two pieces of evidence. In the circumstances, I consider that we are entitled to go into the evidence and come to our own conclusion as to the facts of possession. That being so, the grounds given by the Assistant Sessions Judge are reasons which weigh strongly in favour of the defence. I am not satisfied on the evidence that Pati Ram Das was in possession of the hut. The question of possession, as I have indicated above, is vital to the question of the offence charged, as it furnishes the motive. The wrong admission of evidence is, therefore, very likely also to have affected the conclusion of the jury on the factum of the offence, and it is open to us to consider on the merits the evidence on the factum of arson. This evidence, as I have said already, carries very little conviction, and I have no hesitation in coming to the conclusion that it is insufficient to establish the guilt of the accused.

[16] On the above grounds, I would accept the reference, set aside the verdict of the jury, and acquit the accused persons.

Narayan J. — I agree.

R.G.D. *Reference accepted.*

A. I. R. (37) 1950 Patna 85 *[C. N. 24.]*

SINHA J.

Pradyaman Prasad Singh—Appellant v. *Mahadeo Singh and others—Respondents.*

A. F. A. D. No. 626 of 1947, Decided on 1st December 1948, from decision of Dist. Judge, Bhagalpur, D/- 21st January 1947.

T. P. Act (1882), S. 91 — Suit for redemption by purchaser of mortgaged property.

In a suit for redemption brought by *A* who was claiming to redeem the mortgaged property by virtue of a sale-deed in his favour executed by the mortgagor, the mortgagee contended that *A* had no title to maintain the suit as the mortgaged property had been conveyed already to *B* by a prior sale-deed. It was proved that title in the property did not pass to *B*, even though there was a registered sale-deed between the parties, as the parties themselves admitted that no effect was given to the sale-deed and that the proposed vendee was unable to pay the consideration and take delivery of the sale-deed.

Held that as this was not the case of vendor and vendee, where the title passes to the vendee even though there is non-payment of consideration, *A* was entitled to maintain the suit for redemption. [Para 4]

S. C. Muzumdar—for Appellant.

Rameshwar Choudhary and Bhabananda Mukherji —for Respondents.

Judgment.—This is a plaintiff's second appeal from the decision of the learned District Judge of Bhagalpur, reversing that of the Munsif of Banka in a suit for redemption. The plaintiff claimed title to the property by virtue of the sale-deed executed by the owner of the property on 11th May 1943, in his favour. The land belonged to Nirpat, who mortgaged it to the defendant, first party, on 12th May 1928. On 24th April 1942, the owner purported to sell the property to Pabitra Mistri. But the plaintiff's case is that that document was not given effect to, because the vendee was not in a position to discharge his liabilities under the contract. That is to say, he expressed his inability to pay the consideration money. Thereupon, the mortgagor sold the property to the plaintiff.

[2] The suit was contested by the mortgagee on the grounds: (1) that the plaintiff had no title to maintain his suit, the land in question having been conveyed already by the aforesaid deed dated 24th April 1942, in favour of Pabitra Mistri, and, (2) not very consistently with the first ground, that the mortgagor had sold the land to him by virtue of a deed dated 20th June 1943.

[3] The trial Court decreed the suit, holding that the plaintiff was entitled to redeem, as his previous sale-deed in favour of Pabitra Mistri of the year 1942 had been made ineffective as Pabitra Mistri expressed his inability to meet his obligations under the deed. The Court, also, negatived the alternative defence that the property had been conveyed to the mortgagee himself. On appeal by the mortgagee, the lower appellate Court has dismissed the suit, holding that, in spite of the fact that it was common ground that consideration did not pass under the deed of 1942, nor was there what is popularly called exchange of equivalents under the deed, all the same, as there was not specific stipulation in the deed itself that the title would not pass until the entire consideration money had been paid, title did pass to Pabitra Mistri, and that, therefore, the plaintiff had no *locus standi* to claim redemption. Hence, this second appeal by the plaintiff.

[4] Learned counsel for the plaintiff-appellant has contended, and, in my opinion, rightly, that the learned District Judge has misdirected himself in raising the question of intention of the parties to the deed when the parties to the deed themselves have unequivocally made out the case that the document remained ineffective. The learned District Judge has made reference to certain rulings of this Court, where it has been laid down that ordinarily title would pass to the vendee even though consideration money may not have been paid, unless there was stipulation to the effect that title would not pass until after the passing of consideration. But, in my opinion, the learned District Judge has misdirected himself in holding that, because there is an unequivocal admission of the receipt of the consideration money in the deed of 1942, the parties were estopped from proving otherwise. This is a mere admission, which could be proved to be wrong, and the Courts below have found that that admission was wrong. It has, also, been found by the Courts below that the vendor did not deliver the sale-deed to the vendee, because the latter was not in a position to pay the consideration money, and that the parties were thus agreed that the matter was at an end. Pabitra Mistri has been examined for the plaintiff, and he has supported his case and stated that the document remained ineffective as he was not in a position to take delivery of the sale-deed on payment of the consideration money. Hence, all the discussion in the judgment of the learned District Judge on appeal as to whether or not there was a stipulation in the deed itself is wholly irrelevant. This is not a case as between a vendor and a vendee, as both the parties are agreed that the sale deed remained ineffective as between them. Hence, the position is that, though there was a registered sale-deed, it remained inoperative as the parties were agreed not to give effect to the same. The learned District Judge has been led away by those rulings, which were given in quite a different set of circumstances. As already indicated, this was not a matter arising between the vendor and the vendee. In the present case, the question was between the mortgagee in possession and the plaintiff, who was claiming by virtue of a sale deed in his favour executed by the mortgagor. If

the mortgagee could prove that Pabitra Mistri's deed was given effect to, certainly the plaintiff would be out of Court. But that finding has not been recorded by the lower appellate Court. On the other hand, the learned Munsif clearly recorded the finding that the document was not given effect to. That finding has not been set aside by the learned District Judge. But he has gone on to consider a question which really did not arise on the pleadings of the parties. In my opinion, the learned District Judge was wrong in raising that question of intention as between the vendor and Pabitra Mistri, the proposed vendee. In my opinion, the learned Munsif was perfectly justified on the finding arrived at by him in decreeing the suit. As the only reason given by the learned District Judge for reversing the decision of the learned Munsif is erroneous in law, the appeal must be allowed and the suit decreed with costs throughout.

R.G.D. *Appeal allowed.*

A. I. R. (37) 1950 Patna 86 *[C. N. 25.]*

AGARWALA C. J. AND MEREDITH J.

Pratap Singh Bahadur — Assessee v. *Province of Bihar.*

Misc. Judicial case No. 118 of 1946, Decided on 15th Septemper 1948.

(a) Bihar Agricultural Income-tax Act (VII [7] of 1938), S. 2 (a) — Rent or income derived from land — Malikana is not rent or income derived from land — Malikana paid by Government under Regulation VII [7] of 1822 held not assessable to agricultural income-tax.

Proprietors who were dispossessed of their lands in consequence of their refusal to enter into an engagement for the payment of revenue demanded by Government in 1793 were paid, in consideration of their proprietory right, an allowance which is called Malikana. [Para 4]

Malikana allowance is not rent paid to a displaced proprietor: *Case law relied on*; 10 Cal. 1112, *Disting.* [Para 5]

Semble :—Right to receive Malikana allowance is not a proprietary right or an interest in immoveable property : A. I. R (11) 1924 Cal 197, *Rel. on* ; 9 W. R. 102, 4 Beng. L. R. A. C. 29, 10 W. R. 302 and 7 W. R. 336, *Disting.*; A. I. R. (16) 1929 P. C. 166, *Ref.* [Paras 6 and 7]

The Malikana allowance is not an income derived from land as the person entitled to its receipt derives it from the statutory obligation of Government to pay it. In other words, although land in the genealogical tree of Malikana appears in the second degree, its immediate and effective source is the Government's obligation to pay it, and this obligation is not land within the meaning of the definition: A. I. R. (36) 1949 P. C. 1 *Applied*; A. I. R. (36) 1949 P. C. 13, *Ref.* [Para 8]

Malikana allowance being thus neither rent nor income derived from land, income received as Malikana and paid by Government under Regulation VII [7] of 1822 was held not agricultural income assessable to agricultural income-tax. [Para 10]

(It was also found that land in this case was not used for agricultural purposes).

(b) Bihar Agricultural Income-tax Act (VII [7] of 1938), S. 2 (a) — Land used for agricultural purposes — Whether it is such land is a question of fact to be determined by reference to the use to which the land is being put. (1940) 8 I. T. R. 378 (Cal.) and A. I. R. (36) 1949 P. C. 13, *Ref.* [Para 9]

Lal Narain Sinha and Ugra Singh — for Assessee.
The Advocate-General — for Province of Bihar.

Agarwala C. J.—This is a reference under S. 25 (2), Bihar Agricultural Income-tax Act, 1938, at the instance of Maharaja Pratap Singh Bahadur through the Manager of the Gidhour Court of Wards Estate.

[2] For the year 1942-43, the assessee's net agricultural income for the year ending 31st March 1942, was assessed at Rs. 1,52,634 which included a sum of Rs. 14,359-9-9 received from Government as malikana. In appeal this was reduced and the case was remanded for revision of the assessment after reconsideration of certain items with which we are not concerned at present. The assessee's claim that the sum received as malikana was not assessable was rejected.

[2a] The question referred to us for deci- and is: "Whether income received as malikana sion paid by Government under Regulation VII [7] of 1822 is agricultural income assessable to agricultural income-tax?" On the ground that malikana is not agricultural income the amount received by the assessee on this account has been assessed to tax under the general Income-tax Act which exempts agricultural income from taxation, it having been held that it is not agricultural income within the meaning of the Income-tax Act, 1922, which defines agricultural income as—"Any rent or revenue derived from land which is used for agricultural purposes. . . . ." For the purposes of the Bihar Agricultural Income-tax Act, 1938, however, it has been held that malikana is agricultural income, with the result that the recipient has again been assessed on the amount received. The Bihar Agricultural Income-tax Act, 1938, defines agricultural income as—"Any rent or income derived from land which is used for agricultural purposes. . . . ."

[3] Althought in one Act the word "income" is used, and in the other, the word "revenue", there is no real difference in the two definitions.

[4] In order to bring the sum received as malikana within the definition of agricultural income tax the Revenue Authorities must shew either that it is rent or that it is income derived from land used for agricultural purposes. It is, therefore, necessary to consider the nature of malikana. In 1793 the then Government proposed to settle land with the then proprietors on terms which included the payment of revenue amounting to nine-tenths of the estimated yield.

Regulation VIII [8] of that year provided that the lands of those proprietors who refused to enter into engagements on those terms should either be let in farm or held khas by Government and that the dispossessed proprietors should be paid by Government an allowance in consideration of their proprietary right at such rate as the proper authority might determine. This allowance was called malikana. In the case of lands let in farms the person with whom they were settled was required to pay to Government, in addition to the revenue settled, an additional sum which Government itself would have to pay to the dispossessed proprietor as malikana. It appears, however, that even before the enactment of the Regulation of 1793 some zamindars were in receipt of malikana. This is dealt with in Phillips's "Land Tenures of Lower Bengal," pp. 124 to 126. The learned author says,

> "It has been questioned whether a zemindar could be ousted. . . . . . . It was however probably only in later times, when the zemindar's rights were at their highest pitch, that dismissal was so rare; for we know that during the vigorous times of Mahomedan rule, the zemindars were often expelled . . . . . The claims of the ancient zemindars and village headman, when thus displaced, were usually recognized to the extent of giving them an allowance for subsistence; and sometimes they continued to receive this allowance in the shape of payments from the new occupants called *russoom-i-zemindaree*. This practice probably accounts for the payment, to a displaced zemindar by his successor, of malikana for the subsistence of his family . . . . . . Some times, when the zemindar was incompetent, Government appointed an officer to take khas possession of the zemindary; and in such cases, as also when the revenues were farmed, it was usual in the later Mahomedan and British periods to allow the zemindar malikana, at least in Behar, at the rate of ten per cent. on the revenue although the zemindar performed none of the functions of the office."

[5] It will thus be seen that the malikana allowance was not regarded as rent paid to the displaced proprietor, but merely as a subsistence or compassionate allowance for himself and his family. In *Herranund Sahoo* v. *Mt. Ozeerun*, 9 W. R. 102, it was held that a right to malikana is not the same thing as a right to receive rent, but is a proprietary right constituting an interest in land. In *Mt. Ozeerun* v. *Baboo Heeranund Sahoo*, 7 W. R. 336 it was held that malikana is a

> "money payment, and neither rent nor maintenance; in other words, it is to be regarded like a bond or other debt, the non-payment of which within a certain legal period, bars an action to recover it."

In *Bhoalee Singh* v. *Mt. Neemoo Behoo*, 12 W. R. 498 : (4 Beng. L. R. A. C. 29) a Bench of three Judges held that malikana is not rent, nor has it the elements of rent. Later, in *Syed Shah Najamuddin Hyder* v. *Syed Zahid Hussein*, 6 C. L. J. 300 also it was held that malikana is not a claim for rent. A passage in the judgment of Garth, C. J. in *Mullick Abdool Guffoor* v. *Muleka*, 10 Cal. 1112 at p. 1125 was referred to by the learned Advocate-General :

> "There is nothing in principle, so far as we can see, to distinguish a malikana right from a right to receive rent or the dividends payable upon Government paper."

What the learned Chief Justice was considering there was whether a right to receive malikana could legally be the subject of a gift under the Muhammadan law, and what he decided was that such a right could be the subject of a gift in the same manner as other incorporeal property of that nature. The cases to which I have referred above, in which it was held that malikana is not rent, were not dissented from. On the authorities, I think it is clear that a right to receive malikana is not a right to receive rent.

[6] The next question, therefore, is whether a sum received as malikana is income derived from land within the meaning of the Act. In support of his contention that malikana is income derived from land used for agricultural purposes, the Advocate-General has referred to cases in which there are observations that malikana is a proprietary right or an interest in immovable property. See *Herranund Sahoo* v. *Mt. Ozeerun*, 9 W. R. 102 and *Bhoalee Singh* v. *Mt. Neemoo Behoo*, 12 W. R. 498. In these and similar cases, such as *Budhrul Huq* v. *Court of Wards*, 10 W. R. 302 and *Mt. Ozeerun* v. *Baboo Heeranund Sahoo*, 7 W. R. 336 what was being considered was the period of limitation governing a suit to recover malikana, and that matter was being considered in relation to the Limitation Act of 1859. In *Jaggo Bai* v. *Utsava Lal*, 51 ALL. 439: (A.I.R. (16) 1929 P. C. 166) the Privy Council left open the question whether a right to receive malikana is immovable property but held that a suit for its recovery is not governed by Art. 141 but by Art. 120, Limitation Act of 1908. The *Explanation* to Art. 132 of that Act declares that malikana is "deemed" to be money charged on immovable property which implies that it is not really so.

[7] If the right to receive malikana be regarded as a proprietary right, it is difficult to resist the conclusion that the person with whom land of a dispossessed proprietor was settled under the Regulation of 1793 was a tenure-holder or tenant of some kind under the person entitled to receive the malikana, i. e., the dispossessed proprietor, and that it was rent, but the very case referred to in this connection held that it is not rent. Furthermore, if the person entitled to receive malikana be regarded as the proprietor of the land certain other consequences would seem to follow, e. g., that he is entitled to the underground rights in the land, unless he has expressly parted with them and to accretions.

There is no authority for the proposition that he is entitled to the underground rights and his right to accretions has been negatived in *Soudamini Dassya* v. *Secretary of State*, 50 Cal. 822 : (A.I.R. (11) 1924 Cal. 197). In that case, Rankin J. as he then was, held that although the right to receive malikana may be described as a quasi rent-charge it is not a tenure or dominium and that when a proprietor was dispossessed in consequence of his refusal to enter into an engagement for the payment of the revenue demanded in 1793 *his interest in the land was extinguished*. The question may also be looked at from another point of view. Malikana is payable whether the land in respect of which it was originally granted exists or not. That is not disputed. How can it be said to be derived from land used for agricultural purposes in a case where the land no longer exists or no longer exists as agricultural land?

[8] The question whether malikana is income "derived" from land must, I think be determined in accordance with the principle laid down by the Privy Council in *Commissioner of Income-tax* v. *Kamakshaya Narayan Singh*, P. C. A. No. 23 of 1944, D/-6th July 1948 : (A. I. R. (36) 1949 P. C. 1). What their Lordships were considering in that case was whether interest on arrears of rent is derived from lands used for agricultural purposes within the meaning of S. 2, Income-tax Act, 1922. They observed as follows:

> "The word 'derived' is not a term of art. Its use in the definition indeed demands an enquiry into the genealogy of the product. But the enquiry should stop as soon as the effective source is discovered. In the genealogical tree of the interest land indeed appears in the second degree, but the immediate and effective source is rent, which has suffered the accident of non-payment. And rent is not land within the meaning of the definition.'

Similarly, in the case of malikana the person entitled to its receipt derives it from the statuttory obligation of Government to pay it, and although, so far as malikana under the Regulation is concerned, Government recouped itself from the person with whom the land was settled, land in the genealogical tree of malikana appears in the second degree, its immediate and effective source is the Government's statutory obligation to pay it, and this obligation is not land within the meaning of the definition. In *Mustafa Ali Khan* v. *Commissioner of Income-tax*, P. C. A. No. 33 of 1947, D/-12th July 1948: (A.I.R. (36) 1949 P. C. 13) the Privy Council considered the question whether the malikana received by the Utraula Estate in the United Provinces was entitled to exemption from assessment under the Income-tax Act, 1922. The facts with regard to it were thus stated in the order of the appellate Assistant Commissioner:

> "During the days of the Nawabs of Oudh Raja of Utraula was recognised as the Pargana lord and as such retained the right to a small feudal tribute and to manorial dues. From the beginning of the 19th century till the annexation, the Rajas of Utraula could not manage their estate properly on account of the continued warfare between the neighbouring estates. During this period they transferred, made grants of or sold a large number of villages to certain persons for monetary consideration. In doing so they surrendered all their Zamindari and proprietary rights and lost all their title to real property in respect of those villages. They, however, retained the right of a small annual cash payment by virtue of their position as the old pargana lord. This cash allowance came to be called the Malikana. The villages otherwise became quite independent and the exclusive property of the purchasers, grantees or transferees.
>
> 8. The amount of the malikana was fixed by a settlement decree and is not variable. It is payable whether the land on which it is supposed to be a charge is used for agricultural purposes or not or whether it yields any profits or not. It is admitted that suits for the recovery of this due are cognizable by Civil Courts and not by Revenue Courts. This being so, it is impossible to describe this due as rent or as agricultural income. There is no relation of landlord and tenant between the appellant and the proprietors who are liable to pay this amount. . . ."

Their Lordships observed:

> "It may be conceded that it would never have become payable to the ancestors of the assessee had they not been feudal proprietors of the land. But that does not mean that it is now rent or revenue derived from the land: on the contrary it is paid just because the original proprietors relinquished their claims to the land and it represents the consideration for that relinquishment. The land is in no real sense its source; and even if it is to be regarded as secured by a charge on the land that is no more decisive of the question in the present case than it was in *Maharaja Kumar Gopal Saran Narain Singh* v. *Commissioner of Income-tax, Bihar and Orissa*, 62 I. A. 207 : (A.I.R. (22) 1935 P.C. 143 : 14 Pat. 552 P. C.)

[9] Nor has the Revenue Department proved that the land in respect of which the malikana was originally fixed is land used for agricultural purposes. Whether it is such land has been held to be a question of fact to be determined by reference to the use to which the land is being put: see *In re Bijay Chand Mahtab Bahadur of Burdwan*, 1940-8 I. T. R. 378 (Cal.). The finding of fact in the present case is:

> "There is no trace at present of the lands or village to which the allowance might be said to relate and nothing is, therefore, known as to the present use to which they have been put."

In *Mustafa Ali Khan* v. *Commissioner of Income tax*, P. C. A. No. 33 of 1947, D/-12th July 1948: (A. I. R. (36) 1949 P. C. 13), with regard to the assessee's claim that he was entitled to exemption from taxation under the Income-tax Act, 1922, in respect of the sale proceeds of forest trees on the ground that such proceeds constituted agricultural income, their Lordships observed:

> "It appears to their Lordships that, whether exemption is sought under S. 2 (1) (a) or 2 (1) (b), the primary condition must be satisfied that the land in question is used for agricultural purposes. His case fails if he does

not prove that the land is used for agricultural purposes."

[10] In my opinion, therefore, it has not been established in the present case that malikana is rent or that it is income derived from land, or that the land in respect of which the obligation to pay was originally undertaken is being used for agricultural purposes. I would, therefore, answer the question referred to us for decision in the negative. The assessee is entitled to the costs of this reference which we assess at Rs. 250 including the Rs. 100 deposited for the reference.

Meredith J.—I agree.

G.M.J. *Answer in the negative.*

A. I. R. (37) 1950 Patna 89 *[C. N. 26.]*

AGARWALA C. J. AND MEREDITH J.

Bundi Singh — Defendant — Appellant v. Shivanandan Prasad Sahu, Plaintiff and another, Defendant — Respondents.

Letters Patent Appeal No. 27 of 1948, Decided on 31st August 1949, from judgment of Das J., D/- 19th April 1948.

Civil P. C. (1908), O. 7, R. 7 — Partition of Tauzi between *A*, *B*, *C* — *A* ceasing to have interest in Touzi and *B* getting it — Default in payment of cess —In certificate case interest of *A*, *B* and *C* sold and *D* purchasing it — Suit by *B* for declaration that his right, title and interest in Touzi were not affected by the sale and for injunction restraining *D* from interfering with possession of *B* of his share in the Touzi — Held that as *A* had no interest in Touzi at date of sale, it could not operate to convey that interest in the hands of *B*—Sections 45, 46, Bengal Public Demands Recovery Act (III [8] of 1913) held no bar to *B*'s suit—Though *D* recovered rents from some tenants *B* also recovered rents from some of them — Under the circumstances decree for possession could be passed in *B*'s favour under O. 7, R. 7—Suit not bad under S. 42, Specific Relief Act — **Specific Relief Act (1877), S. 42 — Bengal Public Demands Recovery Act (III [3] of 1913), Ss. 45, 46.**

In a partition between *A*, *B* and *C*, *A* ceased to have any interest in a Touzi and *B* got that interest. There was default in the payment of cess. In the certificate case that was issued certificate debtors were stated to be *A*, *B* and *C*. One *D* purchased the property in the sale held in the certificate case and *B* brought a suit for declaration that the right, title and interest of *B* in the Touzi were not affected by the sale and for injunction restraining *D* from interfering with possession of *B* of his share in the Touzi :

Held that; (1) what passed at a certificate sale was merely the right, title and interest of the judgment-debtor. *A* had no interest in the Touzi at the time of sale. Therefore, in so far as the sale purported to be a sale of the interest of *A*, it was a sale of nothing. It could not operate to convey that interest in the hands of *B*. Therefore neither S. 45 nor S. 46, Public Demands Recovery Act was a bar to *B*'s suit. [Para 5]

(2) The suit was not bad under S. 42, Specific Relief Act. Though *D* got himself recorded in Register *D* and had realised rents from some of the tenants *B* also contended that he also had been realising some rents. Therefore the question of possession was one on which two views were possible. Maintaining that he was still in possession *B* asked for a consequential relief that *D* should be restrained from interfering with his possession. Under the circumstances a decree for recovery of possession could be passed in *B*'s favour under O. 7, R. 7. The inconsistency in the present case between *B*'s case and the relief actually asked for was not of such a type which would bar the application of O. 7, R. 7. [Para 6]

Annotation : ('44-Com.) C. P. C., O. 7, R. 7, N. 2 ; ('46-Man.) Specific Relief Act, S. 42, N. 14, 19.

Sarjoo Prasad and K. K. Sinha—for Appellant.
S. K. Sarkar — for Respondent 1st Party.
Government Pleader — for Province of Bihar.

Meredith J. — This is a defendant's appeal under the Letters Patent from a decision of Das J. The suit was for a declaration that the right, title and interest of the plaintiff in Tauzi No. 4673, Jagir Lal Dubey Havildar, were not affected by the sale in certificate case No. 106 of 1938-39, and for an injunction restraining the defendant auction purchaser from interfering with the possession of the plaintiff of his share of the Tauzi. The facts were that there was default in the payment of cess of the March kist of 1938, and the certificate case in question was consequently issued, the certificate debtors being stated to be the plaintiff, two ladies, Mt. Siromani and Mt. Onkarmani, and two other persons, Mt. Kabutro and Jamuna Prasad Sahu. The shares sold were 1 anna 13 gandas and odd share of Mt. Kabutro, 1 anna 13 gandas and odd share of Jamuna Prasad Sahu, 5 annas and 6 gandas share of Mt. Siromani and Mt Onkarmani, and 16 gandas and odd share of the plaintiff. In fact, however, by a partition prior to the certificate case Mt. Kabutro and Jamuna Prasad Sahu had ceased to have any interest, and the share of the plaintiff had become 10 annas and odd, while Mt. Siromani and Mt. Onkarmani held the remaining 5 annas and odd.

[2] The trial Court and the Court of first appeal, while holding that the notice under S. 7, Public Demands Recovery Act had not been served on the plaintiff, held that the plaintiff had been dispossessed. The suit was essentially one for setting aside the sale, and was barred under S. 45, Public Demands Recovery Act inasmuch as it had not been brought within one year from the date of delivery of possession. The appellate Court further held that the suit was barred under S. 42, Specific Relief Act, as the plaintiff had not asked for recovery of possession.

[3] Before Das J. the plaintiff confined his case to the contention that the sale could not affect his interest beyond the 16 gandas and odd share of his which was actually sold. The sale, in so far as it was a sale of the right, title and interest of Mt. Kabutro and Jamuna Prasad Sahu, was no sale at all as they had no interest. The suit in this light was not for setting aside

the sale, but for a declaration that it could not affect the interest of the plaintiff beyond 16 gandas and odd. The contentions on behalf of the defendant before Das J were that the suit was barred by limitation under S. 45, and that it was also barred under S. 46, Public Demands Recovery Act (which corresponds to S. 47, Civil P. C.) as(?) no fraud had been alleged or established; and, thirdly, that the suit was bad under S. 42. Specific Relief Act. Das J. rejected these contentions and held that, though he had not expressely asked for it, the plaintiff could be given a decree for recovery of possession of his remaining share. Evidently he meant to apply the provisions of O. 7, R. 7, Civil P. C. He gave the plaintiff a decree accordingly.

[4] The same contentions have been pressed before us on behalf of the appellant, but in my opinion, the decision of Das J. was correct. It seems to me obvious that the decision whether S. 45 or S. 46 constituted a bar depended on the question whether there had been an actual sale and delivery of possession of the plaintiff's remaining interest. If there had not been, the suit was not for setting aside the sale, and S. 45 would have no application Similarly, if there had been no sale of that interest and no delivery of possession of that interest, the plaintiff's grievance was not against the certificate-holder, and the question was not one between the certificate-holder and the certificate-debtor, for what the plaintiff complained of was in effect that without purchasing his interest or receiving delivery of possession of his interest the defendant as a mere trespasser had taken possession of that interest under colour of his auction purchase and delivery of possession.

[5] It is, therefore, necessary to consider whether the interest in question was actually sold. In my opinion, it was not. It must be remembered that what was sold was not a specific property, but an interest—the interest of Mt. Kabutro and Jamuna Prasad Sahu. What passes at a certificate sale is merely the right, title and interest of the judgment-debtor. Those judgment-debtors had at the time no interest. Therefore, in so far as the sale purported to be a sale of the interest of those two persons, it was a sale of nothing. It could not possibly operate to convey that interest in the hands of the plaintiff. In this view neither S. 45 nor S. 46 was a bar.

[6] With regard to S. 42, Specific Relief Act, I think the suit was not bad, because the plaintiff did actully ask for the consequential relief which was appropriate to the pleadings. Maintaining that he was still in possession, he asked as a consequential relief that the defendant should be restrained from interfering with his possession. He could not ask for recovery of possession if he did not concede that he had been dispossessed. But then it is urged that a decree for recovery of possession could not be passed on the pleadings. The answer to this is to be found in O. 7, R. 7, Civil P. C. It is true it has been held that under O. 7, R. 7, a relief cannot be given which is inconsistent with the plaintiff's case and the reliefs actually asked for. But, in my opinion, the inconsistency in this case was not of a type which would bar the application of O. 7, R 7. A perusal of the judgment of the final Court of fact shows that the finding of defendant's possession was merely a finding that the defendant had got himself recorded in Register D and had realised rents from at least some of the tenants. It was not inconsistent with the plaintiff's contention that he also had been realising some rents. Therefore, the question of possession was one upon which two views were possible. It would be a question of degree whether the realisation of rents by the defendant had been on such a scale as to amount to complete dispossession of the plaintiff. This being so, the finding, having regard to its nature, is consistent with the plaintiff's case being honest and *bona fide* since the plaintiff might have honestly considered that technically he was still in possession and that a declaration and injunction was the appropriate remedy. In such circumstances it would, in my opinion, be stretching technically too far to hold that O. 7, R. 7 could not be applied, and so to deny to the plaintiff the relief to which he was actually found entitled by the Court.

[7] I would dismiss this appeal with costs.

Agarwala C. J.—I agree.

D.H. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 90 *[C. N. 27.]*

REUBEN J.

Baidya Nath Banerji — Petitioner v. *Himangsu Bala Bose and another — Opposite Party.*

Civil Revn. No. 994 of 1946, Decided on 24th September 1948, from order of Judicial Commissioner, Chota Nagpur, D/- 26th August 1946.

Civil P. C (1908), S. 47 — Suit on handnote —Attachment before judgment under O. 38—Objection by wife of defendant in her personal capacity—Objection not tried and suit decided and decree passed against defendant — Execution against wife and son of judgment-debtor after his death as his legal representatives — Wife repeating same objection — Objection rejected — Order reversed in appeal by Judicial Commissioner—Order fell under S. 47 and not under O. 21, R. 58 — Appeal and not revision lay against order of Judicial Commissioner — Civil P. C. (1908), O 21, R. 58.

In a suit upon a handnote executed by the defendant, the wife of the defendant raised an objection to the attachment before judgment under O. 38 of certain property, in her personal capacity. The Court refused to go into the question till the disposal of the suit. A decree against the husband was passed in the suit. In execution of the decree against the wife and the son of the defendant who had died after the decree, the wife raised the same objection which was rejected. But the order was reversed in appeal by the Judicial Commissioner of Chota Nagpur :

Held that the objection must be regarded as one under S. 47 and not under O. 21, R. 58, so that the appeal to the Judicial Commissioner was a competent appeal. The fact that the claim was filed originally during the pendency of the suit made no difference. Hence an appeal lay from the decision of the Judicial Commissioner to the High Court and a petition in revision was incompetent : *Case law considered.* [Paras 4, 5 and 7]

Annotation : ('44-Com.) Civil P. C., S. 47 N. 45, 46, 84; O. 21 R. 58 N. 14 and 24.

K. D. De — for Petitioner.

L. K. Choudhury — for Opposite Party.

Order. — The petitioner obtained a decree against opposite party No. 1, the wife, and opposite party No. 2, the son, of the late Upendra Nath Bose, on the foot of a handnote executed by Upendra Nath Bose. During the pendency of the suit, certain property, to which the present petition relates, was attached under the provisions of O. 38, Civil P. C. A claim to the property was set up by opposite party No. 1 in her personal capacity. The Court, however, refused to go into the matter till the disposal of the suit. The question was raised subsequently in the course of the execution of the decree in Miscellaneous Case No. 108 of 1945 in the Court of the Munsif, Giridih. The objection was rejected by the Munsif. In appeal, this order has been reversed by the Judicial Commissioner of Chota Nagpur, and the claim of opposite party No. 1 has been allowed. This petition is directed against the order of the Judicial Commissioner. The petition was filed on 28th November 1946.

[2] One day previously, the petitioner filed Miscellaneous Appeal No. 350 of 1946 against the same order. This appeal has been dismissed *in limine* as time barred, by the order of a Division Bench dated 17th March 1947. Mr. Choudhuri, on behalf of the opposite party, has, therefore, contended that the petitioner should not be allowed by way of civil revision to get a remedy, his prayer for which has already been rejected in the miscellaneous appeal. In reply, the contention of Mr. De is that the civil revision petition must be considered as distinct from the miscellaneous appeal. According to him, in this case, his relief lies rightly by way of civil revision and, therefore, he claims, he is not affected by the dismissal of his miscellaneous appeal. In these circumstances, it becomes of some importance to decide whether a civil revision or a Miscellaneous appeal properly lies in this case.

[3] Opposite party No. 1 was impleaded in the suit as the representative of her deceased husband, whereas, in the claim case, she claimed the property in her personal capacity. According to Mr. De, therefore, her claim properly fell within the provisions of O. 21, R. 58, Civil P. C., and not under S. 47. It follows that no appeal lay to the Judicial Commissioner, and his order was without jurisdiction, thus, laying itself open to this Court's power in revision. A possible answer to this argument is that, in several cases, it has been held that, where a Subordinate Court wrongly entertains an appeal when it has no jurisdiction to do so, a second appeal against that Court's order lies in this Court *Sagar Mull* v. *Hira Maharaj*, 7 P. L. T. 264: (A. I. R. (13) 1926 Pat. 164) and *Ram Ratan Prasad* v. *Banarsi Lal*, 9 Pat. 685: (A. I. R. (17) 1930 Pat. 280). As against this, my attention has been drawn to *Samhautta Singh* v. *Bhagwati Singh*, 5 P. L. J. 97: (A. I. R. (7) 1920 Pat. 703), in which Sultan Ahmed J. entertained a civil revision in such circumstances and *Champa Debi* v. *Ram Chandra Marwari*, 17 P. L. T. 815:(A. I. R. (24) 1937 Pat. 136), in which a Division Bench of this Court held that in such circumstances, the remedy is either by appeal or by civil revision. In the present case, it is not necessary to consider this point, because I think the petition must fail on another ground.

[4] This ground is that the claim of opposite party No. 1 must be regarded as one under S. 47, and not under O. 21, R. 58, so that the appeal to the Judicial Commissioner was a competent appeal. There is a long series of authorities to this effect, of which I need only mention a few:—*Punchanun Bundopadhya* v. *Rabia Bibi*, 17 Cal. 711 (F.B.), *Dinbai Hormasji* v. *Bamansha Jamasji Shet*, A. I. R. (21) 1934 Bom. 296: (58 Bom. 513), *Sm. Charusilla Dasi* v. *Sukhdev Haluai*, A. I. R. (22) 1935 Cal. 14: (154 I. C. 90); *Swaminathan Chettiar* v. *Somasundaram Chettiar* A. I. R. (25) 1938 Mad. 731 : (I. L. R (1938) Mad. 1080), *Nauratan Lal* v. *Mrs. Margaret Anne Stephen*, 3 P. L. T. 613: (A. I. R. (9) 1922 Pat. 572), *Mt. Khodaijatul Kubra* v. *Damodar Prasad*, A. I. R. (21) 1934 Pat. 188, *Imtiaz Bibi* v. *Kabia Bibi*, 51 ALL. 878: (A. I. R. (16) 1929 ALL. 602) and *Ma Shwe Mra Pru* v. *Maung Ba On*, 5 Rang. 659: (A. I. R (15) 1928 Rang 29). Mr. De relies for the contrary proposition on a decision of a Division Bench of this Court reported in *Lachmilal* v. *Firm Sriniwas Ram Kumar*, A. I. R (26) 1939 Pat. 354 (179 I. C 538), in which their Lordships followed *Kartick Chandra Ghose* v. *Ashutosh Dhara*, 39 Cal. 298 : (12 I. C. 163). The facts of *Lachhmilal's case*, (A. I. R (26) 1939 Pat. 354 : 179 I. C. 538) are somewhat difficult to

follow from the report. It seems clear, however, that there was some doubt in the case as to whether the claimant to the property was or was not the representative of the judgment-debtor, his father, for their Lordships say:

> "Here the complainant was held not to be the representative of the judgment-debtor although in the decision of the learned Judge in the Court below from which this appeal is preferred, it has been held that in the sense that the son of a deceased member of a joint family holds the property of the deceased within the meaning of S. 53, the complainant was the representative of the judgment-debtor."

and again,

> "………it seems difficult to hold that once the appellant has successfully contended that he is not the legal representative of the judgment-debtor, how can we now allow him to be heard in stating that he is the legal representative?"

The attention of their Lordships was drawn to the decision of a Full Bench of the Calcutta High Court in *Punchanun Bundopadhya* v. *Rabia Bibi*, 17 Cal. 71 (F.B.).

In distinguishing that case, they observed:

> "Had the Courts been minded or had they been forced, in the circumstances of the case, to consider whether she was the representative or not, it might have made a considerable difference."

It seems that their Lordships felt some difficulty in reconciling this decision of the Full Bench with the later decision of another Full Bench in *Kartick Chandra Ghose* v. *Ashutosh Dhara*, 39 Cal. 298: 12 I. C. 163 F.B.). In this connection, I would refer to the explanation given by Sir Asutosh Mookerjee and C. P. Beachcroft JJ. in *Ajo Keer* v. *Gorak Nath*, 20 C. L. J. 481: (A. I. R. (2) 1915 Cal. 275):

> "It is further plain from an examination of the terms of O. 21, R. 60 that while it applies to the class of cases of which *Kartick* v. *Ashutosh*, 39 Cal. 298: (12 I. C. 163) may be taken as the type it cannot by any stretch of language be made to cover the class of cases of which *Punchanun* v. *Rabia Bibi*, 17 Cal. 711 (F. B.) is the leading example. In the former class of cases the judgment-debtor objects that he is in possession as trustee and not on his own account within the meaning of O. 21, R. 60; in the latter class of cases, the representative of the judgment-debtor objects that the property in his hands is not assets available to the decree-holder. The objections in the two classes of cases are obviously of fundamentally different kinds."

Their Lordships were, therefore, of the opinion that there was no conflict between the two decisions, a view which was shared by the Bench, which decided *Lachhmilal's case*, (A. I. R. (26) 1939 Pat. 354: 179 I. C. 538)). Further in *Lachhmilal's case*, (A. I. R (26) 1939 Pat. 354: 179 I. C. 538), their Lordships did not question the correctness in *Nauratan Lal's case*, 3 P. L. T. 613: (A. I. R. (9) 1922 Pat. 572). They expressly stated that it was binding on them, but did not apply it to the case before them.

[5] The facts of *Nauratan Lal's case*, (A. I. R. (9) 1922 Pat. 572: 3 P. L. T. 613) were that a decree obtained against Mr. Stephen in 1909 was, after his death, being executed against his legal representatives, including, among others, his widow Mrs. Margaret Anne Stephen, and she claimed the property, which was being proceeded against, as belonging to her personally. Following *Punchanun Bundopadhya* v. *Rabia Bibi*, 17 Cal. 711 (F. B.), it was held that the objection was within the meaning of S. 47, Civil P. C. Mr. De has contended that the case is distinguishable from the present one on two grounds, namely, that, in this case, the decree was obtained against opposite party No. 1 and she was not merely brought in at the execution stage, and, secondly, that her claim to the property was put forward during the pendency of suit before there was any question of execution. Section 47, Civil P. C. however, relates to questions arising between "the parties to the suit ….. or their representatives". I do not think, therefore, that it can make any difference that the objection in question is filed by a person who is the judgment-debtor and not by one, who, is the judgment-debtor, having been impleaded in the suit as the legal representative of the executant of the handnote, and not by a person, who, after the decree was obtained against the executant of the handnote, was substituted as his legal representative in the course of the execution. Among the cases, which I have cited above, *Dinbai Hormasji Mirapurwala* v. *Bamansha Jamasji Shet*, (A. I. R. (21) 1934 Bom. 296: 58 Bom. 513) and *Ma Shwe Mra Pru* v. *Maung Ba On*, 5 Rang. 659: (A. I. R. (15) 1928 Rang. 29)) are cases where the objection was raised by a person against whom the decree had been obtained in a representative capacity. As regards the second point of distinction, there is a provision in O. 38, R. 8, for the investigation of claims made to the property attached before judgment. Here, the objection, with which we are concerned, was taken up and decided in the course of the execution of the decree. The order passed by the Munsif, therefore, may rightly be treated as an order under S. 47, Civil P. C. The fact that the claim was preferred originally during the pendency of the suit, in my opinion, makes no difference.

[6] The facts in *Mt. Khodaijatul Kubra* v. *Damodar Prasad*, A. I. R. (21) 1934 Pat. 188 were similar to those in *Nauratan Lal's case*, (A. I. R. (9) 1922 Pat. 572: 3 P. L. T. 613). There too, the decree was against the deceased husband of the claimant, who objected that the property sought to be proceeded against belonged to her alone. It was held by a Division Bench that the objection was within the scope of S. 47. It may be noted that Wort J. who

delivered the leading judgment in this case also did so in *Lachhmilal's case* (A. I. R. (26) 1939 Pat. 354 : 179 I. C. 538.)

[17] On the above grounds, I think that the order of the Munsif must be taken to be one under S. 47. That being so, an appeal lay to this Court against the order of the Judicial Commissioner, and this petition in revision is incompetent.

[18] The petition is dismissed with costs. The hearing fee is assessed at one gold mohur.

R.G.D. *Petition dismissed.*

A. I. R. (37) 1950 Patna 93 *[C. N. 28.]*

AGARWALA C. J. AND MEREDITH J.

Chander Sekhar Tiwari and others—Appellants v. *Ram Prasad Dubey and others— Respondents.*

Letters Patent Appeal No. 28 of 1948, Decided on 25th August 1949, from judgment of Manohar Lall J., D/- 8th April 1948.

Muhammadan Law—Pre-emption — Witnesses being same and vendor and vendee absent—Reference to performance of talab-i-mawasibat during ceremony of talab-i-ishad necessary.

It is necessary to refer, during the ceremony of *talab-i-ishad*, to the performance of the ceremony of *talab-i-mawasibat*, even when the witnesses who were present during the performance of the second ceremony were also witnesses to the performance of the first ceremony and the vendor and the vendee are absent: *Case law discussed.* [Para 2]

K. P. Upadhya and N. P. Agarwala—for Appellants.

U. N. Sinha and Aswini K. Sinha—for Respondents.

Agarwala C. J. — This is an appeal by defendants first party from the decision of a single Judge of this Court in a suit in which the plaintiffs-respondent claimed a right to pre-empt land which the defendants-second party sold to the appellants, the plaintiffs being co-sharers in that land with the vendors, the defendants-second party. The facts are that the plaintiffs performed the first ceremony necessary to enable them to exercise the right of pre-emption, namely, the *talab-i-mawasibat*, as soon as they heard of the sale to the appellants, in the presence of Bhagwat Lal, whom they examined as witness No 2, and another man, whom they examined as witness No. 3. Then, in the company of these two witnesses, the plaintiffs went to the land which was the subject matter of the sale, and it is claimed that they also performed the second ceremony necessary for exercising the right of pre-emption, namely, *talab-i-ishad.* Thereafter, they offered the appellants the amount for which the land had been sold to them, but the appellants did not accept it. The first Court derceed the suit. The appellate Court, however, held that there was a defect in the performance of the *talab-i-ishad* inasmuch as no reference was made during the performance of that ceremony to the performance of the first ceremony, namely, *talab-i-mawasibat.* The appellate Court, therefore, reversed the decision of the Munsif and dismissed the suit. In second appeal to this Court the decision of the Munsif has been restored.

[2] The question that falls for determination is whether it is necessary to refer, during the ceremoney of *talab-i-ishad*, to the performance of the ceremony of *talab-i-mawasibat*, when the witnesses who were present during the performance of the second ceremony were also witnesses to the performance of the first ceremony. There are cases directly on the point which is in issue between the parties before us, in which it has been held that a strict compliance with the requirements of the Muhammadan law is necessary in order to enable the plaintiff successfully to claim the right of pre-emption, and one of those requirements is that during the performance of the second ceremony reference must be made, in the presence of witnesses, to the performance of the first ceremony. The reason for this has been succinctly stated by Jackson J. in *Hosseinee Khanum* v. *Mt. Lallun*, (1864) W. R. (Gap. No.) 117 at p. 118:

> "When a plaintiff sues on the ground of a right such as that of pre-emption, vexatious even when most fairly exercised, and always restrictive of the rights of property, we think the Court should be fully satisfied that he has really and exactly performed the conditions essential to the maintenance of that right.
>
> We must look upon these preliminaries, not as mere matter of form, but as the immediate expressions of (perhaps) a pre-existent desire to become owner of the particular property, arising out of those circumstances of necessity or convenience which the Mahomedan law recognises as giving birth to the right.
>
> It is not, therefore, as it seems to us, merely for form's sake, but as intimately connected with the question of right, that we require proof of the tulub-i-mowasibut and of the istishad."

Similarly, in *Jadu Lal Sahu* v. *Janki Koer*, 39 I. A. 101 at p 107 : (39 Cal. 915 P. C.) their Lordships of the Privy Council cited with approval the observations of Sir Barnes Peacock, C. J. in *Fakir Rawot* v. *Sheikh Emambaksh*, Beng. L. R. Sup. Vol 35: F. B.

> " . . . . a right or custom of pre-emption is recognized as prevailing among Hindus in Behar, and somother provinces of Western India ; that in districts where its existence has not been judicially noticed, the custom will be matter to be proved ; that such custom when it exists, must be presumed to be founded on and co-extensive with the Mahomedan law upon that subject, unless the contrary be shown ; that the Court may, as between Hindus, administers modification of that law as to the circumstances under which the right may be claimed, when it is shown that the custom in that respect does not go the whole length of the Mahomedan law of pre-emption, but that the assertion of the right by suit must always be preceded by an obser-

> vance of the preliminary forms prescribed in the Mahomedan law, which forms appear to have been invariably observed and insisted on through the whole of the cases from the earliest times of which we have record."

In the face of these observations, it is difficult to find any justification for the arguments that have been advanced before us that one of the preliminary requirements of the Muhammadan law of pre-emption is not necessary in cases where the witnesses to the ceremony of *talab-i-ishad* are the persons who were witnesses to the ceremony of *mawasibat* also. Exactly the contrary to this proposition was held in *Mubarak Husain* v. *Kaniz Bano*, 27 ALL. 160: (1 A. L. J. 569) the head-note of which is:

> "When, in asserting a claim for pre-emption under the Muhammadan law, the making of the talab-i-istishhad, is required, it is absolutely necessary that at the time of making this demand reference should be made to the fact of the talab-i-mawasibat having been previously made, and this necessity is not removed by the fact that the witnesses to both demands are the same."

On behalf of the appellants, however, the learned counsel refers to an observation made in the course of the judgment:

> "We can well understand why the law in this respect should be so strict. The second demand is not made for the information of the witnesses, but for the information of the vendee or vendor, to whom it happens to be made. If the witnesses to both the immediate and the second demands be the same, it naturally does seem unnecessary to repeat the same thing to them; but then at the second demand not only may the same witnesses be present, but also a third party, namely, the vendee or vendor must be present, and it is for his information that at the second demand reference is required to be made to the fact that the first and immediate demand has been made."

On the strength of this observation, it is contended that when neither the vendor nor the vendee is present and the witnesses at the second ceremony are the same persons who witnessed the first ceremony, it is unnecessary to refer to the performance of the *talab-i mawasibat*. That does not seem to me to be the intention of the learned Judge who made that observation. In fact the Allahabad High Court, in a later decision, has again affirmed the necessity of a reference to the making of the first demand before the performance of the second ceremony even when the witnesses are the same: *Sadiq Ali* v. *Abdul Baqui Khan*, A. I. R. (10) 1923 ALL. 251: (45 ALL. 290). The same view was taken by a Full Bench of the Calcutta High Court in *Rujjub Ali* v. *Chundi Churn Bhadra*, 17 Cal. 543 (F. B.) where reference was made to Baillie's Digest of Mahomedan law, Hamilton's Hedaya and Macnaghten's Precedents. This case is important because what led to a reference being made to the Full Bench was that, when the case came before the Division Bench consisting of Petheram C. J. and Gordon J., they held that in a previous decision of the Court in *Nundo Pershad Thakur* v. *Gopal Thakur*, 10 Cal. 1008 it had been held that when a person seeking pre-emption had performed the *talab-i-mawasibat* in the presence of witnesses, and as soon as possible demanded the right from the vendors and the purchasers in the presence of the same witnesses, it was unnecessary that he should again state, when making his demand, that he had declared his right as soon as he heard of the sale, or, in the words of the judgment,

> "that it was unnecessary for him to go through the form of reminding the witnesses that he had claimed his right as soon as he heard of the sale."

This decision was in conflict with another decision of the Calcutta High Court: *Jadunandan Singh* v. *Dulput Singh*, 10 Cal. 581. The matter was referred to a Full Bench, and the Full Bench expressly overruled, *Nundo Pershad* v. *Gopal Thakur*, 10 Cal. 1008. The case eventually went to the Privy Council, where the decision of the Full Bench was upheld, *Jadulal Sahu* v. *Janki Koer*, 39 I. A. 101 : (39 Cal. 915 P. C.). In this Court we have not been referred to any case directly on the point, but there have been cases in this Court in which the necessity of referring to the first demand having been made during the performance of the second ceremony has been affirmed, *Kheyali Prasad* v. *Mullick Nazarul Alum*, 1 P. L. J. 174 at p. 178 : (A. I. R. (3) 1916 Pat. 364), *Sarjug Singh* v. *Jagmohan Singh*, 51 I. C. 40 at p. 41 : (A. I. R. (6) 1919 Pat. 496) and *Medni Proshad* v. *Suresh Chandra*, 21 Pat. 799 at p. 808 : (A. I. R. (30) 1943 Pat. 96).—In the last mentioned case Chatterji J. said : "But it is well settled that such reference to the first demand is absolutely necessary." In these circumstances I can find no justification for accepting the suggestion that reference to the first demand may be dispensed with when the witnesses to the second demand were present when the first demand was made and the vendor and the vendee are absent. I would, therefore, allow this appeal with costs throughout, set aside the judgment of the learned Judge of this Court and restore the judgment of the lower appellate Court.

[3] **Meredith J.**—I agree. The Muhammedan law of pre-emption is a law of technicality, and the existence of the right depends upon the full and complete observance of the formalities. It is a ritual. If the ritual be defective, the *Djinn* will not emerge from his bottle : Unless the words are "open sesame" the door will not open. If the ceremonies are in any way incomplete or erroneous, the right of *shaffa* does not take form, but remains unsubstantial. It is right that it should be so, because the doctrine involves an interference with one of the funda-

mental human rights, the right of freedom of contract. The Hedaya says:

> "The existence of the right of *shaffa* is repugnant to analogy, as it involves the taking possession of another's property contrary to his inclination; whence it must be confined solely to those to whom it is expressly granted by the law."

My Lord the Chief Justice has quoted the observations of Sir Barnes Peacock in a case of 1863, cited with approval by the Privy Council in *Jadu Lal Sahu* v. *Janki Koer*, 39 I. A. 101 : (39 Cal. 915 P. C.). To the passage quoted by the Privy Council, Sir Barnes Peacock added :

> "In this requirement (as to the preliminary forms) we see no evil inasmuch as a right of pre-emption, undoubtedly, tends to restrict the free sale and purchase of properties, and it is desirable, therefore, to encompass it with certain rules and limits lest the right should be exercised vexatiously."

Again, the Hedaya says :

> "The right of *shaffa* is but a feeble right, as it is disseizing another of his property merely in order to prevent the apprehended inconveniences."

So, the general tendency of the Courts, in the interest of free alienations and free contracts, has been to restrict the right within the narrowest limits and to insist upon the most literal fulfilment of the formal requirements of the *Shariat*. This was clearly laid down in the case of, *Mt. Hosseinee Khanum* v. *Mt. Lallun*, (1864) W. R. (Gap. No.) 117, in the passage quoted by my Lord the Chief Justice. It is certain that the preliminaries cannot be looked upon as merely matters of form.

[4] In performing the *talab-i-isshad* it is necessary to refer expressly to the fact of the *talab-i-mawasibat* having been duly made, as is clear from the Hedaya itself and from Baillie's Digest. The form given in the Hedaya is "I have already claimed my privilege of *shaffa*, and now again claim it; be therefore witness thereof."

[5] The contrary was held in the case of *Nundo Pershad Thakur* v. *Gopal Thakur*, 10 Cal. 1008 by the Calcutta High Court. But, as my Lord the Chief Justice has pointed out, this decision was expressly overruled by the Full Bench in *Rujjub Ali Chopedar* v. *Chundi Churn Bhadra*, 17 Cal. 543 (F. B.) and that Full Bench decision has been followed by the Allahabad High Court in *Akbar Husain* v. *Abdul Jalil*, 16 ALL. 383 : (1894 A. W. N. 122) *Abbasi Begam* v. *Afzal Husen*, 20 ALL. 457 : (1898 A. W. N. 112), *Abid Husen* v. *Bashir Ahmad*, 20 ALL. 499 : (1898 A. W. N. 132), *Mubarak Husain* v. *Kaniz Bano*, 27 ALL. 160: (1 A. L. J. 569) and *Sadiq Ali* v. *Abdul Baqi Khan*, A. I. R. (10) 1923 ALL. 251 : (45 ALL. 290). Yet it is merely upon an observation made in an Allahabad decision that the respondents seek to rely. The view taken in *Nundo Pershad Thakur* v. *Gopal Thakur*, 10 Cal. 1008 was that the requirements might be dispensed with when the pre-emptor had made his first assertion before competent witnesses and had then repeated it after a very short interval in the presence of those same witnesses. It seemed to those learned Judges unnecessary that the plaintiff should go through the empty form of reminding those witnesses of what they had just heard. The same feature was present, however, in the case that came before the Calcutta Full Bench, but it was held that the authorities were clear and must be strictly followed.

[6] The view taken in some Allahabad cases that the object of the second ceremony is merely to inform the vendor or purchaser of the performance of the first ceremony, and the consequent suggestion (which has not been made in the Allahabad decisions) that the reference is unnecessary in the absence of the vendor and vendee, cannot be accepted, since the ceremony can be validly performed on the premises in the absence of both. Its object is to call attention, in the presence of witnesses, to the performance of the first ceremony, and so to impress the fact upon their minds for the purpose of future evidence. The theory that the formality is unnecessary when its object is already served by the prior knowledge of the witnesses represents, in my opinion, a wrong line of approach to the problem, when formality is of the essence of the doctrine and the emergence of the right is dependent upon the correct performance of the ritual.

D.H. *Appeal allowed.*

A. I. R. (37) 1950 Patna 95 *[C. N. 29.]*

DAS AND NARAYAN JJ.

Province of Bihar—Appellant v. *Chhedilal Sharma—Respondent.*

Government Appeal No. 7 of 1948, Decided on 8th September 1948, from decision of Magistrate 1st Class, Bhagalpur, D/- 3rd February 1948.

(a) Cotton Cloth and Yarn (Control) Order (1945), Para. 18 (2)—Accused taking stocks of yarn to railway station — Accused not holding stocks which were held by his master—Para held did not apply.

Where the accused, who was found taking stocks of yarn to the railway station, did not hold the stocks, but was merely a servant who was carrying out the order of his master, who was holding the stocks, in taking yarn from the latter's shop to the railway station :

Held that para. 18 (2) had no application to the case of the accused. [Para 2]

(b) Cotton Cloth and Yarn (Control) Order (1945), Para 23 — Order sanctioning prosecution—Order signed by Under-Secretary for Additional Under-Secretary—Order held was defective—Bihar Government Notification No. 2094-A, dated 1st May 1947, R. 1.

Where the order sanctioning the prosecution of the accused purported to be an order of Governor of Bihar, but the Under-Secretary who signed the order did not purport to sign it in his capacity as Under Secretary but signed "for the Additional Under Secretary":

Held, that such signature was not proper authentication of the order as laid down in R. 1 of the Notification and, therefore, the order sanctioning the prosecution of the accused was defective. [Para 3]

S. K. Mitra — for Appellant.

S. Safdar Imam and S. R. Ghosal—for Respondent.

Das J.—This is an appeal by the Provincial Government against an order of the learned Magistrate exercising 1st class powers at Bhagalpur dated 3rd February 1948, by which the learned Magistrate has acquitted one Chhedilal Sharma in the following circumstances. On 22nd December 1946, Mr. B. N. Das, a Cloth Inspector and one Muhammad Moniruddin Ansari, Secretary of the Weavers' Association, were going on a *tamtam* from Bhagalpur to Nathnagar. At about 3-30 P.M., they noticed another *tamtam* coming from the direction of Nathnagar and going towards Bhagalpur Railway Station. On this latter *tamtam* were the respondent, Chhedilal Sharma, and some bundles — two big bundles and seven small bundles. The Cloth Inspector was suspicious of the contents of the bundles, and he stopped the *tamtam* and enquired of the respondent as to the contents of the bundles. The respondent said that the bundles contained handloom cloth. This did not allay the suspicion of the Cloth Inspector who opened one of the bundles and found that it contained cotton yarn. The respondent further stated that the bundles belonged to one Lakhi Prasad Budhia, proprietor of the Agarwal Silk Stores, and the respondent was taking them to Bhagalpur Railway Station under the orders of Lakhi Prasad Budhia for the purpose of despatching them to Patna. The respondent along with the bundles was taken to the Sub-Divisional Officer. In his presence all the bundles were opened. It was found that they contained cotton yarn. The Cloth Inspector then submitted a written report to the Sub-Divisional Officer, and, on receipt of sanction from the Provincial Government for the prosecution of the respondent, the learned Sub-Divisional Magistrate took cognizance on the report of the Cloth Inspector. Thereafter the respondent was put on trial, and was acquitted by the learned Magistrate exercising 1st class powers at Bhagalpur. The learned Magistrate found that the statement of the respondent that the bundles belonged to Lakhi Prasad Budhia was true, and that, therefore, the respondent was not liable for the offence with which he was charged. I may here state that the respondent was charged with committing an act in contravention of para. 18 (2), Cotton Cloth and Yarn (Control) Order, 1945 (hereinafter to be referred to as the Control Order, 1945). The relevant paragraph of the Control Order, 1945, reads as follows:

> "No dealer or other person, not being a manufacturer, shall, save with the permission of the Textile Commissioner, at any time hold stocks of cloth or yarn in excess of his normal requirements."

The Control Order, 1945, was made in exercise of the powers conferred by sub-r. (2) of R. 81, Defence of India Rules. The Defence of India Rules ceased to have any effect after 30th September 1946, but the orders made under the Defence of India Rules were kept alive by the provisions of the Essential Supplies (Temporary Powers) Ordinance, 1946. Therefore, on the relevant dated the Control Order, 1945, was in effective force by virtue of the provisions contained in the Ordinance referred to above. This point is not in dispute before us, and need not be examined in any greater detail. Therefore, the gravamen of the charge against the respondent was that he held stocks of yarn in excess of his normal requirements. The defence of the respondent was that he did not hold the stocks of yarn, but was merely a servant who was carrying out the orders of his master in taking the yarn from the shop to the Railway Station. The learned Magistrate accepted the defence of the respondent, and held that in the circumstances of the present case it could not be said that the respondent was holding stocks of yarn in excess of his normal requirements.

[2] The learned Government Advocate appearing for the Crown has contended before us that the learned Magistrate took an erroneous view of para. 18 (2) of the Control Order, 1945. He contends that the respondent was found in possession of the yarn in question, and it was for the respondent to prove that the yarn belonged to somebody else, and not to him. Assuming that the burden of proof was on the respondent, though I am not sure that the burden was really on the respondent, the learned Magistrate has referred to the evidence in the record which shows beyond any doubt that the yarn in question did not belong to the respondent. As soon as the respondent was questioned about the contents of the bundles, he said that they belonged to Lakhi Prasad Budhia. The driver of the *tamtam* on which the bundles were being carried was examined in the case. He also made a statement to the Cloth Inspector. That statement is Ex. 3 in the record. From that statement also, it appears that the bundles in question were loaded on the *tamtam* at the shop of Lakhi Prasad Budhia. This circumstance fits in with the statement of the respondent that the

yarn in question did not belong to him. The Cloth Inspector had given evidence to the effect that he examined the books of the shop of Lakhi Prasad Budhia and did not find any entry of the yarn in question in those books. The absence of any entry in the books of the shop of Lakhi Prasad Budhia does not necessarily discredit the statement of the respondent. If a shopkeeper is engaged in dealing in yarn in contravention of the conditions of his license, he will naturally not enter the yarn in his books. In my opinion the learned Magistrate was right in his appreciation of the evidence and correctly came to the finding that the statement of the respondent that the yarn did not belong to him was true. If that finding is correct, then the learned Magistrate was right in his conclusion that para. 18 (2) of the Control Order, 1945, would have no application in the case of the respondent. The respondent was not holding the stocks of yarn. It was the owner of the yarn who was holding the stocks. The respondent was merely taking the yarn to the station under the orders of the owner.

[3] Learned counsel for the respondent has drawn our attention to another defect in the case. Paragraph 23 of the Control Order, 1945, lays down that no prosecution for the contravention of any of the provisions of the Order shall be instituted without the previous sanction of the Provincial Government or of such officer of the Provincial Government not below the rank of District Magistrate, as the Provincial Government may by general or special order in writing authorise in that behalf. The order sanctioning the prosecution of the respondent in the present case purports to be an order of the Governor of Bihar, but is signed by somebody "for the Additional Under Secretary to Government." Learned counsel for the respondent has drawn our attention to Notification No. 2094A, dated 1st May 1937, by which certain rules made by the Governor of Bihar in exercise of the powers conferred by sub-s. (2) of s. 59, Government of India Act, 1935, were published. The first rule states that all orders or instruments made or executed by order or on behalf of the Government of Bihar shall be expressed to be made by, or by order of the Governor of Bihar. The second rule states that, save in cases where an officer has been specially empowered to sign an order or instrument of the Government of Bihar, every such order or instrument shall be signed by either the Secretary, the Additional Secretary, the Joint Secretary, the Deputy Secretary, the Under Secretary or the Assistant Secretary to the Government of Bihar, and such signature shall be deemed to be the proper authentication of such order or instrument. There is no mention of an "Additional Under Secretary" in the rule in question. The learned Government Advocate was not in a position to state before us if any amendment has been made in the rule since 1937 so as to authorise an Additional Under Secretary to authenticate an order of the Governor of Bihar. Apart from that, however, the order is not even signed by the Additional Under Secretary. It is signed by some officer "for the Additional Under Secretary." I have examined the original order which bears the signature of Mr. M. B. Mukharji. It has been suggested before us that Mr. M. B. Mukharji was the Under Secretary, and was competent to authenticate the order. We do not, however, know whether Mr. M. B. Mukharji was Under Secretary at the time when the order was signed. Assuming, however, that he was Under Secretary at the time, he does not purport to sign the order in his capacity as Under Secretary. He signs "for the Additional Under Secretary." Such signature is not, in my opinion, proper authentication of the order as laid down in the rule referred to above. The order sanctioning the prosecution of the respondent is thus defective.

[4] For the reasons given above I am of the view that there are no grounds for interference with the order of acquittal passed in this case. In the result the appeal fails and is dismissed.

Narayan J.—I agree.

V.R.B. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 97 *[C. N. 30.]*

FULL BENCH

AGARWALA C. J., MEREDITH AND NARAYAN JJ.

Kamakshya Narain Singh Bahadur — Appellant v. *Baldeo Sahai and others — Respondents.*

A. F. O. D. No. 85 of 1943, Decided on 10th March 1948, from decision of Addl. Sub-Judge, Hazaribagh, D/-27th February 1943.

Civil P. C. (1908), S. 11 and O. 32, R. 3—Decree against minor—Suit by minor on attaining majority to set aside decree on ground of gross negligence on part of gurdian-ad-litem — Fraud or collusion not proved — Suit is maintainable — Evidence Act (1872), S. 44.

Per *Agarwala C. J., and Meredith J., Narayan J., contra*—A minor can avoid on attaining majority a decree passed against him during minority on the ground of gross negligence on the part of his guardian-ad-litem or next friend by bringing a subsequent suit even if he has not succeeded in proving fraud or collusion on the part of such guardian-ad-litem or next friend: A.I.R. (35) 1948 Pat. 300 and (1944) Civil Revn. No. 749 of 1943 (Pat), *Not foll.*; A. I. R. (26) 1939 Bom. 66 (F. B), *Dissent.*; A. I. R. (24) 1937 P. C. 1, *Considered*; *English and Indian case law and text books considered.* [Paras 63, 66]

Per *Narayan J.* — A minor if he is properly represented in a suit is bound by the decision arrived at therein just as an adult is, and this is the combined effect of S 11 and O. 32, Civil P. C.

A minor seeking to avoid the provisions of S. 11, Civil P. C., can only do so by taking advantage of S. 44, Evidence Act.

The principle of S. 44, Evidence Act, cannot be extended to cases of gross negligence.

The point should not be decided on the basis of English cases, firstly, because in England there is a statute which gives protection to infants and, secondly, because in India we have stereotyped and statutory rules for making effective decrees against minors. [Para 74]

Annotation : (44-Com.) Civil P. C., S. 11, N. 69; O. 32, R. 3, N. 12, 13; (46-Man.) Evidence Act, S. 44, N. 4 and 5.

L. K. Jha and S. P. Singh—for Appellant.

B. C. De, K. D. De and A. N. Chatterji —for Respondents.

Meredith J.— The question which has been referred to this Full Bench is:

> "Can a minor avoid a decree passed against him on the ground of gross negligence on the part of his guardian-ad-litem by bringing a subsequent suit even if he has not succeeded in proving fraud or collusion on the part of such guardian."

[2] I understand that the case in which this reference has been made was one of alleged negligence on the part of the minor plaintiff's next friend, and I presume, therefore, that an answer is required both as regards a person who alleges gross negligence on the part of his next friend when he was a minor plaintiff and as regards a person who alleges gross negligence on the part of his guardian-ad-litem when he was a minor defendant.

[3] In a recent case decided by Agarwala C. J. and myself (Second Appeal No. 7 of 1946 decided on 4th January 1948) I said:

> "It may be taken as well settled, so far as this Court is concerned, that the minor can avoid the decree if he was not effectively represented in the suit, and where there is gross negligence on the part of the guardian he cannot be said to have been effectively represented."

Having regard to the fact that learned counsel have been arguing before us on this question for the best part of three days, this statement must be characterized as somewhat optimistic. Nevertheless I do not think it is incorrect to say that until recently the question was regarded as settled in this Court

[4] In *Ganganand Singh* v *Rameshwar Singh*, 6 Pat 388 : (A. I. R. (14) 1927 Pat. 271), decided in 1927, Das and Adami JJ. held that even where a minor is represented by a gurdian-ad-litem not disqualified from so acting, he can in a subsequent suit impeach the decree passed in the previous suit on the ground that there was gross negligence on the part of the guardian.

[5] In 1934 Fazl Ali and James J. in *Kali Charan Singh* v. *Hirdai Narain*, A. I. R. (22) 1935 Pat. 24; (154 I. C. 948), observed:

> "It is now well settled that gross negligence, which may be interpreted as culpable neglect of the interest of a minor defendant on the part of his guardian-ad-litem, will entitle the minor to the avoidance of proceedings undertaken against him."

[6] In 1935, in *Mathura Singh* v. *Rama Rudra Prasad Sinha*, 14 Pat. 824 : (A. I. R. (23) 1936 Pat. 231), Khaja Mohamad Noor and Dhavle JJ. held that a minor can avoid a decree passed against him on account of the gross negligence of his guardian. Gross negligence, they held, amounts to fraud and affects the proper representation of the minor and thus takes away the jurisdiction of the Court to pass a decree.

[7] In 1944, in *Madhusudan* v. *Jogindra*, 23 Pat. 640 : (A. I. R. (32) 1945 Pat. 133). Fazl Ali C. J., and Manohar Lall J. held that where a minor is properly a party to a suit, that is to say, is represented by a guardian not disqualified from acting, the jurisdiction of the Court to try and determine the cause as against the minor is complete and cannot be ousted on proof that the Court did not follow the proper procedure for the appointment of the guardian. Where, however, the minor suffers, the matter is different, and at his instance a decree against him in such action may be set aside.

[8] Up to 1947 there was, so far as I am aware, no reported case of this High Court in which a contrary view was taken. There was, however, in 1944 a case decided by Fazl Ali C. J. and Reuben J. (unreported); First Appeal No. 163 of 1941, in which Reuben J. in the course of the judgment referred to the remarks of Lord Thankerton in *T. Venkata Seshayya* v. *T. Kotiswara Rao*, 64 I. A. 17 : (A. I. R. (24) 1937 P. C. 1), and then said:

> "Here all that is alleged against the guardian-ad-litem is gross negligence. This is obviously insufficient to entitle the appellant to claim the protection of S. 44, Evidence Act."

Gross negligence had been alleged, but it was held that the decision in the previous suit operated as *res judicata* nevertheless.

[9] During the year 1947, the question came before Benches of this Court in two cases. The first, *Kamakshya Narain Singh* v. *Fateh Kumar*, 26 Pat. 220: (A. I. R. (35) 1948 Pat. 300), was before Manohar Lall and Bennett JJ. In the course of the judgment Bennett J. remarked that there were apparently conflicting decisions of this Court, and it was desirable that the point, when it again came before the Court, should be referred to a Full Bench for decision. He said:

> "Prior to the decision of the Privy Council in *Venkata Sheshayya* v. *Kotiswara Rao*, 64 I. A. 17 : (A. I. R. (24) 1937 P. C. 1), there was a consistent jurisprudence of this Court that gross negligence on the part of the gurdian-ad-litem will entitle the minor to the avoidance of proceedings decided against him . . ."

Following this decision of their Lordships of the Privy Council, there have been two unreported decisions of Division Benches of this Court in First Appeal No. 168 of 1937 and First Appeal No. 163 of 1941 which are directly contradictory to the earlier jurisprudence of this Court. This is a matter of considerable public importance, because, if a minor is not protected against the negligent acts of his guardian, the door is left wide open to undetectable fraud and grave injustice as a result of which minor children would be completely deprived of their inheritance. I do not understand the reservation of their Lordships of the Privy Council in the abovementioned case in any way to reflect upon the principles established by the earlier cases protecting minors from the negligent conduct of a former litigation by their guardians-ad-litem except in so far as those cases purport to extend the provisions of S. 44, Evidence Act, beyond the scope limited by the plain and obvious meaning of the words therein used, and it may well be that the principles protecting a minor from the negligent conduct of a former litigation by his guardian-ad-litem are to be founded not upon or by extension of, or by way of analogy to S. 44, Evidence Act, but upon the proposition that the minor can only properly be considered to have been a party to the former litigation in so far as he was properly represented therein by his guardian-ad-litem, and that when the guardian-ad-litem neglects a plain duty, the minor cannot be said to have been properly represented. Order 32, Civil P. C., contains no express provision to the effect that where a guardian ad-litem of a minor is properly appointed thereunder to represent a minor the minor shall be bound by the decision in the litigation as if he had been a party thereto, and it may well be, therefore, that that question has been left open to be decided upon the facts of each particular case in accordance with the principles of justice, equity and good conscience.

[10] The two unreported cases referred to were appended in the report as notes to this judgment. That of 1944, Fazl Ali C. J. and Reuben J., I have already referred to. The other was a case of 1941 before Manohar Lall and Chatterji JJ. In the course of the judgment Chatterji J. referred to *Venkata Seshayya* v. *Kotiswara Rao*, 64 I. A. 17 : (A. I. R. (24) 1937 P. C. 1) and the Bombay Full Bench decision, *Krishnadas Padmanabhrao* v. *Vithoba Annappa Shetti*, I. L. R. (1939) Bom. 340 : (A. I. R. (26) 1939 Bom. 66 F. B.), and said:

> "Assuming . . . . . that the guardian was guilty of gross negligence, it cannot, in view of the aforesaid decisions, justify the setting aside of the decree."

There was no reference in either of the cases to the view expressed in the previous Patna cases which had hitherto prevailed.

[11] In 1944 there was another unreported case, Civil Revision No. 749 of 1943, disposed of by Manohar Lall and Beevor, JJ. who made an observation:

> "Now in face of the Privy Council decision in *Venkata Seshayya* v. *Kotiswara Rao*, 64 I. A. 17 : (A. I. R. (24) 1937 P. C. 1), it appears that mere negligence of the guardian-ad-litem would give the present opposite party No. 1 no cause of action."

There was, however, no discussion of the question.

[12] The other case of 1947 to which I referred, *Ramudar Singh* v. *Ramsurat Singh*, 26 Pat. 362 : (A. I. R. (35) 1948 Pat. 281), was a decision of Bennett and Beevor JJ. In that case Bennett J. made observations to the same effect as those I have already quoted. He said:

> "A minor is not bound by any proceedings taken against him during his minority unless he was a party thereto. Whether a minor was or was not a party to any such proceedings depends, in my opinion, upon whether or not he was effectively represented therein."

He said that there was nothing in O. 32 to indicate that provided that the letter of the order is followed, the minor will be bound by the decision, although in fact he was never effectively represented in the proceedings. "Nor", said the learned Judge,

> "in my opinion, can such an intention, which is against the dictates of justice, equity and good conscience, in that it would open the door to undetectable fraud whereby many minors would be deprived of their rights and inheritance, be attributed to the Legislature. When, therefore, any question arises as to whether a person is bound by any decree or order of a civil Court passed during his minority, the proper and only test, in my opinion, is whether he was so effectively represented in the proceedings . . . as in justice, equity and good conscience to justify, in the circumstances of the particular case, the conclusion that he was in fact a party to these proceedings."

[13] It is apparent that the reopening of the question in this Court was due to the observations in *Venkata Seshayya* v. *Kotiswara Rao*, 64 I. A. 17 : (A. I. R. (24) 1937 P. C. 1), and to the Bombay Full Bench case. Before, however, I proceed to examine those observations and that case, it will be well to indicate the position in the other High Courts of this country. The first Calcutta case of importance is *Raghubar Dyal* v. *Bhikya Lal*, 12 Cal. 69. In the year 1855, Field and O Kinealy, JJ., after examining some English cases, held that while a minor had a remedy against gross negligence of his next friend or guardian-ad-litem it was by way of application for review and not by subsequent suit.

[14] In 1894 came the leading case, so far as Calcutta is concerned. In *Lalla Sheo Churn Lal* v. *Ramnandan Dobey*, 22 Cal. 8, Trevelyan and Ameer Ali JJ. held that a minor is entitled to reopen the matter by a fresh suit where he can show gross negligence on the part of his next

friend in the previous suit. The English rule of law on this point, said the learned Judges, being the law of equity and good conscience could be applied by the Court to the case in the absence of any statutory provision. It is perhaps worth noting that Trevelyan J. was the author of a well-known work "The Law Relating to Minors in British India", while, as is well known, Ameer Ali J. subsequently became a member of the Privy Council.

[15] Ever since *Sheo Churn Lal* v. *Ramnandan*, 22 Cal. 8, Calcutta opinion has been consistent and in accordance therewith, and one may skip over nearly 50 years to a case in 1941. In *Mahesh Chandra* v. *Manindra Nath*, 45 C. W. N. 508 : (A. I. R. (28) 1941 Cal. 401), Mukherjee J. held that gross and culpable negligence on the part of the guardian ad-litem of the minor resulting in serious loss of rights is a sufficient ground to enable a minor to set aside the decree obtained against him. Fraud and collusion of the guardian are not the only grounds. It was observed that S. 44, Evidence Act, could not destroy the minor's right which exists independently of the Evidence Act. *Venkata Seshayya* v. *Kotiswara Rao*, 64 I. A. 17 : (A. I. R. (24) 1937 P. C. 1), was relied on in support of the view taken.

[16] I now turn to Madras. Going back to 1921, in *C. Punnayyah* v. *Rajam Viranna*, 45 Mad. 425 : (A.I.R. (9) 1922 Mad. 273), Spencer and Ramesam JJ. held that a person who had been impleaded as a minor defendant represented by a guardian-ad-litem in a suit in which a decree was passed *ex parte* against him can institute a suit to set aside the decree on the ground of gross negligence, apart from fraud or collusion of the guardian-ad-litem in not defending the suit properly on his behalf.

[17] In *Subbaratnam Chettiar* v. *G. Vidya Sankar*, A. I. R. (24) 1937 Mad. 472 : (169 I. C. 694), Varadachariar J. held that a minor can have a decree set aside not only on the ground of fraud, but also on the ground of gross negligence on the part of his guardian. The learned Judge said that on general principles the Patna High Court had taken the same view as the Madras Court.

[18] In 1942 in *Egappa Chettiar* v. *Ramanathan Chettiar*, A.I.R. (29) 1942 Mad. 384:(I. L. R. (1942) Mad. 526), Leach C. J. and Kuppuswami Aiyer J. held that it is open to a minor to challenge a decree passed against him on the ground that his guardian had been grossly negligent in the conduct of the suit in which the decree was passed against him. In this case the decisions of the other High Courts were reviewed, and the effect of *Venkata Seshayya* v. *Kotiswararao*, 64 I. A. 17 : (A. I. R. (24) 1937 P. C. 1), was also considered.

[19] Next the Allahabad High Court. The matter came before a Full Bench in *Siraj Fatma* v. *Mahmud Ali*, 54 ALL. 646 : (A. I. R. (19) 1932 ALL. 293 F. B.), in the year 1932. Sulaiman and Sen JJ. held that a suit was maintainable based upon gross or culpable negligence on the part of the guardian in the absence of fraud or collusion. Boys J. dissented, holding that

> "to allow evidence of negligence on the part of a guardian for the purpose of destroying the effect of a decree will be to act upon a rule of evidence not embodied in the Evidence Act or any statute or regulation, and which is, therefore, prohibited by S. 2, Evidence Act. S. 44 of that Act made an exception to the operation of S. 11, Civil P. C., but no such exception was made in favour of negligence of the guardian-ad-litem. It was an undue straining of language to say that because a duly appointed guardian-ad-litem was negligent the minor was not properly represented."

He thought that the bar of *res judicata* could not be overcome. The view of the other Judges was that S. 44 was permissive, not prohibitive, and the Evidence Act, being an adjective law, could not take away a substantive right existing independently of the Evidence Act.

[20] In 1940 Bennett and Verma JJ. in *Dwarika Halwai* v. *Sital Prasad*, I. L. R. (1940) ALL. 344:(A.I.R. (27) 1940 ALL. 256), again applied the principle that where a minor has not been properly represented in the suit, he is not a party to the suit in the proper sense of the term, and a suit by him to set aside the decree and sale and execution of that decree on the score of gross negligence of his guardian is not barred.

[21] As recently as 1946, there was a Full Bench decision of the Lahore High Court in *Iftikhar Hussain Khan* v. *Beant Singh*, I. L. R. (1946) 27 Lah. 515 : (A. I. R. (33) 1946) Lah. 233 F. B.), Abdul Rashid, Ram Lall and Mehr Chand Mahajan JJ. in agreement held, after consideration of all the authorities, that a minor can avoid a decree passed against him on the ground of gross negligence of his guardian-ad-litem even if he has not succeeded in proving fraud or collusion on the part of such guardian. The view of the Bombay Full Bench was examined, and dissented from, as also that of Boys J. in his dissenting judgment in the Allahabad High Court. It was remarked, I may note, that the Patna High Court had uniformly taken the view that it was open to a minor on attaining majority to avoid a decree obtained against him on account of the gross negligence of his guardian. The decision was based on a substantive right of the minor based on justice, equity and good conscience which, they said, was taken from the English law. They held that under the English law a minor possesses the right, though the

usual practice was to allow a review in cases of negligence, and a separate action where fraud or collusion was alleged. In Indi might be difficult for the Court to be moved by way of review in view of the observations of their Lordships of the Privy Council in *Chajju Ram* v. *Neki*, 3 Lah. 127 : (A. I. R. (9) 1922 P. C. 112). There seemed, therefore, no reason why the minor should not enforce his substantive rights by means of a separate suit, and this could not be taken away either by S. 11, Civil P. C., or S. 44, Evidence Act. Finally, they said :

> "The result of a review of all the available authorities is that with the exception of the Bombay Court it has been laid down by all the High Courts in India that a minor can avoid a decree passed against him on the ground of gross negligence on the part of his guardian-ad-litem."

Having regard to the review of the authorities which I have made, that observation seems to me substantially correct. The question must be taken to be settled so far as the Calcutta, Madras, Allahabad and the Lahore High Courts are concerned, while in Patna it has only recently become unsettled. The view of Oudh Chief Court seems to be similar (see *Mohammad Baksh* v. *Allah Din*, A.I.R. (29) 1942 Oudh 33: (17 Luck. 1).

[22] There is no direct Privy Council authority on the point, so far as India is concerned, but there is an old Privy Council decision in a case on appeal from the Cape of Good Hope (*Orphan Board* v. *Van Reenen* (1829) 1 Knapp 84) in which Lord Wynford said:

> "If His Majesty were to dismiss this appeal on account of the neglect of their guardians to bring it to a decision, when the infants attain their full ages they would have a right to revive it. Infants are not to be prejudiced by the negligence of their guardians. On the contrary, according to the Civil law, as laid down in the Digest, lib, 4, tit. 1, 1.8 'Minors, although defended by their guardians or curators, may afterwards, on their causes being heard, be released from judgments pronounded against them."

[23] So far as India is concerned, there are cases where the Privy Council has reviewed its judgment in favour of minors whose guardians had been guilty of gross negligence, see *Rajunder Narain Rae* v. *Bijai Govind Singh*, 2 M. I. A. 181 : (1 Moo. P. C. 117), *Birjobuttee* v. *Pertaub Singh*, 8 M. I. A. 160 : (13 Moo. P. C. 465 P. C.) though no doubt in the latter case there were other considerations also.

[24] In *Ram Autar* v. *Raja Muhammade Mumtaz Ali Khan*, 24 I. A. 107: (24 Cal. 853 P. C.), in a suit for cancellation of an order made by the settlement Court, it appeared that the order had been obtained on an admission by the infant's guardian (the Court of Wards), which ought not to have been made, and it was held that the order was not binding on the infant.

[25] *Mt. Rashid-un-Nisa* v. *Muhammad Ismail Khan*, 36 I. A. 168: (31 ALL. 572 P.C.) bears on the question of proper representation. This was a suit by a minor for a declaration that two decrees and execution sales resulting therefrom were invalid against her as she had not been properly represented in the proceedings. She had in fact been represented by a disqualified person, and the Privy Council took the view that the minor was never a party *in the proper sense of the term* to the suits in which the decrees were made, and so she was not precluded from bringing her suit.

[26] I now come to the two sources for the doubt which has been cast on the view so long and widely accepted in the Indian Courts.

[27] The observations in *T. Venkata Seshayya* v. *T. Kotiswara Rao*, 64 I. A. 17:(A. I. R. (24) 1937 P. C. 1), do not trouble me at all. The relevant observations of Lord Thankerton are as follows:

> "In both Courts the principles relating to negligent conduct of a former litigation by a guardian in the name of a minor were accepted as applicable to the case of parties litigating on behalf of a public interest, as in the present case. The cases illustrative of this principle, which are referred to the judgments are *Lalla Sheo Churn Lal* v. *Ramnandan Dubey*, 22 Cal. 8; *Punnayyah* v. *Viranna*, 45 Mad. 425 : (A. I. R. (9) 1922 Mad. 273); *Karri Bapanna* v. *Yerramma*, 45 Mad. L. J. 324 : (A. I. R. (10) 1923 Mad. 718) and *Ananda Rao* v. *Venkatadri Appa Rao*, 47 Mad. L. J. 700 : (A. I. R. (12) 1925 Mad. 258). Their Lordships are not concerned to discuss the validity of these decisions, or the elusive distinction between negligence and gross negligence, as they are satisfied that the principle involved in these cases is not applicable to such cases as the present one. The protection of minors against the negligent actings of their guardians is a special one, and in these cases the plaintiff in the second suit was also the plaintiff in the former suit, although in the earlier suit he or she had sued through a guardian. Their Lordships would only add that they are not prepared to agree with the view expressed in *Karri Bapanna's case*, (45 M. L. J. 324 : A. I. R (10) 1923 Mad 710) that the principle of S. 44, Evidence Act can be extended to cases of gross negligence.
>
> The provisions of S. 11, Civil P. C., are mandatory, and the ordinary litigant, who claims under one of the parties to the former suit, can only avoid its provisions by taking advantage of S. 44, Evidence Act which defines with precision the grounds of such avoidance as fraud or collusion. It is not for the Court to treat negligence, or gross negligence, as fraud or collusion, unless fraud or collusion is the proper inference from the facts."

[28] It is surely clear that their Lordships have been careful to express no opinion with regard to the validity of the decisions cited except one, namely, that in *Karri Bapanna's case*, 45 M. L. J. 324 : (A. I. R. (10) 1923 Mad. 718), the Judges were wrong in extending the principle of S. 44, Evidence Act to cases of gross negligence. But the Indian decisions, taken as a whole, do not base the minor's right of suit upon the provisions of S. 44, but on a substantive right which S. 44 cannot affect. There is,

therefore, no question of extending the principle of S. 44 to cases of gross negligence.

[29] In referring to S. 11, Civil P. C., their Lordships are careful to qualify the word "litigant" by the word "ordinary" which in the context can only mean that they are safeguarding themselves from any expression of opinion with regard to the position of minors mentioned in the preceding paragraph. On the contrary, these observations do show that their Lordships recognised that there was a special protection in law of minors against the negligent actings of their guardians.

[30] I now come to the Bombay Full Bench case, *Krishnadas Padmanabhrao* v. *Vithoba Annappa Shetti*, A. I. R. (26) 1939 Bom. 66: (I. L. R. (1939) Bom. 340 F. B.). The leading judgment was delivered by Beaumont C. J. and Bromfield and Norman JJ. agreed with him, though, as it appears to me from their judgments with some hesitation. I think it is worth noticing that Sir John Beaumont rejects the view of Boys J. in the Allahabad Full Bench case. He says:

> "Boys J., in a dissenting judgment considered that such an action would not lie by virtue of S. 2 and S. 44, Evidence Act. That view cannot, I think, be supported. Section 44, Evidence Act, deals with defences open against a judgment in a prior suit relied on as *res judicata*; but if it be part of the substantive law that a minor can challenge a decree on the ground of negligence by his guardian, it must necessarily be open to him to attack the judgment on that ground without reference to S. 44, Evidence Act. The Evidence Act does not destroy substantive rights."

With that opinion I respectfully agree. Next it is to be noticed that Sir John examines *Venkata Seshayya* v. *Kotiswara Rao*, 64 I. A. 17: (A.I.R. (24) 1937 P. C. 1) and comes to the conclusion that the question at issue has not been determined by the Privy Council. As already indicated, with that view also I am in full agreement.

[31] Sir John next recognises that in India there is a preponderance of authority in favour of the view that a minor can challenge a decree in a separate suit on the ground that such decree was passed against him owing to the gross negligence of his guardian-ad-litem He goes on:

> "The learned Judges however who take this view appear to me to base their judgments on the consideration that such an action lies under English law and that there is no reason why the principles of English law should not be incorporated into India. I therefore propose to consider the question whether the suggested action does lie under English law. I may say at once that I have succeeded in finding no reported case in the English Courts in which such an action has ever been brought."

He then goes on to refer to Simpson on "The Law of Infants", and doubts whether the cases relied on by Simpson really support his conclusion. He cites Halsbury with a similar criticism. He notes the distinction which Halsbury makes between the infant plaintiff and the infant defendant, and says it seems difficult to justify the distinction. He refers to *In re Hoghton; Hoghton* v. *Fiddey*, (1874) 18 Eq. 573: (43 L. J. Ch. 758) and says that as far as he can see there is no question of setting aside any decree made against an infant since no such decree had been passed, and he goes on:

> "If it be the law that it is open to an infant to challenge a decree passed against him on the ground of the negligence of his guardian-ad-litem, it seems extraordinary that no case on the subject is to be found in the books. The Courts in England no doubt exercise great care in the appointment of a guardian-ad-litem but it is too much to suppose that no guardian has ever fallen short of his duty. I may add that in the course of more than 25 years practice at the Chancery Bar, I never myself came across such an action. The conclusion I come to is that under English law an infant cannot challenge a decree properly passed against him on the ground that his guardian ad-litem was guilty of gross negligence in suffering the decree, and if that is so, I can see no reason why such a cause of action should lie in British India. All the Judges in India who take the view that such a cause of action does lie seem to me to base their opinion on a misconception of English law on the subject. I think also that they underrate the danger and inexpediency of destroying the finality of decrees duly obtained in suits against minors."

[32] These observations of Sir John Beaumont must naturally command the very greatest respect, and, therefore, it becomes necessary to do my best, by careful examination of the authorities, to examine whether the references to English law are really correct. I hope to be able to show that in England the right of the minor to avoid a decree obtained by the gross negligence of his next friend or guardian has, from an early period, been well recognised, though the means of enforcing it may not ordinarily have been by suit. Alternative means did, however, I think, exist, and it is owing to the existence of those alternative means of enforcing the right that authorities, wherein the right was allowed to be enforced by suit, are scanty or wanting. The recognition of the right seems to me, however, the important thing, and the means of enforcing it of subsidiary importance. If the right is there, Indian Judges can enforce it in India upon principles of justice, equity and good conscience, and can allow it to be enforced by such means as Indian procedure renders applicable.

[33] Then, with regard to the statement that Indian Judges have underrated the danger and inexpediency of destroying the finality of decrees duly obtained in suits against minors, I would only say that, taking for example Calcutta, the right of minors to question the finality in suitable cases for gross misconduct has been uniformly recognised for over 50 years, but the skies have not fallen.

[34] Upon the question of English law, let us see first what the commentators say in the text books. In Macpherson on Infants, at page 386, we find the following :

> "An infant plaintiff, though thus favoured in the course of the suit, is as much bound by a decree and by all the proceedings in a cause as a person of full age, and cannot, nor can his representatives, open the proceedings, unless upon new matter, or on the ground of gross laches, or of fraud and collusion, which will annul the proceedings of the Courts of Justice as much as any other transactions."

[35] Simpson on the Law of Infants, 4th edition, in Chap. XX, deals with the question, taking separately the cases of infant plaintiff and infant defendant. In regard to the infant plaintiff, he says:

> "An infant plaintiff is, as a general rule, bound by a judgment or order in his own action as much as an adult, even though made by consent without any reference whether it is for the infant's benefit, or though there has been some irregularity in obtaining it, unless fraud, gross *negligence*, error or new matter is shown."

He says, "An infant may be allowed under special circumstances to amend his claim after judgment or bring a fresh action *(Napier* v. *Effingham*, (1726) 2 P. Wms. 401: (24 E. R. 786) is relied on). He then comes to the infant defendant, and first as to real estate says:

> "According to the old practice, the infant was always allowed to show cause in analogy to the parol demurrer, and the same rule obtained after the parol demurrer had been abolished both in the case of legal and equitable mortgages.
>
> It should be explained that under the old law the infant was allowed to plead his infancy and that he ought not to answer until he was of age, and upon this all proceedings were stopped until he attained 21 or according to the technical expression, the parol demurrer. The parol demurrer was abolished under 11 George IV and 1 William IV, C. 47, S. 10. But the practice of giving the infant opportunity to show cause after he came of age continued."

Simpson says that,

> "though a day to show cause against a decree is no now given, except in cases of foreclosure, a judgment against an infant may reserve his rights either absolutely or if he takes proceedings within a certain time, and such time might, it seems, in analogy to the time to show cause, be enlarged, if necessary. A judgment against an infant with a day to show cause becomes absolute on the expiry of the time limited or on the infant's death."

[36] Next, in Ss 4 (page 324) Simpson deals with impeachment of a judgment by an infant. He says that subject to what he has said above an infant defendant is as much bound by a judgment or order of the Court as an adult, but he may set it aside for fraud, *negligence*, error or new matter. He says (and I shall refer to this again later):

> "Fraud may be a case of direct collusion or allowing a judgment or order to be made on an erroneous view of facts, it being considered fraudulent to take advantage of the incompetency of the infant to defend himself."

Upon the authority of *Hoghton's case*, (1874) 18 Eq. 573: (43 L. J. Ch 758) he says:

> "A decree has been impeached where there is gross negligence by the next friend in the conduct of the infant's case."

He goes on :

> "If an infant had grounds of defence, which were not before the Court, or not insisted on at the original hearing, he might, according to the old practice, apply to the Court by motion or petition for leave to put in a new answer, and this, on the infant attaining 21, was a matter of course . . . . Under the present practice the form of the motion or petition will be for leave to put in a new defence."

[37] I next take Daniel's Chancery Practice. In Edn. 8 at p. 105 we find :

> "An infant is usually bound by the effect of any action or proceedings instituted on his behalf, and for his benefit, but if there has been any mistake in the form of such action, or the proceedings under it, or in the conduct of them, the Court will, upon application, permit such mistake to be rectified . . . and where the persons acting on behalf of an infant plaintiff by mistake make submissions or offers on his behalf, which he ought not to have been called upon to make, the Court will not suffer the infant to be prejudiced thereby."

[38] This is with regard to the infant as plaintiff. Dealing with the infant as defendant, we find at p. 114 :

> "Where an infant defendant on coming of age is dissatisfied with the defence put in by his guardian he may apply to the Court for leave to amend his defence or to put in a new one and it seems that this privilege applies as well after judgment has been given as before, but an infant wishing to make a new defence must apply to the Court as early as possible after attaining 21."

At p. 116,

> "If the late infant, to whom a day has been given to show cause, seeks to impeach a judgment by showing that he had grounds of defence which were either not before the Court or not insisted upon at the original hearing, it is conceived that he should apply for leave to make a new defence."

[39] At p. 1333 the learned author says :

> "It has been also said that where an improper judgment has been made against an infant, without actual fraud, it ought to be impeached by original action."

For this proposition three cases are relied on *Richmond* v. *Tayleur*, (1721-24 E. R. 591) ; *Brooke* v. *Mostyn*, (1864-46 E R. 419) and *Hoghton's case* (1874-18 Eq. 573 : 43 L J. Ch 758).

[40] There remains Halsbury. In the Halisham edition, Volume 17, p. 708, Para. 1456, we find:

> "An infant plaintiff is as much bound as an adult by a judgment or order in the cause, even though there may have been irregularities in the conduct of it, unless there has been fraud, or gross *negligence* on the part of his next friend. But in special circumstances he may be allowed on coming of age to amend his claim or to *bring a fresh action*."

At p. 714, Para. 1464, occurs :

> "A judgment in an action is as binding against an infant defendant as it is against an adult. . . .He may, however, even while an infant, bring another action to impeach the judgment on the ground of fraud or collusion."

It will be noticed that a distinction is made between infant plaintiff and infant defendant.

Gross negligence is referred to in the case of the infant plaintiff, but only fraud or collusion in the case of the infant defendant. This distinction, I speak with hesitation, is perhaps due to the fact that whereas the remedy of the infant defendant for gross negligence was a matter of course upon application for review, it was not so certain, but that the infant plaintiff could only avail himself of the remedy by a fresh action.

[41] From the above I deduce that the opinion of the writers was that the infant always had a remedy, on coming of age, for gross misconduct. His right was well recognised. His remedy was certainly by showing cause on the day given, and was probably also by suit in exceptional cases.

[42] I have cited, I think, a formidable array of authors. Can they all be wrong ? Well, in the year 1841, in *John Malone* v. *John Malone*, (1841) 8 E. R. 71 at p. 81 : (2 P. Wms. 401), Lyndhurst L. C. said :

> "If the question should arise how far a party, who was an infant during the time when a decree was pronounced, afterwards on attaining 21, is entitled to be let in to make a new defence in a case like this; if that question should arise, it is one which I think will require serious consideration. There is very great obscurity and a great deal of contradiction in the authorities upon that subject, and it is a proper subject for very serious consideration whenever the question may arise."

[43] It is evident from this that the answer to the question "what is the English law on the subject ?" is not going to be easy or clear. Let us turn to such authorities as I have been able to discover. We go back to the year 1718 for *Fountain* v. *Caine*, (1718) 24 E. R. 491 : (1 P. Wms. 504). This was a case where certain creditors sued for the sale of an estate making the infant heir a defendant through his guardian. The suit was decreed, but in accordance with practice as regards the infant a decree nisi was made. The infant on coming of age moved the master of the rolls for permission to put in a new defence as she alleged that the former defence put in by her guardian was not complete. The Master of the Rolls allowed this, saying that he understood it to be a matter of course, and that there was no other way except this for the infant (on coming of age) to set forth his title, which he ought to have an opportunity of doing. There was no reason why he should be bound by the answer of his guardian, for that would be at the same time to give him liberty to show cause and tie up his hands from showing cause.

[44] This then was the position of an infant defendant as far back as 1718. It was recognised that the infant was not bound by the defence put in by his guardian, and, on coming of age, was able to put in a better defence to supplement that by his guardian.

[45] The next case is of 1721, *Richmond* v. *Tayleur*, ((1721) 24 E. R. 591). Here an absolute decree was made against an infant without giving him a day to show cause, the decree being by consent of the guardian. Subsequently, the infant and her husband brought a suit asking that the decree be set aside as it was gained by fraud and collusion. The Lord Chancellor said that if fraud had been proved, he would have set aside the decree, but there was no fraud. There is a contemporaneous note to the case which seems to me of great importance. It is stated that it was held in this case that the infant is not bound to proceed by way of an application for rehearing or review, but may impeach the former decree by any original suit in which it will be enough for him to say that the decree was obtained by fraud and collusion or *that no day was given him to show cause against it.* In other words, if by reason of the decree being made absolute, the infant was deprived of the ordinary means of putting in a new defence in his show cause, then it was open to him to impeach the former decree by fresh suit based merely upon that very fact, so that, in any event, a remedy was available to him without showing fraud or collusion.

[46] I now come to a case which has been much commented upon, *Sir John Napier* v. *Lady Effingham*, (1726) 2 P. Wms. 401 : (24 E. R. 786). It is a case of the year 1726, and its importance is that it deals with an infant plaintiff. An infant, Sir John Napier, sued, through his next friend, his mother Lady Effingham, who had remarried, to set aside a settlement made in her favour by his father, and Lady Effingham also brought a cross suit against Napier to establish the settlement. Napier asked for leave to bring a new suit on the ground that his case had been mismanaged by his former solicitor, and the Court allowed him to do so. Both cases were heard, and a decree was made from which both parties appealed to the Lords, and it was held that, as to so much of the decree as ordered Sir John Napier's suit to stand dismissed, it should be affirmed with the addition that Sir John should have six months to show cause against it after coming of age. Sir John Napier on coming of age asked for leave to amend his original claim or to bring a new or supplemental suit, as he should be advised, and also asked for leave to amend his defence to the cross suit. The Lord Chancellor called to his assistance the Master of the Rolls. It was held that there was no precedent for amendment of a claim which had been dismissed upon the merits. At the same time it could not be imagined that Sir John was tied to the former proceedings only in showing cause, for that would be the most imperfect relief which could be given.

Therefore the case was to be treated as if there had been an ordinary decree against an infant relating to his inheritance with a *nisi cause* within six months of coming of age, in which case it would be plain that the defendant might amend his defence. It was observed that all infant defendants by their answers put in an early claim to the care and protection of the Court, and ought to have it, as they are supposed unable to take care of themselves, and all decrees against them give them six months, after coming of age, to show cause. Therefore, Sir John Napier should have leave to put in a new defence, and that meant that his defence might be different from what it was before, and he might examine witnesses anew.

[47] So the recognised rule giving the infant defendant a means of overcoming any negligence of his guardian was applied to the infant plaintiff who might have suffered in a similar manner. The order in this case was affirmed on appeal to the House of Lords. It is further to be noticed that Sir John Napier was allowed to bring a fresh suit on account of the original mismanagement of his estate by his next friend (the solicitor).

[48] The next case is *Anonymous*, ((1729) 25 E. R. 274. A suit was decreed against an infant with the usual provision entitling him to show cause within six months after he came of age. The infant showed cause, and asked to amend his defence by putting in a new defence. The Lord Chancellor allowed the motion, and said that the defendant himself was the best judge at present what would be material for his defence, and since the case of Sir John Napier and Lady Effingham this was a motion of course.

[49] In 1729 came the case of *Trefusis* v. *Cotton* (1729) 25 E. R. 350. The usual six months had been allowed to the infant defendant. He applied to have that time enlarged, and the Lord Chancellor said that the time of six months allowed by the practice of the Court was not so sacred, but that in particular cases where the matter was of consequence the Court might enlarge it, and the time was enlarged for three months more.

[50] What happened on Trefusis showing cause is reported in the same volume at p. 409. In showing cause no fraud or collusion was alleged, but it was asserted that the guardian had not made a proper defence. The Lord Chancellor said that the infant in such a case cannot come in and controvert the decree by a fresh suit, but he could do it in two ways. If there was fraud or collusion or if the matter that then appeared was not insisted on (i. e., negligence of the guardian), by amending his defence and having a bill of discovery, so that he might have the same remedy by amending his defence as was asked for by Trefusis by proposing a new suit. That it to say, whether he proceeded by amending his defence or by a fresh suit, it came in substance to the same thing, and this, I think, affords the answer to the argument that the substantive right of avoidance by showing cause recognised in England as a matter of course is something quite different from the substantive right of bringing a new suit claimed in this country.

[51] The next case is of the year 1747, *Gregory* v. *Moleswort*, (1747) 26 E. R. 1160 : (3 Atk. 626). In regard to this case, Broomfield J., in the Bombay Full Bench case said :

> "It could not be seriously suggested that this case was any authority for holding that according to the English law an infant could bring a suit to set aside a decree on the ground of the negligence of his next friend or guardian-ad-litem."

It is, however, a case which has been cited by the text books as an authority, and, though the observations of Lord Hardwicke relied upon were in a sense *obiter* still I think there is no reason to suppose that it was not a considered statement. The infant sought to bring a fresh suit and it was held that an infant is bound by a decree in a cause where he is plaintiff as much as a person of full age. The former decree was pleaded in bar, and the plea was accepted. The Lord Chancellor, however, in saying that the infant was as much bound as a person of full age said :

> "I know but of one case that is an exception, *Lady Effingham* v. *Sir John Napier*, where, upon an appeal from Lord Macclesfied's decree with regard to real estate, the House of Lords gave Sir John Napier leave to shew cause, when he come of age, against his own decree. . . . . . It is right to follow the rule of law, where it is held an infant is as much bound by a judgment in his own action, as if of full age and this is general, unless *gross laches*, or fraud and collusion appear in the *prochein any* (next friend) then the infant might open it by a new bill."

[52] There was no suggestion that the decision in *Napier* v. *Effingham*, (1726-2 P. Wms. 401: 24 W. R. 786) needed reconsideration, and it was also treated as a case where the infant was allowed to open the matter by a new bill (fresh suit) on account of the fault of the next friend.

[53] I now come to the year 1805, *Carew* v. *Johnston*, (1805) 2 S. & L. 260 at p. 292. The Lord Chancellor said :

> "I should wish before I finally decide this case to look into the cases where Courts of Equity have proceeded upon decrees against infants. . . . . . If a decree has been obtained against an infant, which is erroneous, and the error is not in the judgment of the Court but in the facts on which the judgment is founded, the manner in which the infant proceeds to investigate the decree. . . . . . . is generally by original bill. The proceeding on which the decree against him has been founded according to my recollection of

> the cases (not having looked into them) is treated as fraudulent; it being considered as fraudulent to take advantage of the incompetency of the infant to defend himself."

It is here suggested that the criterion of fraud in cases where infants are concerned is different from that adopted in cases of ordinary litigants. I shall revert to this later.

[54] The next case is of 1834, *Kelsall* v. *Kelsall*, (1834) 39 E. R. 1000: (2 My. & K. 409). A decree had been made against an infant defendant, and on coming of age the late infant petitioned for liberty to put in a new and further defence. Lord Chancellor Brougham said:

> "The question whether the infant defendant on coming of age was entitled to make out a new case was of importance and of a rare occurrence."

He said that in the opinion of some eminent practitioners the right did not exist and, if it existed, it was, in his opinion, fit to be taken away. On the other hand, if some such latitude were not given, the right of showing cause would be reduced to very narrow limits. A decree against an infant was erroneous if it had not the clause "unless cause be shown within six months". That either meant nothing or it was intended to secure the infant against any proceedings taken to his prejudice at a time when the law supposed him to be absent or at least not present in such a manner as to be capable of sufficiently defending his rights, and the permission was of no avail to his protection if he be only allowed to show for cause error on the face of the decree or record. Otherwise he would have little advantage over an adult defendant who might have an appeal or rehearing upon the same grounds. He went on:

> "Upon such reasons, probably, the decisions have proceeded which render it now too late to question this privilege, however inconvenient to the administration of justice its exercise may prove."

He noted that the statute (1 W. IV, C. 47 S. 10) abolishing the parol demurrer did not alter the law in this particular. "Upon the whole," he said ;

> "there can be no doubt that the infant is entitled of right, when he comes of age to answer anew and make a better defence, and to support that defence by evidence."

and he provided, in allowing the application, that the parties should proceed in all respects *as if the suit with the exception of the bill, were commenced anew*. Parties were to proceed on the new answer exactly as if it had been the first.

[55] The next case that I notice is of the year 1864, *Brooke* v. *Lord Mostyn*, (1864) 46 E. R. 419: (2 De. G. J. & S. 373). This case bears on the question of fraud in relation to infants. It was an appeal by the plaintiff from a decree of the Master of the Rolls dismissing his suit. It is unnecessary to state the facts which are lengthy and involved. It was sought to set aside a compromise, which had been sanctioned by the Court on behalf of the infant, on the supposed insufficiency of the estate to pay his legacy. At the time of the enquiry as to the compromise being for the benefit of the infant, a document relative to the valuation of the estate was in possession of the owners of the estate, but was not produced. It was held that the compromise must be set aside because it was the duty of the owners of the estate to supply all material information in their possession. It was observed that to impeach a compromise made under the order of the Court there must be circumstances amounting in the eye of the Court to fraud in the party claiming the benefit of the compromise, meaning by fraud not moral fraud but what in the eye of the Courts of equity was considered as amounting to fraud, and it was held that if there is knowledge on one side which is withheld, the withholding of the knowledge amounts in the view of the Courts of Equity to fraud. Persons were before the Master whose duty to the Court and to the infant it was to bring to the attention of the Master every material fact within their knowledge, but who omitted to do so. This was the position before the Master of the Rolls, whose decision was recovered by the Lords Justices. It was then brought by appeal to the House of Lords where the decision of the Lords Justices was reversed. But the reversal did not affect the statement of the law as laid down in the Courts below (See Law Reports, English and Irish Appeal Cases, volume 4, 1869 page 304).

[56] I now skip to 1874, the important case of *Hoghton*. v. *Fidey*, (1674) 18 Eq. 573: (43 L. J. Ch. 758). In the Bombay Full Bench case the writers of the text books have been criticised for treating this case as an authority for the proposition that the late infant could bring a fresh suit to upset the decree, inasmuch as there was no previous decree against the infant, but in her favour, and it was not sought to upset it but to enforce it.

[57] So far as I can understand the report, these criticisms do not appear to be accurate. Whether the decree was against the infant or in her favour, it was still a decree. In fact, I think, it can have been only partly in her favour, and it was undoubtedly sought not to enforce that decree but to go behind it so as to secure rights for the infant which the decree did not give. The petition was in fact for liberty to file a bill or supplemental bill in the nature of a bill of review. The petitioner was one of the children of Lady De Houghton who, by her will, had given her personal estate to trustees of

whom two, Colonel Blackburn and a Solicitor, Fidday, proved the will and accepted the trusts. Under these trusts the estate was to be converted into money and invested for the benefit of her children. After her death a suit was brought in the name of her infant children, through a next friend, against the executors charging Fidday with having misapplied the assets and seeking to have the estate administered by the Court. Colonel Blackburn concurred in the institution of an ordinary administration suit against himself and Mr. Fidday, and an order was obtained staying all further proceedings in the first *suit as not being for the benefit of the infants*. The usual administration decree was made on the summons, but the order was never carried into Chambers, and no further step was taken in the suit.

[58] That is to say, the suit in which Fidday was charged with misappropriation was stayed as not being for the benefit of the children, and the administration decree in the other suit was never executed. The order staying proceedings in the first suit was obtained upon an affidavit by the Solicitors that Fidday had rendered full and satisfactory accounts, but after Fidday's death, the petitioner alleged, it was discovered that Fidday had been allowed by Colonel Blackburn to obtain sole possession and control of the securities, and had converted them to his own use and died bankrupt. It was now desired to carry on the administration suits with a view to make Colonel Blackburn liable for the losses occasioned by the default of his co-trustee. So practically what the petitioner asked was to re-open the ordinary administration decree and the order staying all further proceedings in the first suit, and to proceed with the suit on a new ground and for a different relief.

[59] It was explained for the petitioner that the leave of the Court, which might ordinarily have been unnecessary, was sought because the petitioner desired to be free *to add to the decree, if necessary*, without running the risk of having to meet an objection that the leave of the Court was required. The objection made on behalf of Colonel Blackburn was that permission should not be given unless the Court was satisfied that the facts on which the petition was based, had come to the knowledge of the applicant and her agent since the period when it could have been used in the original suit. This objection was rejected.

[60] The order of Sir Richard Malins, Vice Chancellor, shows clearly that he treated it as an application to go behind the consent decree, for he said :

> "The question which I have to decide is, whether this infant, on whose behalf a decree was taken by consent in 1867, is to suffer by any negligence or want of knowledge on the part of her then next friend. . . . . The case was one of a next friend having taken a common administration decree at a time when there was no reason to suspect that anything more could be required, and having grossly and inexcusably neglected his duty in not even having carried the decree so obtained into Chambers."

He pointed out that had the consent decree been prosecuted Fiddey might possibly have been able then to find the money. "However that may be," he said,

> "the proposition that an infant of tender years may have her whole fortune wrecked by the neglect of her next friend is so monstrous that I cannot pay attention to it. She is entitled to have a next friend who is diligent and will protect her interests."

He held that the infant was entitled to file a bill. He said that possibly the leave of the Court might not be necessary, but, on the other hand, it might be necessary to add an enquiry to the decree in the suit, and so it might be more proper that there should be the leave of the Court to make that addition. In short, the leave of the Court was given for a fresh enquiry; in other words for going behind the consent decree, and not merely executing it. With regard to the proposition that it was necessary to show that the mistake could not have been earlier discovered by reasonable diligence, he said that the case of *Thomas* v. *Rawlings*, (1865) 34 Beav. 50 : (11 L. T. 721), in which it was held that that was necessary in a person *sui juris*, had no application to an infant of tender years who can be guilty of no negligence and cannot be answerable for the negligence of her next friend.

[61] Upon this examination of the decisions, I have formed the conclusion that it is not a case of the text book writers unanimously making a mistake. The substantive right of an infant, on attaining majority, to avoid a decree obtained against him owing to the gross negligence of his next friend was, in my opinion, undoubtedly recognised in England from early times. The reason why Sir John Beaumont was unable to find cases where that right was exercised by fresh suit was that a different procedure was adopted, whereby it could be successfully enforced, so that there was ordinarily no reason to resort to a suit. But if by any reason the late infant was unable to adop that procedure, then a fresh suit could be brought based on that ground alone. Sir John Beaumont speaks only of the infant defendant, and negligence on the part of the guardian-ad-litem. The procedure for his relief was so clear and universally followed that it could hardly be expected that cases would be found where he had to resort to suit. But the position of the infant plaintiff was somewhat more obscure. The cases do, however, in my

view, establish that his right was equally recognised. It was recognised in *Napier* v. *Effingham*, (1726 P. Wms. 401 : 24 W. R. 786) and *Houghton* v. *Fiddey*, (1874-18 E. Q. 573 : 43 L. J. Ch. 758), and it was referred to in *Gregory* v. *Molesworth*, (1747-26 E. R. 1160 : 3 Atk. 626).

[62] The right of the infant to make a new answer was for all practical purposes the same as a right to bring a fresh suit since it entitled him to take new grounds and to adduce fresh evidence. The existence of the right is the main thing. The procedure adopted for enforcing it is quite another thing and of comparatively minor importance. In England there was a special procedure. In India, where a substantive right exists, it can be enforced by suit under S. 9, Civil P. C., unless there is anything in law to prevent it. I find nothing in the laws of India to prevent the exercise of that right. Whether it can also be enforced by an application for review seems to me doubtful. If it can be, so much the better.

[63] I would respectfully adopt the remarks of the learned Judges in *Lalla Sheo Churn Lal* v. *Ramanandan Dobey*, 22 Cal. 8 :

> "According to the law as administered in England, the gross negligence of his next friend would entitle an infant to obtain the avoidance of proceedings undertaken on his behalf. We can see no reason why in this country an infant should be in a worse position . . . . These rules (of equity and good conscience) cannot be more restricted than the rules of equity administered in England. There is no authority in this country which could prevent us giving effect to the English rule."

I would also adopt with respect the observations of Bennett J. in the two cases in *Kamakshya Narain* v. *Fatehkumar*, (26 Pat. 220 : A. I. R. (35) 1948 Pat. 300) and *Ramudar Singh* v. *Ramsurat Singh*, (26 Pat. 362 : A. I. R. (35) 1948 Pat. 281) which I have quoted. They seem to me, if I may say so, to express the progressive and enlightened view. As law has developed, the principle that an infant needs and is entitled to the special protection of the Courts has become more and more clearly recognised, and many laws have been made in England to secure that end. To hold now at this late stage that an infant is to be debarred, when he comes of age, from asserting his just rights, merely because some one, taking upon himself the burden or opportunity to represent the infant, at a time when the latter had no say in the matter, chose to put forward the claim before the Courts in a manner so negligently as to result in a decree shutting out that claim for ever, would be to put back the clock of progress and upon grounds unsustainable in law and wholly unjustified in equity. In India the right of the minor to special protection has been recognised from the earliest times. In the Laws of Manu, Ch. 8, Verse 27, we find :

> "The King shall protect the inherited (and other) property of a minor, until he has returned (from his teacher's house) or until he has passed his minority:"

(Sacred Books of the East, edited by Max Muller, Vol. 25, p. 257). I would without hesitation answer the question referred to us in the affirmative.

[64] Before I conclude I refer with considerable hesitation to another possible aspect of the matter, namely, the observation in some of the text books that, in the case of infants, withholding of information, which it is the duty of all concerned in cases of infants to place before the Courts, amounts to fraud in the eye of equity. I have referred to at least two cases where that seems to have been recognised in the English Courts. If this is so, there may well be cases where the infant may be able to assert fraud in the nature of gross negligence on the part of his next friend or guardian-ad-litem where there would be no question of fraud as between ordinary litigants. If the gross negligence is wilful negligence, in the shape of neglect by the guardian to bring forward the available materials which it is his duty to the infant and to the Court to supply, then, I think, that will be fraud, though not moral fraud, in the eye of equity. The Privy Council has said in *Venkata Seshayya* v. *Koteswara Rao*, 64 I. A. 17 : (A. I. R. (24) 1937 P. C. 1).

> "It is not for the Court to treat negligence or gross negligence as fraud or collusion unless fraud or collusion is the proper inference from the facts."

But it may well be that where infants are concerned fraud will be a proper inference from the facts where in the case of adult litigants it would not be so.

[65] I do not like the expression 'gross negligence' as it makes it difficult to fix the dividing line between cases where negligence will enable the avoidance of the decree and where it will not. I would prefer to say, quoting Trevelyan on the Law Relating to Minors, Edn. 5 p. 284 :

> "It is not every kind of negligence nor any amount of negligence which would render proceedings otherwise regular and proper liable to be opened up. It must be such negligence as leads to the loss of a suit, which, if it had been conducted with due care, must have been successful."

[66] **Agarwala C. J.** — I have had the advantage of reading the judgment of Meredith J., and agree that the question referred to us must be answered in the affirmative. I was at first impressed by the absence of any cases in the English Courts in which a decree against a minor defendant had been set aside in a suit on the ground of negligence, and by the observation of Sir John Beaumont, Chief Justice of the Bombay High Court, that in his twenty five years' expe-

rience as a Chancery practitioner, he had not come across such an instance. A thorough examination of the question at the hearing of the persent appeal, however, has shown that the reason for this is that in Chancery there was a procedure which enabled a minor defendant on attaining majority to reopen the entire litigation. The existence of this procedure explains the absence of cases in which a decree against a minor has been set aside in a suit on the ground of negligence. The authorities in England, however, are quite clear as to the existence of the minor's right to have a decree set aside on the ground of negligence of his guardian and that there was an effective remedy in chancery of which he could avail himself on attaining majority. The existence of that right has also been consistently recognised in this country until a note of dissent was sounded in Bombay and in the later cases of this Court. There being no procedure equivalent to the procedure in chancery, to which reference has been made, the minor's remedy in India must be looked for elsewhere. As a remedy by way of review is not available in view of the restricted meaning given to the provisions of O. 47, R. 1, Civil P. C., the only remedy left is by way of suit.

[67] **Narayan J.** — The question referred to the Full Bench is as follows :

> "Whether a minor can avoid a decree passed against him on the ground of gross negligence on the part of his guardian ad litem by bringing a subsequent suit even if he has not succeeded in proving fraud or collusion on the part of such guardian."

The question raised has now become a complicated question, because there is considerable divergence of judicial opinion with regard to it in this country, and because up till now there is no clear pronouncement upon the point by the Judicial Committee of the Privy Council.

[68] Thepr inciple of *res judicata* has been incorporated in S. 11, Civil P. C., and the rules regarding suits by or against minors are embodied in O. 32 of the present Code of Civil Procedure which are equivalent to Ss. 440, 441, 442 and certain other sections of the old Code. The provisions of S. 11, Civil P. C., to quote the language used by their Lordships of the Privy Council in the case of *T. Venkata Seshayya* v. *T. Kotiswara Rao*, 64 I. A. 17: (A. I. R. (24) 1937 P. C. 1), are mandatory, and the Privy Council case of *Mt. Bibi Walian* v. *Banke Behari Pershad Singh*, 30 I. A. 182: (30 Cal. 1021 P. C.), is an authority in support of the view that whenever it is found that a minor's interest has been effectively represented in suit, it would not be open to the minor attaining majority to challenge the decree passed against him even if it is found that there were certain defects of procedure or irregularities with regard to the fact of the appointment of the guardian in the suit. There was some discussion at the Bar even with regard to the question as to in what circumstances a decree against a minor can be treated as void or voidable, though, in my opinion, in view of the Privy Council decision referred to above and certain other cases decided by this Court as well as by the Calcutta High Court this question should not have been raised at all in this present litigation. Their Lordships of the Judicial Committee in the case of *Hari Saran Moitra* v. *Bhuneshwari Debi*, 15 I. A. 195: (16 Cal. 40 P. C.) approved of the decision that had been made by the Calcutta High Court in the case of *Suresh Chander* v. *Jagut Chander*, 14 Cal. 204 (F. B.). The decision of the Calcutta High Court in *Suresh Chander* v. *Jagut Chunder*, 14 Cal. 204 (F. B.), was that if there is an error of description in a plaint of a suit which is substantially brought against the minor that error of description cannot without proof of prejudice invalidate a decree against the minor and also that the want of a formal order appointing a guardian ad litem is not fatal to the suit, when it appears from the face of the proceedings that the Court has sanctioned the appointment. This Court held in the case of *Satdeo Narain* v. *Ramayan Tewari*, 2 Pat. 335: (A. I. R. (10) 1923 Pat. 242), that where a minor is properly a party to a suit, that is, if he is represented on the record by a guardian not disqualified from acting, the jurisdiction of the Court to try and determine the cause against the minor is complete, and such jurisdiction will not be ousted on proof that the Court did not follow the appropriate procedure for the appointment of the guardian. This case was referred to with approval in a very recent case of this Court, namely, *Madhusudan* v. *Jogendra*, 23 Pat. 640: (A. I. R. (32) 1915 Pat. 133), and in this case the distinction between a void decree and a voidable decree was pointed out, and Manohar Lall J. with whom Sir Fazl Ali C. J., agreed, further observed that the words that the decrees are null and void against the minors are often loosely used. The *ratio decidendi* from the decisions of this Court and the Calcutta High Court and also from the Privy Council cases certainly is that even if a minor is represented by a negligent guardian, it cannot be said that he is not represented at all. Even if some of the decisions say that a minor represented by a negligent guardian is to be treated as though he is not represented at all, I would not be able to follow those decisions, it being entirely another point if on the basis of the substantive law or on the basis of the rules of justice, equity and good conscience as they prevail in England, we are inclined to hold that

gross negligence on the part of a guardian ad litem is a ground for avoiding the decree against a minor and that the principle of *res judicata* would not operate as a bar to a suit instituted by the minor on attaining majority for setting aside the decree passed against him during the period of his minority on the ground of gross negligence on the part of his guardian ad litem. Probably, this sort of discussion would not have at all been raised before us in this case but for certain observations of Sulaiman J. in the Full Bench case of the Allahabad High Court reported in *Siraj Fatma* v. *Mahmud Ali*, 54 ALL. 646: (A. I. R. (19) 1932 ALL. 293 F. B.) His Lordship observed as follows:

> "It therefore follows that the real basis of the binding character of a decree against a minor is the fact of his having been duly represented by a proper person, and not the mere existence of any formal order appointing a guardian for him. Even when there be such an order, if the guardian does not properly represent him, the decree would not be binding. On the other hand, even if there be any defect in the formal appointment of a guardian, the decree would be binding upon him if he is sufficiently represented and his interests are well protected."

In a subsequent decision of the Allahabad High Court reported in *Dwarika Halwai* v. *Sitla Prasad*, A. I. R. (27) 1940 ALL. 256: (I. L. R. (1940) ALL. 344). Bennett and Verma JJ. interpreted this passage to mean that even where there was an order appointing a person as guardian, but that if that guardian did not properly represent the minor, the decree would not be binding on the minor. Their Lordships say that the Full Bench meant that such a decree would be void ab initio and not merely voidable. The Full Bench case of the Allahabad High Court as well as the case of *Dwarika Halwai* v. *Sitla Prasad*, A. I. R. (27) 1940 ALL. 256. (I. L. R. (1940) ALL. 344) were considered by the Oudh Chief Court in *Mohammad Baksh* v. *Allah Din*, A. I. R. (29) 1942 Oudh 33 : (17 Luck. 1) by Bennett and Madeley JJ. and their Lordships in this case held that though the minor has on attaining majority the right to set aside a decree obtained against him on the ground of his guardian's negligence, it is not open to him to assume such negligence and to treat the decree as void on that ground. Their Lordships in disagreement with what had been held by the Allahabad High Court observed that the existence of a flaw in the appointment of a guardian, resulting in the minor not being properly represented, is one thing and the negligence of a properly appointed guardian is quite another. In the Full Bench case of the Allahabad High Court Sulaiman J. made another important observation, and it is this; that it is possible to avoid the effect of the provisions of S. 11, Civil P. C, by holding that the minor ceased to be a party to the suit when his guardian ad litem was grossly negligent and that there can be no bar of res judicata when a party in a subsequent suit was not properly speaking a party to the previous suit. I cannot go so far as his Lordship has gone and assent to the proposition that if a guardian is found to have acted negligently in a cause there would be deemed to have been no representation in that cause at all on behalf of the minor. I say with the greatest respect that because the decision of the Full Bench of the Allahabad High Court has proceeded on the assumption that if a guardian acts negligently there would be deemed to have been no representation on behalf of the minor at all. I find it difficult to follow it. I am altogether unable to subscribe to the view which his Lordship, Sulaiman J., has taken so far as the question of representation on behalf of the minor is concerned. The question that has been referred to us for decision by Manohar Lall and Ray JJ. presupposes that the minor was properly represented. What we are called upon to determine is whether a minor who was quite properly represented in a particular suit can avoid the decree passed against him in that suit on the ground of gross negligence on the part of his guardian ad litem by bringing a subsequent suit. I cannot hold that a guardian who is negligent is no guardian at all, and in view of the conflicting decisions on this point I have no hesitation in agreeing at least with this observation of Broomfield J. in the case of *Krishnadas Padmanabhrao* v. *Vithoba Annappa*, A. I. R. (26) 1939 Bom. 66 : (I. L. R. (1939) Bom. 340 F. B.), that the question whether minors are properly represented and whether decrees obtained against them are legally valid or not cannot without risk of hopeless confusion be left to depend on "the illusory distinction between negligence and gross negligence". That there has been a confusion with regard to this point cannot be doubted. The Full Bench case of the Allahabad High Court *Siraj Fatma* v. *Mahmud Ali*, 54 ALL. 646: (A. I. R. (19) 1932 ALL. 293 F. B.) was decided before the pronouncement by the Privy Council in *T. Venkata Seshayya* v. *T. Kotiswara Rao*, 64 I.A. 17: (A.I R. (24) 1937 P. C. 1) and his Lordship, Sulaiman J., repelled the contention that a litigant who wants to avoid the provisions of S. 11, Civil P. C. can do so only by taking advantage of S. 44, Evidence Act. His Lordship has observed at p. 661, that in his opinion there can be no doubt that the right to avoid a judgment exists independently of S. 44, Evidence Act, and at p. 659, while discussing the rule of res judicata, his Lordship has observed as follows :

> "In India we have codified law. The rule of res judicata is contained in S. 11, Civil P. C. That section

> may not be absolutely exhaustive, and the principle of res judicata may apply for instance to execution proceedings, although execution proceeding do not come within the letter of the section. But to say that S. 11 has certain exceptions not set forth therein is quite another matter. We here have a statutory enactment prohibiting a Court from re-trying an issue in which the matter directly and substantially involved has been directly and substantially in issue in a former suit between the same parties litigating under the same title, in a Court competent to try the subsequent suit and which has been heard and finally decided by such a Court. In the face of the express language of the Act it cannot be said that the section is not of general application but that there are certain exceptions to it which are not set forth therein.

His Lordship has recognised that we in India have a statutory enactment prohibiting a Court from re-trying an issue in which the matter directly and substantially involved has been directly and substantially in issue in a former suit and also that in the face of the express language of the Act it cannot be said that the section is not of general application, but that there are certain exceptions to it which are not set forth therein. But the difficulty arises when his Lordship says that a right to avoid judgment on the ground of fraud exists independently of S. 44, Evidence Act. No further discussion on this point would be necessary or even permissible if we find that his Lordship's view that a right to avoid judgment on the ground of fraud exists independently of S. 44, Evidence Act, cannot be sustained because of the dictum that was laid down by the Privy Council. In *Venkata Seshayya* v. *Kotiswara Rao*, 64 I. A. 17: (A. I. R. (24) 1937 P. C. 1), their Lordships of the Judicial Committee have said that the provisions of S. 11, Civil P. C. are mandatory and that the ordinary litigant who claims under one of the parties to the former suit can only avoid its provisions by taking advantage of S. 44, Evidence Act, which defines with precision the grounds of such avoidance as fraud or collusion. I am at present discussing the case of an ordinary litigant and the view of Sulaiman J. that a right to avoid a judgment on the ground of fraud exists independently of S. 44, Evidence Act cannot be supported when their Lordships of the Judicial Committee have clearly expressed themselves on the point and said that the ordinary litigant can avoid the provisions of S. 11, only by taking advantage of S. 44, Evidence Act. The view taken by Sulaiman J. has been adopted by a Full Bench of the Lahore High Court in *Iftkhar Hussain Khan* v. *Beant Singh*, A. I. R. (33) 1946 Lah. 233: (I. L. R. (1946) 27 Lah. 515) and by a Single Judge of the Calcutta High Court in *Mahesh Chandra* v. *Manindra Nath*, 45 C. W. N. 508 : (A. I. R. (28) 1941 Cal. 401) though these cases were decided after the pronouncement by the Privy Council, and the view of Sulaiman J., that S. 44, Evidence Act is permissive and not prohibitive, and that the right to avoid a judgment exists independently of the Evidence Act has been adopted without considering the observation that was made by the Privy Council. Rashid J., as he then was, who delivered the leading judgment of the Lahore High Court expressed his agreement with the views of Sulaiman and Sen JJ. without noticing that the question whether the provisions of S. 11, Civil P. C, could be avoided in any other manner except by taking recourse to the provisions of S. 44, Evidence Act stood concluded by the observation of the Privy Council which was made subsequent to the decision of the Full Bench of the the Allahabad High Court. I can say with the greatest respect to the learned Judges who decided the Lahore case, and to Mukarji J. who decided the Calcutta case that the Full Bench of Allahabad High Court had not the advantage of the decision of the Privy Council which their Lordships had. Mukharji J. in *Mahesh Chandra* v. *Manindra Nath*, 45 C. W. N. 508: (A. I. R. (28) 1941 Cal. 401), felt bound by an earlier decision of the Calcutta High Court in the case of *Lalla Sheo Churn Lal* v. *Ramnandan Dobey*, 22 Cal. 8). But this decision had been made long before the Privy Council came to decide the case of *T. Venkata Seshayya*, 64 I. A. 17: (A. I. R. (24) 1937 P. C. 1). The Full Bench decision of the Lahore High Court was no doubt made after the pronouncement of the Privy Council, but in the Lahore case I do not find any reasoning independent of those which had been adopted by Sulaiman J., in *Siraj Fatma* v. *Mahmud Ali*, 54 ALL. 646: (A. I. R. (19) 1932 ALL. 293 F. B.) The Madras case, *Subbaratnam Chettiar* v. *Vidyasankar*, reported in A. I. R. (24) 1937 Mad. 472: (169 I. C. 694), which is the decision of Varadachariar J., as he then was, does not make any reference to the Privy Council decision and almost all the cases which have been referred to in this decision are cases which were decided before the pronouncement by the Privy Council. The Madras case, *Egappa Chettiar* v. *Ramanathan Chettiar*, A. I. R (29) 1942 Mad. 384: (I. L. R. (1942) Mad. 526) is no doubt a case which was decided after the pronouncement by the Privy Council, but the Judges of the Madras High Court were of the opinion that their Lordships of the Judicial Committee had not decided the question whether a person could rely on the gross negligence of his guardian ad litem in a previous suit when he sought to set aside a decree passed therein. In this case there is an observation that the judgment of the Privy Council does not effect any change in the law, but this is an observation with which I cannot agree. What was held by Sulaiman J., in *Siraj Fatma* v.

Mahmud Ali, 54 ALL. 646: (A. I. R. (19) 1932 ALL. 293), concerning S. 11, Civil P. C. and S. 44, Evidence Act cannot be regarded as good law in face of what the Privy Council have laid down and if there is any decision of any of the High Courts in India subsequent to the decision of the Privy Council, ignoring the pronouncement made by the Privy Council, then that decision cannot also be followed by us.

[69] It is true that their Lordships of the Judicial Committee refused to discuss the validity of the decisions of the Indian High Courts which lay down that a minor can avoid a decree passed against him on the ground of gross negligence on the part of his guardian ad litem by bringing a subsequent suit. But their Lordships did make certain observations which to my mind have considerably shaken the authority of the Calcutta case in *Sheo Churn Lall* v. *Ramnandan*, 22 Cal. 8 the Allahabad Full Bench case reported in *Siraj Fatma* v. *Mahmud Ali*, 54 ALL. 646: (A. I. R. (19) 1932 ALL 293 F. B.) and the Lahore case reported in *Ifthkar Husain* v. *Beant Singh*, A. I. R. (33) 1946 Lah. 233: (I. L. R. (1946) 27 Lah. 515).

[70] The first principle which their Lordships of the Judicial Committee have laid down is that the provisions of S. 11, Civil P. C., being mandatory, and the ordinary litigant can only avoid its provisions by taking advantage of S. 44, Evidence Act. Boys J., in his dissentient judgment in the case of *Siraj Fatma* v. *Mahmud Ali*, 54 ALL. 646 : (A. I. R. (19) 1932 ALL. 293 F.B.) had observed that while by S. 11, Civil P. C., the judgment, given that other necessary conditions exist, is conclusive, an exception was provided by S. 44, Evidence Act and he further observed that there was no distinction between the rule of evidence permitting proof of fraud or collusion and the rule of evidence permitting evidence of negligence and that consequently evidence cannot be given of negligence on the part of a guardian in order to arrive at a conclusion that a decree can be treated as a nullity. According to his view, gross negligence had been omitted from S. 44, deliberately and the idea of putting gross negligence of guardian on the same footing as fraud and collusion was absent from the minds of the Legislature. In my opinion the Privy Council decision lends considerable support to the opinion of Boys J. Though the opinion of Boys J., was not accepted by Sir John Beaumont in *Krishnadas* v. *Vithoba*, A. I. R. (26) 1939 Bom. 66: (I. L. R. (1939) Bom. 340 F. B), it ought to be accepted by me now because of the pronouncement of the Privy Council. It gets amply established by the Privy Council decision that the provisions of S. 11, Civil P. C., can be avoided only by taking advantage of S. 44, Evidence Act, and the Privy Council does not speak of any substantive right to avoid the provisions of S. 11, Civil P. C., independently of S. 44, Evidence Act, it being another matter what their Lordships meant by using the word "ordinary litigant". The point whether they wanted to exclude a minor from the category of an ordinary litigant is a different point, and for the present I am only pointing out that it is now a principle well-recognised by the Privy Council that the provisions of S. 11, Civil P. C., can be avoided only by taking advantage of S. 44, Evidence Act. I cannot now agree with the view of Sir John Beaumont that there is a substantive right in any litigant independently of what is contained in S. 44, Evidence Act to avoid a judgment.

[71] The second thing which gets established by the Privy Council decision is that the distinction between negligence and gross negligence is elusive, and that negligence or gross negligence cannot be treated as fraud or collusion. Their Lordships when they pointed out that the distinction between negligence and gross negligence was merely elusive certainly meant that no line of demarcation could be fixed between negligence and gross negligence, and when they said that the Court should not treat negligence or gross negligence as fraud or collusion they had in mind the confusion that had often been created on account of treating negligence as gross negligence and gross negligence as fraud or collusion. As for example, in the case of *Mathura Singh* v. *Rama Rudra Prashad Sinha*, 14 Pat. 824 : (A. I. R. (23) 1936 Pat. 231), Khaja Mohammad Noor and Dhavle JJ. observed that gross negligence amounts to fraud and affects the proper representation of the minor and thus takes away the jurisdiction of the Court to pass a decree, as a Court cannot pass a decree against a minor unless he is represented by a guardian. With the greatest respect for the learned Judges who decided that case, I should say that I am not able to adopt the principle enunciated by their Lordships and I respectfully agree with the observation of Broomfield J. in the Full Bench case of the Bombay High Court that the question whether minors are properly represented and whether decrees obtained against them are legally valid or not cannot without risk of hopeless confusion be left to depend on the illusory distinction between negligence and gross negligence. In actual practice it would be at times very difficult to distinguish between negligence and gross negligence, and in deciding the question referred to us we have to bear in mind the observation of their Lordships of the Judicial Committee that the distinction between negligence and gross negligence is after all elusive.

[72] The third important observation of their Lordships of the Judicial Committee is that they are not prepared to agree with the view expressed in *Kari Bapanna* v. *Sunkari Yerramma*, A. I. R. (10) 1923 Mad. 718: (45 M. L. J. 324), that the principle of S. 44, Evidence Act can be extended to cases of gross negligence. In order to understand what their Lordships meant we will have to look to the decision in *Kari Bappanna's case*, A. I. R. (10) 1923 Mad. 718 : (45 M. L. J. 324) which was to the effect that cases of gross negligence are on the same footing as cases of fraud and that on principle no distinction could be made between the one class of cases and the other. Their Lordships of the Judicial Committee expressed their disapproval of this view and definitely laid down that the principle of S. 44, Evidence Act cannot be extended to cases of gross negligence. We should consider all the three principles laid down by their Lordships together, namely : (1) that the distinction between negligence and gross negligence is elusive, (2) that the principle of S. 44, Evidence Act cannot be extended to cases of gross negligence and (3) that the provisions of S. 11, Civil P. C., can only be avoided by taking recourse to the provisions of S. 44, Evidence Act. The cumulative effect of these three principles to my mind is that a minor cannot avoid a decree passed against him by alleging gross negligence on the part of his guardian ad litem by instituting a subsequent suit. On behalf of the appellant, very great stress was laid on the use of the word "ordinary" by their Lordships of the Privy Council and it was argued that their Lordships intended to exclude a minor from the operation of the rule laid down by them. I would have attached some weight to this argument had not their Lordships said that they were not prepared to agree with the view expressed in *Kari Bapanna's case*, A. I. R. (10) 1923 Mad. 718 : (45 M. L. J. 324). This is a case in which it had been pleaded that a previous decree was invalid because it had been obtained owing to negligence of the guardian and their Lordships laid down that they were not prepared to agree with the view expressed in this case. Their Lordships certainly meant that either according to S. 44, Evidence Act or on the principle on which that section was based a minor cannot avoid a decree on the ground of gross negligence by the guardian, and I need not repeat that the result of all the observations made by their Lordships is that the authority of the cases on which the appellant's learned lawyer has relied before us has been considerably shaken. It cannot be said that all kinds of litigants except a minor litigant are ordinary litigants. A pardanashin lady, a mutwalli of a wakf property and an asthaldhari or the mahanth of a Hindu temple are not ordinary litigants, but it cannot be asserted that they can avoid the provisions of S 11, Civil P. C. There was at least one case in this Court, namely, the unreported case of *Ganesh Prasad Singh* v. *Prem Lall Chowdhury* (A. F. O. D. NO. 163 of 1941) in which relying on the Privy Council decision Reuben J. and Sir Fazl Ali C. J., held that gross negligence was obviously insufficient to entitle a minor on attaining majority to claim the protection of S. 44, Evidence Act. I need not refer to the other cases of this Court, when my view is that the question referred to us can be decided on the basis of the Privy Council ruling.

[73] As, however, some English decisions have been cited before us, it is necessary that I should express my view as to how far we should depend upon the English decisions for the determination of the point raised. Even, Sulaiman J. recognised that in India we have statutory enactment prohibiting the Court from retrying an issue in which the matter directly and substantially involved had been directly and substantially in issue in a former suit between the same parties litigating under the same title, in a Court competent to try a suit which had been heard and finally decided by the Court. His Lordships says that in the face of the express language of the Act, the question is of general application admitting of no exceptions. His Lordship further recognised that though in England gross negligence of the guardian is good ground for the avoidance of a decree the general practice in England is to allow review in a case where negligence is asserted and by a separate action where fraud or collusion is asserted. Besides the statutory rule of the res judicata we have got elaborate rules here to secure the proper representation of minors in civil actions provided by O. 32, Civil P. C. After having considered the English cases which have been cited before us or which we could find out, I am inclined to agree with the views of Broomfield J. as expressed in the Full Bench case of the Bombay High Court that the infant's right in English law seems to be no more than the compliment of the Court's duty to protect his interest. It used to be the practice in England to give infants six months' time after they came of age to show cause against the decree and the infants could put in a new answer and examine witnesses in defence which may be different from what it was before. Naturally, because of such a provision and because the right to fair hearing had been reserved for the infants before the decree became final in English law some cases cropped up in which the minors on attaining majority were permitted to question the decrees passed

against them. The case of *Gregory* v. *Molesworth*, (1747) 3 Atk. 626 : (26 E. R. 1160), is generally cited as an authority for the general rule that a minor is as much bound by a decree as an adult, and Lord Hardwicke who delivered the judgment in this case made the following observation :

> "It is right to follow the rule of law, where it is held an infant is as much bound by a judgment in his own action, as if of full age; and this is general, unless gross laches, or fraud and collusion appear in *the prochein amy*, then the infant might open it by a new bill."

It seems to me to be doubtful that this case is a clear authority for holding that according to English law an infant can bring a suit to set aside a decree on the ground of gross negligence on the part of his guardian *ad litem*. Another case which is often cited is the case of *Hoghton* v. *Fiddey*, (1874) 18 Eq. 573: (43 L, J. Ch. 758). So far as this case is concerned, I would respectfully adopt the comments of Broomfield J. This was a case in which there was no decree against infant's father; there was a decree in their favour, for administration. The decree had not been enforced for seven years and then the infant through a next friend wanted to reopen the proceedings in order to make the decree effective. There is ample force in the argument that in this case there was no recognition of any right to bring a suit to set aside a decree. In *Brooke* v. *Lord Mostyn*, (1864) 46 E. R. 419 there is an observation which runs as follows :

> "The rule which applies between adults seems to me to be not less applicable to compromises by the Court on behalf of infants. The orders of the Court cannot be set aside on grounds less strong than those which would be required to set aside the transaction between competent parties. Whether the grounds which would be sufficient to set aside a compromise between competent parties would in all cases be sufficient to set it aside when sanctioned by this Court, I do not think it necessary for us in this case to determine. There is not, as I apprehend, any doubt that a decree or order may be impeached for fraud by original bill, and I pass by therefore the argument which was urged at the Bar as to a bill for review being necessary to set aside the order, and the consequences which would follow upon that argument. It is sufficient to say, that in my opinion the plaintiff, in order to entitle himself to relief in this suit, must make out a case of fraud and that this bill, therefore, is properly founded and the case was properly rested at the Bar upon that ground. This is the principle which, in my judgment, ought to be applied to the determination of this case, and it is upon this principle I rest my judgment upon it."

As was pointed out in *Kelsall* v. *Kelsall*, (1834) 39 E.R.1000 at p.1001:(2 My & K.409), a decree against an infant is erroneous, if it has not the clause, "unless cause be shewn within six months", and that this is intended to secure the infant against any proceedings taken to his prejudice, at a time when the law supposes him to be absent, or at least not present, in such a manner as to be capable of sufficiently defending his rights. This to my mind explains the position of an infant as it prevails under the English law. The case of *Richmond* v. *Tayleur*, (1721) 24 E. R. 591, contains the following note :

> "In this case it was held, that where an infant conceives himself aggrieved by a decree, he is not under a necessity to stay till he comes of age before he seeks redress, but may apply for that purpose as soon as he thinks fit (but see *Bennet* v. *Lee*, (1742) 2 Atk. 487 : (26 E. R. 694), neither is he bound to proceed by way of rehearing or bill of review, but may impeach the former decree by an original bill, in which it will be enough for him to say the decree was obtained by fraud and collusion, or that no day was given him to shew cause against it . . . "

The following observation was made by the Lord Chancellor in *Sir John Napier* v. *Lady Effingham*, (1726) 24 E. R. 786 : (2 P. Wms. 401):

> "All infant defendants by their answer put in an early claim to the care and protection of the Court in relation to their right, and ought to have it, for as much as they are supposed unable to take care of themselves; which arises from the general superintendency this Court has over infants; all decrees against them give six months after they come of age, to shew cause; and therefore Sir John Napier in the present case ought to have leave to put in a new answer."

On the basis of the decision in *Hoghton's case*, ((1874) 18 Eq. 573 : 43 L. J. Ch. 758), Simpson in his book on Infants says as follows :

> "A decree has been impeached, where there has been gross negligence by the next friend in the conduct of the infant's case, or new matter discovered since the date of the decree."

But in the subsequent paragraph of his book where he points out the mode of proceeding, he has observed that though an infant may commence a fresh action to set aside the judgment on the ground of fraud, collusion or error, the prudent and proper course is first to apply in the original action for the leave of the Court. Simpson has quoted the decision of *Kelsall* v. *Kelsall*, (1834) 39 E. R. 1000 : (2 My. & K. 409), in support of his view that an infant on attaining the age of 21 may set up a new defence. But that decision appears to be based mainly on the assumption that under the English law the infant enjoys a certain kind of special privilege. Undoubtedly, there are some observations in some English cases which go to show that an infant on attaining majority can challenge the decree passed against him during the period of his minority but on a perusal of the cases which have been placed before us I am of opinion that an infant in England enjoys such a privilege because of certain statute. In Halsbury's Laws of England the gist of the law on the subject is given in the following language :

> "A judgment in an action is as binding against an infant defendant as it is against an adult; but if it was obtained on the footing of his being of age, it is in the discretion of the Court to set it aside. He may, however, even while an infant, bring another action to impeach the judgment on the ground of fraud or collusion."

If it is found, as it must be found, that in the English law there is a particular statute giving certain privileges to infants, I do not think it will be quite safe to base the decision on the English cases. Such a right has not been preserved to infants by the Code of Civil Procedure which instead contains elaborate rules for making the decree effective against the minors. These elaborate rules would not have been framed by the Indian Legislature had it not been the intention of the Legislature in this country to protect the interest of the innocent plaintiff.

[74] I would sum up my views on the question referred to us in the following sentences : (1) A minor if he is properly represented in a suit is bound by the decision arrived at therein just as an adult is, and this is the combined effect of S. 11 and O. 32, Civil P. C. (2) A minor seeking to avoid the provisions of S. 11, Civil P. C. can only do so by taking advantage of S. 44, Evidence Act. (3) The principle of S. 44, Evidence Act cannot be extended to cases of gross negligence. (4) The point referred to us should not be decided on the basis of English cases, firstly, because in England there is a statute which gives protection to infants, and, secondly, because in India we have stereotyped and statutory rules for making effective decrees against the minors.

[75] I am, therefore, of the opinion that the question referred to us should be answered in the negative.

Question answered in affirmative.

R.G.D.

A. I. R. (37) 1950 Patna 115 *[C. N. 31.]*

FULL BENCH

AGARWALA C. J., MEREDITH AND NARAYAN JJ.

Upendra Pratap Narain Sahi — Plaintiff —Appellant v. *Dulhin Ishwarwati Kuer and another—Defendants—Respondents.*

A. F. O. D. No. 169 of 1945, Decided on 16th April 1948, from decision of Addl. Sub-Judge, Motihari, D/- 9th April 1945.

Tenancy law — Bihar Tenancy Act (VIII [8] of 1885), S. 22 (2) (as amended in 1907) — Co-sharer landlord purchasing occupancy holding between 1907 and 1923 — He is entitled to retain its possession on partition between him and his co-sharers— (Per *Meredith and Narayan JJ.*; *Agarwala C. J., contra.*)

(Per *Meredith and Narayan, JJ.*; *Agarwala C. J., contra.*) — The provisions of S. 22 (2) as amended in 1907 entitle a co-sharer landlord, who has purchased a non-transferable or a transferable occupancy holding between the years 1907 and 1923, to retain it in his possession as his purchased land on a partition taking place between him and his co-sharers.

The cases in A. I. R. (13) 1926 Pat. 263, A. I. R. (8) 1921 Pat. 341 and A. I. R. (9) 1922 Pat. 62, were correctly decided, assuming that the acquisitions of the occupancy holding were made after 1907 in those cases: *Case law discussed.* [Paras 1, 9, 71 & 83]

T. N. Sahai and B. N. Prasad—for Appellant.

S. N. Bose and P. K. Bose —for Respondents.

Agarwala C. J. — The questions referred to us for decision are :

"(1) Do the provisions of S. 22 (2), Bihar Tenancy Act as amended in 1907 entitle a co-sharer landlord, who has purchased a non-transferable or a transferable occupancy holding between the years 1907 and 1923, to retain it in his possession as his purchased land on a partition taking place between him and his cosharers ?

(2) Were the cases of *Jhapsi Sao* v. *Bibi Aliman*, 5 Pat. 281 : (A. I. R. (13) 1926 Pat. 263) and *Babu Ram Prasad* v. *Gopal Chand*, 2 P. L. T. 163: (A. I. R. (8) 1921 Pat. 341) and *Basudeo Narain* v. *Radha Kishan*, 3 P. L. T. 22 : (A. I. R. (9) 1922 Pat. 62) correctly decided, assuming that the acquisitions of the occupancy holding were made after 1907 in those cases?

[2] This case again raises the much debated question of the rights, on partition, of a cosharer proprietor who has purchased an occupancy holding. So far as purchases made before 1907 are concerned, it was decided by the Full Bench in *Sunder Mall* v. *Lachhmi Tewari*, 19 Pat. 893 : (A. I. R. (27) 1940 Pat. 467 F. B.) that the purchasing co-sharer is not entitled to retain possession after partition. What has now to be decided is whether he is entitled to retain possession after partition if his purchase is subsequent to the amendment of S. 22, Tenancy Act in 1907. There have been a number of decisions in this Court, including those mentioned in the reference, in which it has been held that he is entitled to retain possession. There are other cases of this Court in which, although it has not been held directly that he is not entitled to retain possession after partition, it has been held that he is not entitled to retain possession after he has parted with the proprietary interest, that is to say, after he has ceased to be a co-sharer in the proprietary interest. It has also been held, however, that he does not, by partition, cease to be a co-proprietor. The logic of this view I find it extremely difficult to follow.

[3] So far as the acquisition of an occupancy holding by a sole landlord, or by the entire body of co-sharer landlords, is concerned, sub-s. (1) is quite clear that the tenancy merges in the proprietary interest with the result that it ceases to exist as a separate interest. The difficulty has always been with regard to the position when an occupancy holding is purchased by one of several co-sharers. Sub-section (2) attempts to define his position. In order to understand the scope of that section it is as well to bear in mind what the Privy Council has held to be the position when a *raiyati* holding is purchased by a co-sharer proprietor. In the *Midnapur Zamindary Co.* v. *Naresh Narayan Roy*, 51 Cal. 631 :

(A. I. R. (11) 1924 P. C. 144), their Lordships laid down the following propositions :

> "(1) Where lands in India are held in common by co-sharers, each co-sharer is entitled to cultivate in his own interest in a proper and husband-like manner any part of the lands which is not being cultivated by another of his co-sharers, but he is liable to pay to his co-sharer compensation in respect of such exclusive use of the lands ;
>
> (2) No co-sharer can, as against his co-sharers, obtain any *jote* right, a right of permanent occupancy, in the lands held in common, nor can he create by letting the lands to cultivators as his tenants any right of occupancy of the lands in them;
>
> (3) Even if the Midnapur Company purchased any *jote* rights in lands held in common by the co-sharers, such a purchase would in law be held to have been a purchase for the benefit of all the co-sharers, and the *jote* rights so purchased would upon purchase be extinguished."

The suit was for partition of certain lands in which the plaintiffs and the Midnapur Zamindari Company were cosharers proprietors, a declaration that the Company had no *jote* rights in any of the lands of which partition was sought, and a decree for possession after partition by ejectment of the Company. The substantial defence of the Company was, (1) that the plaintiffs had not been in possession within 12 years from the date of the institution of the suit which was 8th August 1912, of the lands in which he claimed *jote* rights and that his claim to eject the Company, therefore, was barred by limitation; and (2) that the Company had *jote* rights in the lands in question. It was with regard to the second of these defences that the propositions mentioned above were stated. It is to be noticed that these propositions were laid down in 1924 (i. e., long after the amendment of 1907) and that among the members of the Judicial Committee which stated them were Sir John Edge and Mr. Ameer Ali, both of whom were familiar with the tenancy legislation of Bengal. It cannot be supposed, therefore, that S. 22, Tenancy Act was not considered. There is another reason which negatives any such supposition. In 1868 in *Womesh Chunder* v. *Raj Narayan Roy*, 10 W. R. 15, Sir Barnes Peacock, C. J. had expressed a doubt whether the doctrine of merger applies in the mofussal in India. The doubt then expressed was reiterated by the Privy Council in 1921 in *Dulhin Lacchanbati Kumari* v. *Bodhnath Tiwari*, 26 C. W. N. 565 : (A. I. R. (9) 1922 P. C. 94). When, therefore, their Lordships stated in the *Midnapur Zamindari Company's case*, (51 Cal. 631 : A. I. R. (11) 1924 P. C. 144) that even if the Company purchased any *jote* rights in land held in common by the co-sharers, such purchase would in law be held to have been a purchase for the benefit of all the co-sharers, and the *jote* rights so purchased would, upon purchase, be extinguished, it was not on the basis of the common law that they so held. The only statutory authority for the application of the doctrine of merger to agricultural lands is S. 22 (1), Tenancy Act, and, therefore, this must be "the law" to which reference is made in the phrase "such a purchase would in law be held to have been a purchase for the benefit of all the co-sharers". The decision of the Board must, therefore, be regarded as a statement of the law as enacted in S 22. The importance of this case is that it decided, *first*, that a purchase of *jote* rights in land, by one co-sharer, is for the benefit of all; *secondly*, that the effect of such a purchase is to extinguish the *jote* rights; *thirdly*, that a co-sharer cannot create in lands held in common, by letting them to cultivators as his tenant, any right of occupancy in the land; and *fourthly*, that no co-sharer can, as against his co-sharer, obtain a right of permanent occupancy in lands held in common. The *first* and *second* of these propositions merely state the effect of sub-s. (1) of S. 22, a purchase by a co-sharer being regarded as a purchase by all the co-sharers with the consequence that all of them hold the subject-matter of the purchase as proprietors. Sub-section 2 deals with two different situations viz. (1) when the purchasing co-sharer does not let the lands and (2) when he does let them. In the *first* case he is entitled, as against his co-sharers, to retain possession subject to his payment to them of what is due to them. In the *second* case the person to whom the purchaser lets the land is to be "deemed to be" a tenure-holder or a *raiyat*, as the case may be, although, but for this provision, he would not enjoy this status because, as observed by the Privy Council, a co-sharer cannot create in lands held in common, by letting them to cultivators as his tenants, any right of occupancy in the land.

[4] The question before us comes within the *first* case, namely, when the purchasing co-sharer does not let the land. For how long is he entitled to hold it as against his co-sharers ? He has no right of permanent occupancy in it but the statute confers on him the right to hold it so long as he pays to his co-sharers what is their due. For how long is he entitled to pay his co-sharers their dues and retain possession of the land? The Privy Council answered that question in the same case. They stated that the period for which the co-sharers' dues are payable is "until partition has been effected and possession of the land falling on partition to the plaintiff has been delivered to him." In my view, the privilege accorded to a co-sharer purchaser by sub-s. (2) of holding the land which he has purchased subsists only so long as the land is held in common. If he parts with his interest in the proprietary interest, he loses his right to retain

possession of any land held in common which he has purchased. This was expressly held in *Bambahadur Lal* v. *Mt. Gungra Kuer*, 7 P. L. T. 87 : (A. I. R. (12) 1925 Pat, 547). In *Babu Ram Prasad* v. *Gopal Chand*, 2 P. L. T. 163: (A. I. R. (8) 1921 Pat. 341), *Jhapsi Sao* v. *Mt. Bibi Aliman*, 5 Pat. 281: (A. I. R. (13) 1926 Pat. 263), *Basudeo Narain* v. *Radha Kishan*, 3 P. L. T. 22 : (A. I. R. (9) 1922 Pat. 62). it was held that a purchasing co-sharer is entitled to retain possession even after the land has been allotted to a former co-sharer on partition. These decisions are consistent with *Bambahadur Lal* v. *Mt. Gungra Kuer*, 7 P. L. T. 87 : (A. I. R. (12) 1925 Pat. 547), only if it be held that the condition imposed by sub-s. (2) ceases to operate on partition. The only argument I have heard in support of this view is that otherwise the purchasing co-sharer would lose the money he had paid for the holding. In *Sundermall* v. *Lachhmi Tewari*, 19 Pat. 893 : (A. I. R. (27) 1940 Pat. 467 F. B.), it has been pointed out that this is a risk which the purchasing co-sharer takes and which he may be assumed to allow for when making his purchase.

[5] To me it seems that the correct construction of this sub-section has been unnecessarily complicated by describing the position of the purchasing co-sharer as the holder of a "peculiar" or "anomalous" tenancy. An examination of the other provisions of the Act, however, shows clearly that he is neither a tenant nor is the land which he holds as purchaser a holding within the meaning of the Act. Section 3 (3) defines 'tenant' as a person who holds land under another person, and is, or but for a special contract would be, liable to pay rent for that land to that person. In the case of a person holding land under co-sharer proprietors, 'tenant' means a person who holds land under the entire body of co-sharers. A co-sharer proprietor in possession of land belonging to all the co-sharers cannot be said to be holding under the entire body of co-sharers, for, so far at least as his own interest is concerned, he cannot hold under himself.

[6] Then again, 'holding' has been defined in S. 3 (9) as a parcel or parcels of land held by a *raiyat* and forming the subject of a separate tenancy. But a person cannot be both a co-proprietor and a *raiyat* at the same time in respect of the same land or interest.

[7] A consideration of the definition of the words "holding" and "tenant" in the Tenancy Act, therefore, leads to the conclusion that land in the possession of the co-sharer is not a holding and that the co-sharer is not a tenant in respect of it. The true position appears to be as stated by the Privy Council in the case, namely, that on a purchase of an occupancy holding by a co-sharer, the purchase must be regarded as being for the benefit of all the co-sharers. But for sub-s. (2), sub-s. (1) would apply and the land would then be held by the entire body of co-sharers as proprietors and not as tenants. The effect of sub-s. (2) is to give statutory recognition to the other proposition laid down by their Lordships, namely, that the purchasing co-sharer is entitled to retain possession of the land which he has purchased on payment to his co-proprietors of their shares of what is payable for exclusive use of the land. And, as held in *Bambahadur Lal* v. *Mt. Gungra Kuer*, 7 P. L. T. 87: (A. I. R. (12) 1925 Pat 547), this right exists only so long as the purchaser remains a cosharer. On partition he ceases to be a cosharer and his right to possession as against the person to whom the land is allotted on partition also ceases. The observation of Kulwant Sahay J. to the contrary in the case last mentioned must be attributed to the fact that he was bound by the decisions in *Babu Ram Prasad* v. *Gopal Chand*, 2 P. L. T. 163: (A.I R. (8) 1921 Pat. 341), *Jhapsi Sao* v. *Bibi Aliman*, 5 Pat. 281 : (A. I. R. (13) 1926 Pat. 263) and *Basudeo Narain* v. *Radha Kishan*, 3 P. L. T. 22: (A. I. R. (9) 1922 Pat. 62).

[8] In view of the provisions of S. 26N of the Act it makes no difference whether the land in question constitutes a transferable or non-transferable holding provided the purchase was, as in this case, prior to 1st January 1923.

[9] I would answer both questions referred to us in the negative, but as my learned brothers take the contrary view the Court's answer will be in the affirmative.

[10] **Meredith J.**—The questions which have been referred to this Full Bench are:

1. Do the provisions of S. 22 (2), Bihar Tenancy Act as amended in 1907 entitle a cosharer landlord, who has purchased a non-transferable or a transferable occupancy holding between the years 1907 and 1923, to retain it in his possession as his purchased land on a partition taking place between him and his cosharers?

2. Were the cases of *Jhapsi Sao*, 5 Pat. 281: (A.I.R. (13) 1926 Pat. 263), *Babu Ram Prasad*, 2 P. L. T. 163: (A. I. R. (8) 1921 Pat. 341) and *Basudeo Narain*, 3 P. L. T. 22 : (A.I.R. (9) 1922 Pat. 62), correctly decided assuming that the acquisitions of the occupancy holding were made after 1907 in those cases?

[11] Section 22 (2) as amended in 1907 runs as follows:

> "If the occupancy right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure holder, he shall be entitled to hold the land subject to the payment to his co-proprietors or joint permanent tenure-holders of the shares of the rent which may be from time to time payable to them; and, if such transferee sub-lets the land to a third person, such third person shall be deemed to be a tenure-holder or a *raiyat*, as the case may be, in respect of the land."

[12] The answer to the first and main question referred to us depends upon the status of

the purchasing co-proprietor and the nature of his rights, since the effect of a partition is not to create or extinguish rights, but to distribute them. Unfortunately it is on just this point that the provision is silent and incomplete. To quote the learned author of S. C. Sen's Bengal Tenancy Act:

> "the alterations made in this sub-section have created a great anomaly; for it is not laid down anywhere as to what will be the status of a cosharer (to whom an occupancy holding is transferred) in relation to the other cosharers."

[13] The question, I think, reduces itself to this. Does the purchaser get by his purchase a tenancy right of some anomalous kind, as has been held in many cases, or is the purchase merely an acquisition to the *bakasht* of the estate? In 1943, in *Anand Prasad Singh* v. *Medni Prasad Singh*, 23 Pat. 291: (A. I. R. (31) 1944 Pat. 313), I stated the view on the question which I then held. I have tried, however, in again considering the matter and the arguments addressed to us to keep an open mind, not always an easy thing to do. Whether I have succeeded in doing so or not, I have arrived at the same conclusion as I did then. I summed up my opinion in that case in these words:

> "The legal position seems to me to be that pending acceptance or rejection by the co-owners of the right to contribute and share in the benefit, the purchasing co-owner is merely holding the land in trust for all the owners, and during that period it may be that he is not a tenant. To that extent the decision of the Full Bench is, I think, correct. I agree that, having regard to the pre-1907 provisions of S. 22 and the general law as stated by the Privy Council in the *Midnapur Zamindari case*, 51 C. 631: (A. I. R. (11) 1924 P. C. 144), a co-proprietor purchasing before 1907 did not thereby become a tenant of his co-proprietors. On the contrary, his purchase gave him merely an equitable lien on the land. But, in my opinion, upon his recognition as a tenant by his co-proprietors either expressly or by necessary implication or upon his taking a fresh settlement from them, a new tenancy is created. I can find nothing at all either in the Act or in the general law or in the Privy Council decision referred to, inconsistent with this view. The nature of the tenancy, like the tenancy created immediately on purchase under the new section, may be anomalous. Its holder may not be exactly a tenure-holder or exactly a *raiyat*. But the anomaly is the creation of the statute. Upon the point of recognition it must not be forgotten that in this country a tenancy is undoubtedly created by use, occupation and recognition. If a man cultivates the *zamindar's* lands and the *zamindar* lets him, there is an implied contract between them, creating the relationship of landlord and tenant: *Nityananda Ghose* v. *Kissen Kishore*, (1864) W. R. Act 10 Rul. 82, quoted with approval in *Azim Sirdar* v. *Ram Lal*, 25 Cal. 324. This has been consistently followed by the Courts. Upon the question of proof of title by evidence of recognition the decision of the Privy Council in *Chandra Churdeo* v. *Laldhari Prasad Singh*, 14 P. L. T. 57: (A. I. R. (19) 1932 P. C. 264), may also usefully be referred to".

[14] These observations were mainly made in regard to the pre-1907 provisions of s. 22. But one thing, I think, is certain. Whether or not the 1907 amendment strengthened the position of the purchaser, at least it did not weaken it except in so far as it made it clear that the status of the purchaser was not that of a *raiyat*. Writing now I feel that perhaps I expressed myself over emphatically or even dogmatically; nevertheless I am of opinion that what I said then was substantially correct.

[15] As S. 22 (2) does not define the status of the purchaser, we have to look to the general law, and try and interpret the provisions in the light thereof. In this connection the relevant law will clearly be that of merger and that regarding the rights *inter se* of tenants in common and joint tenants. In examining the question, therefore, I propose to consider first the law of merger, and second the law relating to co-tenants. After that I shall consider the section in its historical aspect and the circumstances leading to the 1907 modification. Lastly, I shall consider the relevant rulings.

[16] I think it can be laid down with some confidence that under the general law no merger will take place. The preponderance of opinion is unquestionably that, apart from statute, there is no law of merger in the mufassal in India. As far back as 1868 in *Womesh Chunder* v. *Raj Narayan Roy*, 10 W. R. 15, Sir Barnes Peacock C. J. said:

> "My own impression is that the doctrine of merger does not apply to lands in the Mofussal (sic) in this country."

Jackson J. said in the same case:

> "I most fully concur in all that has fallan from the Chief Justice in respect of the doctrine of merger. I am not aware of any solid foundation for the opinion that that doctrine is any part of our mofassal law."

[17] Conceding that there may be some doubt upon this point, it is at least clear that, if any law of merger is applicable, it is upon the principle laid down by the Privy Council in *Robert Watson* v. *Ram Chand*, 17 I. A. 110: (18 Cal. 10 (P. C.), that where no specific rule exists, the Courts are to act under the Bengal Regulations according to "justice, equity and good conscience." Therefore, it will not be the English Common law of merger irrespective of intention, but the equitable doctrine that merger depends upon intention, and in the absence of evidence of intention upon benefit. Markby J. in *Rushton* v. *Atkinson*, 11 W. R. 485 said:

> "Upon the question of merger, what the Judge would have to do, assuming the English law to be applicable, would have been not to apply the dry rule of English Common law, but the rule as modified by all the equities which an English Court of Chancery would import into the consideration of the case."

[18] I do not intend to refer to the large number of decisions cited before us on the question of merger in India. It will be enough to cite one Privy Council decision in support of

what I have just stated. It is *Dulhin Lacchanbati Kumari* v. *Bodh Nath Tewari*, 26 C. W. N. 565: (A. I. R. (9) 1922 P. C. 94). Their Lordships queried whether prior to the Transfer of Property Act there was a law of merger applicable in the mufassal, and went on to say :

> "But, if the doctrine of merger is appealed to, that doctrine must be taken as it stands. Merger is not a thing which occurs *ipso jure* upon the acquisition of what, for the sake of a just generalisation, may be called the superior with the inferior right. There may be many reasons—conveyancing reasons, reasons arising out of the object of the acquisition of the one right being merely for a temporary purpose, family reasons and others — in the course of which the expediency of avoiding the coalescence of interest and preserving the separation of title may be apparent. In short, the question to be settled in the application of the doctrine is, was such a coalescence of right meant to be accomplished as to extinguish that separation of title which the records contain ?"

[19] I will quote also one English case, *Ingle* v. *Vaughan Jenkins*, (1900) 2 Ch. 368 : (69 L. J. Ch. 618). Therein it was laid down that :

> "The principle applicable to the merger of charges in equity applies also to the merger of leases. The Court is guided by the intention ; and, in the absence of express intention, either in the instrument or by parol, the Court looks to the benefit of the person in whom the two estates become vested."

[20] The rule of merger in India in regard to non-agricultural leases is laid down in S. 111 (d), T. P. Act. It has no application to the matter before us, but, if it had, there would be no merger thereunder since the provision is that a lease of immoveable property determines in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right.

[21] It should now, I think, be apparent that when a cosharer landlord purchases a *raiyati* lease or interest in his own name for his own benefit, there will be no merger under the general law for the conditions necessary to apply the rule of merger do not exist. The entire interests do not coalesce in the same hands and in the same right (unless the purchase can be regarded as a purchase of all the cosharers—a point with which I shall deal later). There is patently in these cases no merger when the purchaser intends to maintain his separate interest, or it is to his benefit that there should not be merger. If, therefore, merger takes place, it is only by reason of and to the extent created by the provisions enacted in S. 22 itself.

[22] Nor is any difficulty created by the fact that if there is no merger the same person will unite in himself the status of landlord and tenant ; for that is a position which is well recognised, and frequently found, where co-tenants are concerned. If there are three co-sharers, two may lease their shares to the third, and the position of the third will then be proprietor as regards one-third and lessee as regards the remaining two-thirds. Similarly, if one co-sharer takes a transfer of a leasehold interest under the three, if merger does not take place, he will become the lessee to the extent of two-thirds under his co-sharers.

[23] Upon this point in *Anand Prasad Singh* v. *Medni Prasad Singh*, 23 Pat. 291 : (A. I. R. (31) 1944 Pat. 313), I quoted Freeman on Co-Tenancy. At p. 233 Para. 156, he says :

> "The purchase made by a co-tenant of an outstanding title or incumbrance is not void, nor does the interest so acquired by him, or any part of it, by operation of law, vest in his co-tenants. They may not wish to share in the benefits of his purchase ; for, in their judgment, the title purchased by him may not be paramount to that before held in common. The law gives them a privilege which they may assert. This privilege consists in the right to obtain a conveyance of the title bought in, upon their praying their share of the price at which it was bought. The privilege may be waived by an express refusal to reimburse the co-tenant for his outlay, or by such a course of action as necessarily implies such a refusal. The right of a co-tenant to share in the benefit of a purchase of a an outstanding claim, is always dependent on his having, within a reasonable time, elected to bear his portion of the expense necessarily incurred in the acquisition of the claim."

[24] And again at p. 242, Para. 164, he says :

> "The co-tenants are at liberty to contract with one another, in relation to all matters, including the subject-matter of the tenancy. One may lease his moiety to the other; and upon such leasing, the parties bear to each other the relations, are subject to the obligations, and entitled to the rights of landlord and tenant."

[25] Similarly, in Fawcett's Landlord and Tenant, Edn. 3, p. 63, we find in regard to joint tenants :

> "He (one joint tenant) may consequently lease his share either to another joint tenant, so as to create the relationship of landlord and tenant between them, with a right to distrain in respect of rent in arrear, or to a stranger."

[26] And, in regard to tenants in common, he says on the same page :

> "One tenant in common may demise his share to another . . . . A demise by all the tenants in common, though joint in its terms, operates as a separate demise by each of his own undivided share, and a confirmation by each of the demise of his companions' shares; and it is the same as to a joint lease by coparceners."

[27] With regard to the position in India, I quote from "the Law of Landlord and Tenant in Bengal and Bihar" by Ranjit Sinha (Calcutta: R. Cambray and Company). The learned author says, at p. 87 :

> "No doubt a cosharer occupying a portion of an estate larger than his own share in the estate entitles him to hold (*sic*) may do so by arrangement with his co-proprietors by renting the excess lands, and again it is easy to imagine a case where the property in a village might be divided amongst a very great number of share-holders, and one share-holder or a few share-holders might cultivate the whole at an agreed rent or rents. In such cases the cultivating share-holders might be treated as having a double character, and might be sued for the rent agreed by them to be paid to the other share-holders for the occupation of the land."

The author refers to *Cowper* v. *Fletcher*, (1865) 34 L. J. Q. B. 187 : (13 W. R. 739) where, he says: "it was held upon the authority of Lord Coke that joint tenants of land may agree to the creation of the relationship of landlord and tenant between themselves, and the possession held by one under such an agreement involves all the incidents of an ordinary tenancy by him to the others as joint landlords."

[28] *Cowper* v. *Fletcher*, ((1865) 34 L. J. Q. B. 187 : 13 W. R. 739) was decided in 1865. The plaintiff and two defendants were co-executors under a will, and were also joint tenants of the property, and as Blackburn J. put it, the plaintiff wrote to the executors, "who, to speak literally, were himself and the defendants," and offered to take a lease of a timber-yard and offices, and then the three executors including himself made an agreement for a lease. Blackburn J. said :

> "I think it is clear that the parties were agreeing for a lease, and that we ought to give effect to it in this way, that the two defendants who were seised of two-thirds of the land, agreed to let to the plaintiff those two-thirds, and allowed him to have the exclusive possession of the remaining third, which was in him."

[29] I have already referred to *Ingle* v. *Vaughan Jenkins*, (1900) 2 Ch. 368:(69 L. J Ch. 618). Farwell J. said :

> "In the first place, there was merely an agreement to grant a lease, and I know of no case in which such an agreement, which is specifically enforceable in equity, has been held to be merged or extinguished because the person entitled to the lease subsequently happened to fill the position of a lessor. For example, if a testator having agreed to grant a lease to J. S. . . devises the property to J. S for life with remainders over, J. S. can still enforce the agreement against the estate, although if he is the person in whom the power of leasing is vested he would have to grant the lease to himself."

[29A] Another case that may be mentioned is *Napier* v. *Williams*, (1911) 1 Ch. 361 : (80 L. J. Ch. 298). C. R., a trustee and his co-trustees executed a lease in favour of himself with certain covenants. It was held that the lease was not void in law though the covenants by one person with himself and others were void.

[30] After all this, it is perhaps unnecessary to draw attention to the fact that the principle in question is recognised in S. 22 itself in the Explanation to sub-s. (3) which runs :

> "A person having a right to hold the lands of an occupancy holding as a raiyat does not lose it by subsequently holding the land as a temporary tenure-holder or farmer of rents †."

This, be it noted, is inserted not as a positive legislation, but as an explanation.

[31] It is not, however, enough to consider the position with regard to merger. The question of merger is one thing, and the question of the rights *inter se* as between co-sharers is another. If the purchase by one co-sharer is to be regarded as a purchase by all, then, generally speaking, the conditions for merger will be satisfied, and, in any event, merger will take place under the provisions of S. 22 (1) which definitely provide for it. The purchaser is to hold the land not as a raiyat but as a proprietor or permanent tenure-holder, as the case may be. Now, there is a recognised principle that a co-tenant, who purchases an outstanding title, will be held to have purchased for the benefit of all the co-tenants. This has been stated by the Privy Council in *Midnapur Zamindary Co.* v. *Naresh Narayan Roy*, 51 Cal. 631 : (A. I. R. (11) 1924 P. C. 144). Their Lordships said :

> "Even if the Midnapur Company purchased any jote-rights in lands held in common by the co-sharers, such a purchase would in law be held to have been a purchase for the benefit of all the co-sharers, and the jote right so purchased would by the purchase be extinguished."

[32] That, however, is not the whole position. If it were, there would have been no need to enact S. 22 (2) separately from S. 22 (1), for the cases would have been the same. The statement just made seems to me to indicate the position where the cosharers have opted to participate in the purchase and the rights thereunder by contributing their share of the money expended. The complete position is, I think, as stated by Freeman, p. 232, Para. 154 :

> "The purchase, is, notwithstanding his designs to the contrary, for the common benefit of all the co-tenants. The legal title acquired by him is held in trust for the others, if they choose, within a reasonable time, to claim the benefit of the purchase, by contributing, or offering to contribute, their proportion of the purchase money."

I have already referred to Freeman's statement at p. 233, para. 156 :

> "The purchase made by a co-tenant of an outstanding title or incumbrance is not void, nor does the interest so acquired by him or any part of it, by operation of law, vest in his co-tenants. They may not wish to share in the benefits of his purchase; for, in their judgment the title purchased by him may not be paramount to that before held in common. The law gives them a privilege which they may assert. This privilege consists in the right to obtain a conveyance of the title bought in, upon their paying their share of the price at which it was bought. The privilege may be waived by an express refusal to reimburse the co-tenant for his outlay, or by such a course of action as necessarily implies such a refusal. The right of a co-tenant to share in the benefit of a purchase of an outstanding claim is always dependent on his having, within a reasonable time, elected to bear his portion of the expense necessarily incurred in the acquisition of the claim."

[33] At page 349, para. 263, Freeman says:

> "If an outstanding paramount title be purchased by one co-tenant, and the others fail or refuse to pay their share of the purchase price, the purchaser may indem-

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† (The above occurs in the certified copy. The correct wording of the explanation to sub-s. (3) as amended by the Beng. Act I of 1907, runs as follows : "*Explanation.*—A person having a right of occupancy in land does not lose it by subsequently becoming jointly interested in the land as proprietor or permanent tenure-holder, or by subsequently holding the land in *ijara* or farm."—*Ed.*)

nify himself *by asserting the paramount title which he has so accquired.*"

[34] As for Patna cases, in *Gopi Singh* v. *Jagdeo Singh*, 8 P. L. T. 69 : (A. I. R. (14) 1927 Pat. 172), Dawson-Miller. C. J. and Foster J. held that even under the old tenancy law prevailing before 1885 the doctrine of merger had no application to the case of a co-sharer proprietor purchasing *raiyati jote* lands, and in *Parmeshwar Singh* v. *Sureba Kuer*, 88 I. C. 495 : (A. I. R. (12) 1925 Pat. 530), Dawson Miller C. J. and Macpherson J. held that where a co-sharer landlord purchases the interest of a tenant, then, unless the purchase is made on behalf of all the co-sharers, the interests of the lessor and the lessee do not become merged in the purchaser. This was a case of a purchase prior to either the Transfer of Property Act, 1882, or the Bengal Tenancy Act, 1885, and Dawson Miller C. J. said :

> "The law of merger as it then existed with regard to the interests of landlords and tenants was not the same as exists at the present day under the provisions of the Bengal Tenancy Act. Whether it was the same as was enacted in the Transfer of Property Act is not a matter which we need discuss, for even assuming that the law laid down in S. 111 (d), Transfer of Property Act was the same as that which previously existed, that section only applies to a case where the interests of the lessee and of the lessor in the whole of the property become vested at the same time in one person in the same right."

In the case before him Balgobind, the purchaser, was not the proprietor of the whole property. He merely had a one anna share in it, and the evidence was clear that he purchased for himself and not on behalf of his co-proprietors. On this point see also *Imamuddin* v. *Mohd. Rashidul Haq*, 4 P. L. J. 540 : (A. I. R. (6) 1919 Pat. 398). The co-proprietors may leave one of their member as a tenant under them provided he is inducted as such.

[35] The true position, therefore, so far as the general law is concerned, seems to be that it will depend upon the attitude of the co-sharers whether merger does or does not take place. They may not want to share in the purchase, and they need not. But if they do not, the consequence will be that there will be no merger, and the title bought in may be asserted against them upon partition. But, if they do wish to participate, the purchaser cannot prevent them. If they offer to pay their share, he cannot assert the title to prevent merger, since the purchase will be regarded as a purchase for all. He can continue to hold the land, but it will be as a co-sharer, and not as a tenant. This will be on the principle that

> "where land in India is settled and held in common, each co-sharer is entitled, subject to paying compensation to the other co-sharers, to cultivate any part of it not being cultivated by them. The other co-sharers are not thereby ousted; their remedy, if they object, is to obtain a partition. No co-sharer can obtain or create in tenants a *jote* right or any right of permanent occupancy against the other co-sharers" (Priy Council in *Midnapur Zamindari Co.* v. *Naresh Narayan Roy*, 51 Cal. 631 : (A. I. R. (11) 1924 P. C. 144).

[36] The remedy of any co sharer, who is dissatisfied, is by suing for partition, and upon the partition all the equities will be adjusted. If the purchasing co-sharer has refused contributions to the purchase price, he will no longer be able to assert any title to the purchased lands. The lands will be partitioned as *bakasht* of the estate, though his right to contribution may be adjusted against his liability to pay compensation for use and occupation. On the other hand, if the co-sharers have refused to contribute, either expressly or by necessary implication, the purchaser at the partition will be able to assert his purchased title and insist upon retaining the land. The refusal to participate in the purchase will amount to a recognition by the co-sharers of the purchaser as their tenant. Even without partition, once the co-sharers have recognised the purchaser as a tenant rather than contribute, they will be able to sue him for their share of the rent.

[37] An interesting case where the rights of co-tenants were considered is *Leigh* v. *Dickeson*, (1885) 15 Q. B. D. 60 : (54 L. J. Q. B. 18). The defendant, one of the tenants in common, had possession of the whole of a house by virtue of a lease from his co-tenant in common. It was held that the defendant must be considered as holding exclusive possession upon the terms of the lease, and having continued in occupation after the expiration of the lease he was liable for rent at the same rate as was reserved by the lease. But having expended money on repairs of the house, he was held to have no right of counter-claim against his co-tenant for contribution. Brett M. R. said :

> "Sometimes money has been expended for the benefit of another person under such circumstances that an option is allowed to him to adopt or decline the benefit: in this case, if he exercises his option to adopt the benefit, he will be liable to repay the money expended ; but if he declines the benefit he will not be liable. But sometimes the money is expended for the benefit of another person under such circumstances, that he cannot help accepting the benefit, in fact that the is bound to accept it: in this case he has no opportunity of exercising any option, and he will be under no liability."

The case was held to fall under the latter category. But it was pointed out that there was a remedy by way of partition, for, in a suit for partition in the Chancery Division expenditure between tenants in common would be taken into account. Cotton L. J. said:

> "There is, therefore, a mode by which money expended by one tenant in common for repairs can be recovered, but the procedure is confined to suits for partition. Tenancy in common is an inconvenient kind of tenure;

but if tenants in common disagree, there is always a remedy by a suit for a partition, and in this case it is the only remedy."

I cite there observations to show that when partition does take place there is nothing to prevent the equities between the cosharers being fully adjusted. If one tenant in common has purchased a holding at a heavy cost and has perhaps spent further large sums in improving it in the course of years, it would be highly inequitable that the holding should be assigned to different cosharers as *bakasht* upon partition without providing for compensation in the general distribution. But there is no reason why that should take place, and, in the circumstances, it would doubtless be held that there were good and sufficient reasons for assigning the purchased property to the share of the purchaser.

[38] Now let us consider how the law is to be treated as modified by the provisions of S. 22. Section 22 (2), as originally enacted in 1885, ran as follows:

> "If the occupancy right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure-holder it shall cease to exist; but nothing in this sub-section shall prejudicially affect the rights of any third person."

Section 22 (1) was to the same effect:

> "When the immediate landlord of an occupancy holding is a proprietor or a permanent tenure-holder and the entire interests of the landlord and the raiyat in the holding become united in the same person by transfer, succession or otherwise, the occupancy right shall cease to exist, but nothing in this sub-section shall prejudicially affect the rights of any third person."

This section was enacted to prevent or discourage the acquisition of occupancy rights by landlords. But it was not fully effective because in 1896 a Full Bench of five Judges of the Calcutta High Court held that the effect of the purchase by one co-owner of land of the occupancy right is not that the holding ceases to exist but only the occupancy right which is an incident of the holding (*Jawadul Haq* v. *Ram Das Saha*, 24 Cal. 143: (1 C. W. N. 166)) and in 1905 this decision was affirmed by another Full Bench of five Judges by a majority of four to one, Rampini J., dissenting (*Ram Mohan Pal* v. *Sheikh Kachu*, 32 Cal. 386: (1 C. L. J. 1 FB).)

[39] The effect of these decisions was that the purchaser was regarded in some cases as a non-occupancy *raiyat*. He could, consequently, again acquire rights of occupancy, and, worse still, if he sub-let, his lessee would merely be an under-*raiyat* with no permanent rights. To prevent this the amendments of 1907 were made, and as this was about the time of the partition of Bengal, amendments were separately made in Bengal and in Eastern Bengal and Assam. The difference in the two is, to my mind, highly significant. In Eastern Bengal the amended provisions were as follows:

> "22. (1) When the immediate landlord of an occupancy holding is a proprietor or permanent tenure-holder, and the entire interests of the landlord and the *raiyat*, in the holding become united in the same person, such person shall have no right to hold the land as a *raiyat* but shall hold it as a proprietor or permanent tenure-holder (as the case may be); but nothing in this sub-section shall prejudicially affect the rights of any third person.
>
> (2) If the occupancy right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure-holder, such person shall have no right to hold the land as a *raiyat*, but shall hold it as a proprietor or permanent tenure-holder, as the case may be, and shall pay to his cosharers a fair and equitable sum for the use and occupation of the same."

[40] The Bengal amended provisions were:

> "22. (1) When the immediate landlord of an occupancy holding is a proprietor or permanent tenure-holder, and the entire interests of the landlord and the *raiyat* in the holding become united in the same person by transfer, succession or otherwise, such person shall have no right to hold the land as a tenant, but shall hold it as a proprietor or permanent tenure-holder (as the case may be); but nothing in this sub-section shall prejudicially affect the rights of any third person.
>
> (2) If the occupancy right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure-holder, he shall be entitled to hold the land subject to the payment to his co-proprietors or joint permanent tenure-holders of the shares of the rent which may be from time to time payable to them; and if such transferee sub-lets the land to a third person, such third person shall be deemed to be a tenure-holder or a *raiyat*, as the case may be, in respect of the land.
>
> *Illustration*: *A*, a cosharer landlord, purchases an occupancy holding of a *raiyat*, *X*. *A* is entitled himself to hold the land on payment to his cosharers of the shares of the rent payable to them in respect of the holding. *A* sub-lets the land to *Y*, who takes it for the purpose of establishing tenants on it; *Y* becomes a tenure-holder in respect of the land. Or *A* sub-lets it to *Z*, who takes it for the purpose of cultivating it himself, *Z* becomes a *raiyat*, in respect of the land."

[41] As regards sub-s. (1), there is only slight difference between the two. In Eastern Bengal it was stated that such person could have no right to hold the land as a *raiyat*, whereas in Bengal the words used were "as a tenant", making it even clearer that it was intended that there should be merger and no tenancy, as was indeed clear, in any event, from the expression "but shall hold it as a proprietor or a permanent tenure-holder, as the case may be".

[42] Now consider sub s. (2). If it was intended that here also there should be no tenancy, but that the purchaser should hold as a cosharer, there would have been nothing easier than to say so, and the Legislature would have surely said so in view of the fact that it had said so expressly in sub-s. (1). Moreover, in Eastern Bengal the Legislature did say so. In sub-s. (2), also Eastern Bengal provided that the purchaser would hold the land as proprietor or permanent tenure-holder, as the case may be; that is to say, as a cosharer. When there was no such provision in the Bengal enactment, the omission must

have been deliberate. The use of the word "rent" instead of "compensation" must also have been deliberate; for in Eastern Bengal the wording was

> "and shall pay to his cosharers a fair and equitable sum for the use and occupation of the same".

But in Bengal the wording was

> "subject to the payment to his co-proprietors or joint permanent tenure-holders of the shares of the rent which may be from time to time payable to them."

In these circumstances the omission to provide that the land would be held as a cosharer, and the use of the word "rent" as opposed to the words used in Eastern Bengal can, in my opinion, only mean that it was deliberately intended to provide that the purchaser should hold as a tenant of some sort under his cosharers. The object of the amendment was to ensure that the purchaser could not acquire the status of an occupancy *raiyat* so as to make his own sub-lessees *under-raiyats*. But it seems to be evident, having regard to the wording employed as opposed to the wording in Eastern Bengal, that it was intended at the same time to secure to the purchaser the benefit of his purchase in some sort of tenancy rights while preventing the reduction of the actual cultivators to the status of *under-raiyats*. It was intended, in my opinion, that the lands by the purchase should not become *bakasht*.

[43] That this view is correct is, I think, placed beyond doubt by a reference to the notes on clauses of the Bengal Tenancy Amendment Bill, 1906, and the report of the Select Committee. In this report it is stated:

> "The amendments made by them in the section will give effect to the intention of the framers of the Act by providing that where a sole landlord acquires an occupancy holding of his *raiyat*, the interests of such landlord and tenant merge into a landlord's interest; and that where one of the several cosharer landlords or joint tenure-holders acquires an occupancy right of a tenant of all the cosharers or joint tenure-holders, such landlord cannot thereby acquire an occupancy right or by sub-letting bar the acquisition of *raiyati* rights by the sub-lessees. At the same time under the section, as modified by us, the landlord will not be prevented from cultivating the land himself, *though the holding will not become proprietor's private land*."

The italics are mine, and I wish to emphasise the statement "the holding will not become proprietor's private land" because I can place only one interpretation on it, namely, that it was intended that the land by the purchase should not become *bakasht* of the proprietors, but should remain tenanted land. The words used also show beyond doubt that the intention was to provide for merger in sub-s. (1) but to prevent it in sub-section (2).

[44] Commenting on this amendment, Mr. S. C. Sen in his Bengal Tenancy Act says:

> "Is such cosharer purchaser a tenant? It seems to be so, for a tenant means a person who holds land under another person and is....... Liable to pay rent for that land to that person (S. 3, cl. (3)). Now such cosharer transferee according to sub-s. (2) of S. 22 holds land under his cosharers and is subject to the payment of rent to the latter. Accordingly, he must be a tenant under his cosharers."

[45] It is interesting to notice that in 1928 there was a further amendment in Bengal, and this provided:

> "Nothing in this section shall prevent the acquisition by transfer, succession or in any other way whatsoever of the holding of an occupancy *raiyat* or share or portion thereof together with the occupancy rights therein by a person who is or who becomes jointly interested in the lands as a proprietor or a permanent tenure-holder:
>
> Provided that a cosharer landlord who purchases a holding of a *raiyat* at a sale in execution of a rent decree or of a certificate under this Act shall not hold the land comprised in such holding as a *raiyat*, but shall hold the land as a proprietor or tenure-holder, as the case may be, and shall pay to his cosharer a fair and equitable sum for the use and occupation of the same. The rent payable by the *raiyat* to the other cosharer landlords at the time of the transfer shall be regarded as the fair and equitable sum until otherwise determined in accordance with the principles of this Act regulating the enhancement or reduction of the rents of occupancy *raiyats*."

[46] That is to say, Bengal has since provided that a cosharer landlord can acquire an occupancy right and set it up against his cosharers except in the case where he has purchased at a sale in execution of a rent decree.

[47] There is no word in S. 22 (2), as amended in 1907 in Bengal, to suggest merger, while in sub-s. (1) merger was clearly provided for, and in sub-s. (2), as enacted in Eastern Bengal about the same time, merger was also clearly provided for. I hold, therefore, that the provision of law which we have to interpret not only does not modify the general law in favour of merger, but plainly suggests an intention to the contrary. It must be interpreted, in my view, as providing for the transfer by the purchase of a tenancy right, apart from an occupancy right, to the purchasing cosharer. Its effect upon the general law is to take away the right of the cosharers to participate in the purchase, so that in effect there will be a tenancy immediately upon the purchase, and not only when the cosharers refuse to participate by contribution, or recognise the tenancy as was the case prior to 1907.

[48] It is well settled that a cosharer in possession cannot create a *raiyati* interest by sub-letting.

> "No cosharer can as against his cosharers obtain any *jote* right, rights of permanent occupancy in the lands held in common, nor can he create by letting the lands to cultivators as his tenants any right of occupancy of the lands in them" (Privy Council in Midnapur *Zamindary Co.* v. *Naresh Narayan Roy*, 51 Cal. 631 : (A.I.R. (11) 1924 P. C. 144).)

But the cosharer purchaser under S. 22 (2) can do so. Surely it follows from this that he is not merely a cosharer proprietor in exclusive possession of *bakasht*. The section expressly provides that where he sub-lets his lessee shall be deemed to be a tenure-holder or a *raiyat*, as the case may be in respect of the land. He can, in other words, create a *raiyati* right by sub-letting. This, to mind, is only consistent with the existence of some intermediate right, whatever it may be called, between the cosharer propreitors as a body and the sub-lessee. If that sub-lessee becomes a *raiyat*, he must be regarded as a *raiyat* of all the cosharers, otherwise the position would be hopelessly anomalous. He has never obtained a lease from all the cosharers, but only from the purchaser, and that, I think, is why the word "deemed" is used, though, inconsistently enough, in the illustration the word is used "becomes."

[49] I shall now deal with the rulings. The position is this, that in every single case, and there are many, where the position of the purchasing cosharer upon partition, under the provisions of S. 22 (2), as amended in 1907, has been considered it has been held that his rights do not cease. There is not a single case to the contrary. In *Balu Ram Prasad* v. *Gopal Chand*, 2 P. L. T. 163: (A. I. R. (8) 1921 Pat. 341), Jwala Prasad, J. held that a co-proprietor acquiring an occupancy holding by purchase is entitled to retain possession of it on payment of rent to his cosharers. The mere fact that the estate in which the holding is situate is partitioned among the co-proprietors and the holding is allotted to some other co-proprietor would not entitle the latter to eject the co-proprietor who had purchased the holding. The learned Judge says:

> "The section clearly empowers a co-proprietor to hold possession of the *kasht* land purchased by him, the only condition imposed upon him being that he should pay rent therefor to his cosharers. There is no limit of time of his possession, nor is it controlled by any event, such as the partition of the estate. If his possession was to remain only for so long as the estate was not partitioned, it would have been clearly and unmistakably expressed by the Legislature."

He noticed that in the case of *Babu Ram Dheng* v. *Upendra Nath Kotey*, 44 I. C. 922 : (A. I. R. (5) 1918 Cal. 968), it was pointed out that the change in cl. (2) by the Amending Act of 1907 did not seem to have altered the position as previously understood that a fractional landlord who gets a transfer of an occupancy holding still acquires from the *raiyat* some sort of tenancy or intermediate interest which prevents him from treating the under-*raiyat* as a trespasser.

[50] In *Nand Kishore Singh* v. *Mathura Sahu*, 3 P. L. T. 13 : (A. I. R. (9) 1922 Pat. 193). Jwala Prasad A. C. J. and Das J. held that a cosharer landlord who purchases an occupancy holding and becomes liable to pay proportionate rent to the other cosharers under S. 22 (2), Bengal Tenancy Act, cannot be ejected from the purchased holding when it is, upon a subsequent Collectorate partition, allotted to the *takhta* of another co-proprietor.

[51] Again in *Basudeo Narain* v. *Radha Kishan*, 3 P. L. T. 22. (A.I.R. (9) 1922 Pat. 62), Das and Adami JJ. laid down that when a cosharer purchases the holding of an occupancy *raiyat*, and upon a Collectorate partition the holding is allotted to the *takhta* of another cosharer, the tenancy right continues, and the holding does not cease to exist. It is true that this case related to the section as it stood prior to 1907, but it is impossible to hold that the amendment of 1907 detracted from the position of a cosharer purchaser except in preventing his acquiring the status of a *raiyat*, and it has been held by the Calcutta High Court in *Babu Ram Dheng* v. *Upendra Nath Koley*, 44 I. C. 922: (A. I. R. (5) 1918 Cal. 968), that the change made in S. 22 (2) by the Amending Act of 1907 has not altered the law as previously understood, in so far as the fractional landlord, who gets a transfer of an occupancy holding, still acquires from the raiyat some sort of tenancy or intermediate interest.

[52] In *Bam Bahadur* v. *Gungra Kuer*, 7 P. L. T. 87: (A.I.R. (12) 1925 Pat. 547), Ross and Kulwant Sahay JJ. said that the status of the cosharer purchaser under S. 22 (2) is a peculiar status which attaches to the cosharer as long as he remains a cosharer. If he ceases to be a cosharer and his proprietary interest is lost, he has no right to retain possession of the land, and it would be passed on to the person who acquires the interest of that cosharer. In my view that is wrong. If I am right in the interpretation of the section, the interest is not dependent upon retaining the status of a cosharer, because it is an anomalous tenancy interest. However that may be, in this case the position of the purchaser upon partition was distinguished upon the ground that after partition the interest of the cosharer did not cease. He continued to be a proprietor after the partition, and hence it was held that he is entitled to retain possession. This reasoning, in my opinion, is again wrong, but the fact remains that the Bench apparently agreed with the decisions in *Babu Ram Prasad* v. *Gopal Chand*, 2 P. L. T. 163 :(A. I. R. (8) 1921 Pat. 341) and *Nand Kishore Singh* v. *Mathura Sahu*, 3 P. L. T. 13 : (A. I. R. (9) 1922 Pat. 193).

[53] In *Japsi Sao* v. *Bibi Aliman*, 7 P. L. T. 170 : (A. I. R. (13) 1926 Pat. 263), Das and Ross JJ. held that the allotment of certain lands by the revenue authorities as *bakasht* lands does not estop the cosharer holding direct possession of the said lands under S. 22 (2), Bihar Tenancy Act from continuing to keep them in his *khas* occupation on payment of rent to the cosharer

to whose *takhta* they have been allotted. Section 22 (2), Bihar Tenancy Act, confers a privilege on the purchasing cosharer which is in derogation to the common law right of the other cosharers, and that privilege subsists and is not taken away by a partition amongst the cosharers and the allotment of the purchased land to the *takhta* of one of the other proprietors. Section 22 (2) imposes a limitation upon the rights of the cosharers for the benefit of the purchasing cosharer, and there is no reason why this limitation should be removed by reason only of a partition taking place. With this decision I respectfully agree.

[54] In *Dhaneshwari Kuer* v. *Chandradhari Singh*, 17 P. L. T. 97: (A. I. R. (23) 1936 Pat. 317), Courtney-Terrell C. J. and Dhavle J. held that S. 22 (2), Bengal Tenancy Act entitled a co-proprietor to hold the *raiyati* lands purchased by him subject to the payment of rent as mentioned in cl. (2) after he has ceased to be a co-proprietor by reason of partition. It is only as long as there are others interested in the land as co-proprietors that it is necessary to deal specially with the purchasing co-sharer's right to hold the land. The partition does not put an end to that right or make a present of it to the co-proprietors who purchased nothing. What is really available for partition is not the land itself, but the rent that would have been paid for the land by the occupancy *raiyat* whose place is taken by the purchasing co-proprietor. With this decision also I respectfully agree.

[55] In *Naga Rai* v. *Buchi Rai*, 18 P. L. T. 173, Courtney-Terrell C. J. and James J., confirmed in Letters Patent Appeal a decision of Wort J. in which he had held *inter alia* that the purchaser under S. 22 (2) was entitled to maintain his purchased rights after partition.

[56] In *Sukhdeo Pandey* v. *Rameshwar Prasad*, A. I. R. (26) 1939 Pat. 522 : (185 I. C. 557), Rowland J. sitting with Chatterji J., said :

> "Undoubtedly it is a correct proposition of law that when a cosharer proprietor acquires a holding of an occupancy *raiyat*, the holding does not cease to exist."

Basudeo Narain v *Radha Kishan*, 3 P. L. T. 22 : (A. I. R. (9) 1922 Pat. 62) was referred to, and not dissented from, but the learned Judge went on to say that the question before him was different. He had to consider the position where the purchaser had parted by sale with his proprietary interest in the *tauzi*, and the question was whether the purchased right would pass to the purchaser along with the share in the *tauzi*. He followed *Bam Bahadur Lal* v. *Mt. Gungra Kuer*, 7 P. L. T. 87 : (A. I. R. (12) 1925 Pat. 547) and held that the status was a peculiar status which attached to a cosharer so long as he remained a cosharer, and on sale the interest would pass on to the person who acquired the interest of the cosharer. Here, in my opinion, he was wrong. If there are independent rights co-existing in the purchaser, there seems no reason in principle why upon the sale of one the other should pass with it.

[57] I now turn to cases which do not directly decide what happens on partition, but nevertheless have an indirect bearing upon the question. *Miss G. B. Solano* v. *Maharaj Kumari Umeshwari Kuer*, 16 Pat. 500 : (A. I. R. (24) 1937 Pat. 506) was a case where the cosharer purchaser had inducted certain tenants upon the purchased holding, and it was held that he was liable to pay to his co-sharer the share of the rent of the original occupancy holding, and not the rent payable in respect of the tenancies that might have been created by him. It was argued that the use of the words "which may be from to time payable to them" was an indication to the contrary, but Dhavle J., in his judgment thought that these words were intended to go not with the rent, but with the shares, and the reference was not to possible variations in the rent, but possible variations in the shares. It was also considered that the words might have been used because rent is always payable periodically.

[58] I now come to two unreported cases, the first Second Appeal 124 of 1945, decided on 1st April 1947, *Suraj Pal* v. *Ramgati*, (*reported in* A.I.R. (35) 1948 Pat. 239). One co-sharer sued the purchasing co-sharer for rent. The purchaser had again settled the land. The defence was that the rent had been reduced by the Rent Reduction Officer, and he was liable to pay rent at that rate to the plaintiff for his proportionate share, and not at the original rate. It was held that the sub-lessee was not a necessary party, and Imam J. said that his impression of the section was that, no matter what the purchasing cosharer does by way of sub-letting the land to a third person *vis-a-vis* himself and his cosharers, his liability to pay the shares of rent to his cosharers remains unaffected, and the rent payable was the share of the original rent.

[59] The second case is Second Appeal 1865 of 1945 decided by Manohar Lall and Ramaswami JJ. on 29th August 1947, *Jadupravamitra* v. *Rai Bato Behari*, (*reported in* A. I. R. (35) 1948 Pat. 202). Here the cosharer purchasers, defendants 1 to 8, had settled portion of the land with defendants 10 and 11. The claim was for produce rent. Defendants 10 and 11 urged that the plaintiffs were not entitled to realise rents from them, and that they had already divided the produce with defendants 1 to 8. A money decree was given against defendants 1 to 8. It was argued that the phrase, "shall be deemed to be a *raiyat*" ought to be construed as "shall be deemed to be

a *raiyat vis a vis* the purchasing proprietor, but not *vis a vis* the remaining proprietors." Ramaswami J. said that such a construction would be unreasonable and not in accordance with the policy and object of the statute, and this restrictive meaning should not be given to the word '*raiyat*.' The sub-lessee must be held to be a *raiyat* under the whole body of landlords; but, though this was so, it was further held that defendants 10 and 11 having paid rent to defendants 1 to 8 could not be required to pay rent again to the plaintiffs. The purchasing cosharers were liable to pay the entire compensation to the plaintiffs. (The word "compensation" was used because of the decision of the Full Bench in *Sunder Mull* v. *Lachmi Tewari*, A. I. R. (27) 1940 Pat. 467: (19 Pat. 893 F. B.). Manohar Lall J., referred to the use of the word "deemed," and he said:

> "We must assume that the sub-lessee must be treated as if he were a *raiyat*, but the other cosharer landlord could not look to him for payment of rent. The sub-lessee was bound to pay the entire rent to the cosharer who had settled the land with him, and could not be heard to say that the person who settled the land with him was only a cosharer, and so entitled to receive his share of the rent only."

[60] *Surya Mohan Thakur* v. *Arjun Rai*, A. I. R. (35) 1948 Pat. 38 : (1948 P. W. N. 22), was decided by Bennett and Beevor JJ. The plaintiff, a cosharer landlord, had purchased the holdings of defendants 1 and 2 in execution of decree for arrears of rent, and subsequently he settled part of the land with defendant 3 who thereby became a *raiyat*. This was the position when the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act, 1938 (Bihar Act IX [9] of 1938) came into force. Defendants 1 and 2 made an application under that Act for restoration of possession over the entire holding, and were given delivery of possession. Defendant 3 objected. The order was revised, and the portion settled with defendant 3 was excluded. The plaintiff then sued defendants 1 and 2 for the entire rent. Defendant 3 intervened. The question was raised whether the plaintiff was entitled to recover from defendants 1 and 2 the 16 annas of their rent or only a share proportionate to his landlord's interest which was 6 annas and odd. It was held that defendant 3 had become a *raiyat* in the full sense with a separate holding, and thereafter defendants 1 and 2 had nothing to do with his holding. What was restored to them would form a separate holding. After restoration defendants 1 and 2 became *raiyats* of that holding. The plaintiff was entitled to a decree for rent against defendants 1 and 2 for their restored lands, and he was entitled to 16 annas of that rent as sole landlord, the defendant not being liable to pay to his cosharers. The same principle was held to apply in the case of a *raiyat* restored to possession of his entire holding after restoration. It was decided that he should pay rent to the purchasing cosharer and not to the entire body of landlords.

[61] We get two things from these cases: (1) that, when the purchasing cosharer sub-lets, his sub-lessee gets the full rights and status of a *raiyat* and, with respect, I think that is the only possible view. Anything else would destroy the whole effect intended by the Legislative and reduce the sub-lessee to a mere trespasser *vis a vis* the remaining cosharers; and (2) that though a sub-lessee has the rights of a *raiyat*, he is liable to pay rent only to the purchasing cosharer. The remaining cosharers cannot sue him for rent, nor can they sue the purchasing cosharer for their proportionate share of the sub-lessee's rent, but only for their share of the original rent of the holding. That also seems to be the correct view.

[62] To me it seems that these two positions are only consistent with the existence of some intermediate interest in the hands of the purchasing cosharer, otherwise the sub-lease being a *raiyat vis a vis* all the landlords, all the landlords will be entitled to sue him for rent, and each will be entitled to the proportionate share of the new rent, I consider, therefore, that these four rulings afford authority for the view that there is an intermediate tenancy of some sort.

[63] This view is further supported by the fact that the purchasing cosharer can, under the section, create a fresh *raiyati* interest, which as a mere cosharer he could not do. *(See Midnapur Zamindari Co.* v. *Naresh Narain Roy*, 51 I. A. 293: (A. I. R. [11] 1924 P. C. 144) and *Kaniz Fatma Bibi* v. *Hussainuddin Ahmed*, 22 Pat. 382: (A. I. R. (30) 1943 Pat. 194 F. B.).) ("No cosharer can as against his co-sharers obtain any *jote* rights or rights of permanet occupancy in the lands held in common, nor can he create by leasing the lands to cultivators as his tenants any right of occupancy in the lands in them"). The purchaser can do a thing which only the entire body of landlords can ordinarily do. His position is therefore, not merely that of a cosharer in exclusive possession, but rather that of one having the entire landlord's powers in himself in this regard. This must, I consider, mean that he holds some sort of intermediate landlord's interest. It is undoubtedly an anomalous status. It is certainly not that of a temporary tenureholder under the other co-sharers, because a temporary *thikadar* has no such right. ("In Bengal a middleman cannot obtain as a middleman a right of occupancy in himself much less can he create in his tenant a right of occupancy in the lands held by him as a

middleman". *Midnapur Zamindari Co.* v. *Naresh Narayan Roy*, 48 I. A. 49 at p. 55: (A. I. R. (9) 1922 P. C. 241) and also *Midnapur Zamindary Co.* v. *Naresh Narayan Roy* 51 I. A. 293: (A. I. R. (11) 1924 P. C. 144)). If, however, the view be adopted that it was intended by the section to confer, some sort of permanent rights upon the purchasing cosharer, the anomaly largely disappears for there is nothing violently opposed to principle if a person with permanent rights of tenure creates a *raiyati* interest below him.

[64] I shall now deal with two arguments put forward as objections to the view which I hold. The first is based on the use of the words in S. 22 (2) "shall be entitled to hold the land subject to the payment to his co-proprietors or joint permanent tenure-holders etc". It is suggested that the use of these words suggests that the status was only intended to last until partition because after partition there will be no co-proprietors or joint tenure-holders.

[65] The answer to this argument is, I think, that in the context these are the only words that could have been used. They relate to the payment of the cosharers' shares of the rents to them. This state of affairs can only exist while there are cosharers. After partition there will be no question of any further such payments irrespective of whether the purchasing cosharer continues to hold the land or not; because if the land is allotted to him upon partition, as, I think was what the Legislature intended should be done, then there is no question of his paying any further rent to any one; while, if it is allotted to some of the cosharers, then though he may continue to hold the land as a tenant, the rent payable by him will not be any shares, but the whole rent—a different matter—for then the entire proprietary interest including his own share therein will have passed at the partition to some one else, and what that person will be entitled to is clearly the whole rent of the original holding.

[66] The other difficulty is the *Midnapur Zamindari case*, 51 I. A. 293: (A. I. R. (11) 1924 P. C. 144), to which I have already referred so many times. In the course of their judgment their Lordships said:

> "Even if the Midnapur Company purchased any *jote* rights in lands held in common by the cosharers, such a purchase would in law be held to have been a purchase for the benefit of all the cosharers, and the *jote* right so purchased would by the purchase be *extinguished*."

[67] The question is, is there anything here inconsistent with the view that the rights of the purchasing cosharer under S. 22 (2), as amended in 1907, are not terminated by partition? The first thing to notice is that, if their Lordships were referring to S. 22 (2) at all, it must have been to the section as it stood before 1907, because it is clear from the statement of facts, that in so far as the Midnapur Company claimed any *jote* rights by purchase, they were purchases long before 1907, since the plea of *jote* rights was one which the Midnapur Company had originally raised in the previous suit of 1902; and indeed the case was decided upon the view that the absence of any *jote* right was *res judicata* by the decision of 1902.

[68] The position, therefore, is this. The Privy Council must undoubtedly have been aware that two Full Benches of five Judges each in the Calcutta High Court held that on the purchase only the occupancy rights cease to exist, and the holding divested of that incident subsists. Is it conceivable that the Privy Council could have intended to overrule these decisions without even referring to them? Surely not. Therefore, when the Privy Council said that the *jote* rights so purchased would by the purchase be extinguished, their Lordships can only have been referring to the extinction of the occupancy rights for which the pre-1907 section provided. Then, with regard to their statement that the purchase would be held to have been a purchase for the benefit of all the cosharers that, in my opinion, was merely a statement of the general law, which was to that effect. But their Lordships did not say that the cosharers would be entitled to this benefit without contribution, or that they would be forced to participate in the purchase and would have no option to refuse. The Privy Council in this judgment quoted with approval from *Robert Watson* v. *Ram Chander Dutt*, 17 I. A. 110: (8 Cal. 10 P. C.). In that case the Privy Council through the mouth of Sir Barnes Peacock had said "Nor can one tenant in common be allowed to appropriate to himself the fruits of another's. . . . . . . capital". Is it conceivable that the Privy Council meant to overrule this without expressly saying so? Again, surely not. I feel confident that the Privy Council in the *Midnapur Zamindary case*, (51 Cal. 631: A. I. R. (11) 1924 P. C. 144) did not intend to say anything with regard to the rights of a purchasing cosharer under the 1907 amendment, with which they were not concerned in the case before them.

[69] In the question referred to us we have been asked to state the position not only with regard to purchase of transferable holdings, but also of non-transferable holdings. In a number of rulings, it has been laid down that S. 22 (2) has no application to the purchase of non-transferable holdings. It will suffice to refer to one, *Lachmi Narain* v. *Ram Saran*, 10 P. L. T. 204: (A. I. R. (16) 1929 Pat. 185)

where Ross and Chatterji JJ. held that S. 22 (2), Bengal Tenancy Act has no application to non-transferable holdings, and that the language of this sub-section has not been altered in this respect by the amendment of 1907. They further held that where a cosharer landlord purchases a non-transferable occupancy holding, his purchase is vaild to the extent of his interest, but he cannot force the purchase on his cosharers who are entitled to joint possession with him to the extent of their shares.

[70] There can be no doubt that S. 26N was intended to be retrospective and applied to purchases by cosharer landlords (see *Miss G. B. Solano* v. *Maharaj Kumari Umeshwari Kuer*, 16 Pat. 500: (A I. R. (24) 1937 Pat. 506)., So the question probably will not arise in the case in which this reference has been made. Nevertheless, I shall state my opinion. In the case of a non-transferable holding, the sale by the *raiyat* will be equivalent to abandonment; but, where the purchase is by a cosharer landlord, consent must be deemed to have been given to the extent of his share. To the extent of their own shares the cosharer landlords will undoubtedly be entitled to treat the holding as abandoned and, consequently *bakasht*. It will be *bakasht* in the possession of the purchasing cosharer, and the latter will be merely a cosharer in exclusive possession. The cosharers, however, will have no right to oust him. Their remedy will be by a suit for partition, and at a partition the purchasing cosharer will be able to set up no special rights in regard to their shares of the land. But once the cosharers do anything which can be interpreted as a recognition of the purchase, they must be deemed to have consented to the transfer, and in that case the purchaser will get the full rights conferred by S. 22 (2); for example, if they accept their shares of the rent from him, that would be an assent to the transfer. Mere refusal on their part to participate in the purchase by declining to contribute their share of the purchase price would in this case not be a recognition of the purchase as it would be quite consistent with an intention not to treat the purchaser as their tenant but to insist on their rights to treat their shares of the holding as *bakasht* upon abandonment.

[71] To sum up, my answer to the first question is an unqualified affirmative in the case of purchase of transferable holdings, and an affirmative only in the circumstances I have indicated where the purchase is of a non-transferable holding. As for the second question, it is merely consequential upon the first, and I do not think any separate answer is needed, as the answer to the first question answers the second also, in the affirmative.

[72] **Narayan J.**—I have had the advantage of reading the judgments of my Lord the Chief Justice and my learned brother Meredith J. and it appears to me that the question referred to us has become very complicated for two reasons, the first reason being that the Legislature failed to consider when it amended S. 22 as to what will be the position of a purchasing co-owner of an occupancy right or holding in the event of partition of the proprietary interest or in the event of his losing the proprietary interest and the second reason being the divergence of judicial opinion on this point. Though on the exact point which I have to determine the rulings of our own Court appear to be consistent, there is ample force in the contention that "a person cannot be co-proprietor and *raiyat* at the same time in respect of the same land" and that "the law does not recognise a person as a tenant of himself". Because of the difficult problem with which we are faced I tried to take help from authoritative books relating to the law of landlord and tenant and I find from Woodfall's "Law of Landlord and Tenent" that a relationship of landlord and tenant can be created in a variety of ways one of which is by the operation of statute irrespective of the intention of the parties. A sort of relationship of landlord and tenant is created between the cosharer purchaser and his co-proprietors because the former has to pay rent to the latter and this is certainly a creature of the statute. It is well known that a plain construction of the statute sometime leads to an absurdity or an anomaly. As a general proposition it is correct to say that the law does not recognise a person as a tenant of himself but a statute on its plain construction may lead to anomaly and the relationship of landlord and tenant can be created by means of a statute. It therefore follows that there can be such a thing as an anomalous tenancy. The first and the most elementary rule of construction is that in cases where the language is plain, precise, clear, unequivocal and unambiguous words should be understood in their technical sense if they have acquired one and otherwise in their ordinary and grammatical sense. Where the language is such as not to admit of more meaning than one, no question of interpretation arises. *Absoluta sententia expositore non indiget.* There is no necessity to explain that which requires no explanation. In the case of *Warbuton* v. *Loveland*, (1832) 2 Dow. & Cl. 480: (98 R. R. 844), it was laid down by Tindal C. J. that where the language is clear and explicit effect should be given to it whatever may be the consequences. The same view was taken by Coleridge J. in *Peacock* v. *Piebring*, (1852) 18 Q. B. 790), wherein he says that once the mind of the

Legislature is ascertained through the words employed

> "nothing is more dangerous than to flinch from that conclusion because we think the enactment is less wise or efficacious than it might have been made or wholly fails of its object; perhaps the most efficacious mode of procuring good laws, certainly the only one allowable to a Court of Justice is to act fully up to the spirit and language of bad ones and to let their inconvenience be fully felt by giving them their full effect."

Lord Brougham observed in *Crawford* v. *Spooner*, 4 M.I.A. 179 : (6 MOO. P C. 1) as follows:

> "The construction of an Act must be taken from the bare words of the Act. We cannot fish out what possibly may have been the intention of the Legislature. We cannot aid the Legislature's defective phrasing of the statute. We cannot add and mend and by construction make up deficiencies which are left there. If the Legislature did intend that which it has not expressed clearly, much more if the Legislature intended something very different, if the Legislature intended pretty nearly the opposite of what it said it is not for Judges to invent something which they do not meet with in the words of the text . . . . It is not for them to so supply a meaning for in reality it would be supplying it. The true way in these cases is to take the words as the Legislature has given them and to take the meaning which the words given naturally imply unless where the construction of those words is either by the preamble or by the context of the words in question controlled or altered. And, therefore, if any other meaning was intended than that which the words purport plainly to import, then let another Act supply the meaning and supply the defect in the previous Act."

[73] Therefore, if the Legislature has used the word "rent" we cannot interpret it to mean compensation for use and occupation. The language of S. 22 (2), as it stands after amendment is as follows :

> "If the occupancy-right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure-holder, he shall be entitled to hold the land subject to the payment to his co-proprietors or joint permanent tenure holders of the shares of the rent which may be from time to time payable to them; and, if such transferee sub lets the land to a third person such third person shall be deemed to be a tenure-holder or a *raiyat*, as the case may be, in respect of the land."

While commenting on the use of the word "rent" in this section, Shearer J. observed in *Anand Prasad Singh* v. *Medni Prasad Singh*, 23 Pat. 291: A. I. R. (31) 1944 Pat. 313) as follows:

> "The other ground, on which the theory of an anomalous tenancy is based, is the use of the word "rent" instead of the word "compensation" in S. 22 (2). In the Eastern Bengal and Assam Tenancy Act, in the Orissa Tenancy Act and in S. 22 (2), Bengal Tenancy Act itself, as amended in 1928, the word "compensation" and not "rent" is used. The use of the word "rent" may, perhaps have been due to an oversight on the part of the draftsman. More probably, the word was, I think, used advisedly in order to make the special period of limitation applicable to suits by the other co-sharers to recover anything due by the purchasing co sharers."

With the greatest respect for his Lordship's views I may point out that it would offend against the canons of interpretation to read the word "rent" as "compensation" and to draw any inference on the assumption that the use of the word "rent" is due to an oversight on the part of the draftsman. The words of the statute best declare the intention of the Legislature and there is no need for reading into the context words not found there. We should not speculate that the word 'rent' was used advisedly in order to make the special period of limitation applicable by the other co-sharers to recover the amount payable to them by the purchasing co-sharer. If the statute is defective it should be amended and till it is done its plain meaning cannot be set at naught on an assumption, however, well founded it may appear to be. But if really the word "rent" was used in order to make the special period of limitation applicable, the suits instituted by the other co-sharers against the purchasing co-sharer then that supports the view that the amount payable by the purchasing co-sharer is really not compensation. Moreover, if we proceed to consider the existing S 22 (2) in the light of the amendment that was made in East Bengal at about the same time when the amendment was made in Bengal we would feel convinced that the intention of the Legislature in making the amendment of 1907 was to create a sort of tenancy in favour of the purchasing co-sharer. The amended s. 22 (2) as it prevails in East Bengal is as follows :

> "If the occupancy right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure-holder, such person shall have no right to hold it as a proprietor or permanent tenure-holder, as the case may be, and shall pay to his co-sharers a fair and equitable sum for use and occupation of the same."

There was no difficulty in making a similar amendment in Bengal it being a very simple matter to use the words "fair and equitable sum for the use and occupation" instead of the word "rent". There is a good deal of difference between "compensation for use and occupation" and "rent" because "rent" according to the statute means "whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant". The use of the word "rent" presupposes that there is the relationship of the landlord and tenant and, therefore, if in Bengal the word 'rent' was used and in East Bengal the words "equitable sum for the use and occupation" were used this must be taken to be a deliberate act of the Legislature. In 1928, the Tenancy Act in Bengal was amended by Act of 1928 and the amended sub s. 2 in Bengal now stands, as follows:

> "Nothing in this section shall prevent the acquisition by transfer succession or in any other way whatsoever, of the holding of an occupancy *raiyat* or

> share or portion thereof, together with the occupancy rights therein by a person who is, or becomes, jointly interested in the lands as a proprietor or a permanent tenure holder. Provided that a co-sharer landlord who purchases a holding of a *raiyat* at a sale in execution of a rent decree or of a certificate under this Act shall not hold the land comprised in such holding as a *raiyat* but shall hold the land as a proprietor or tenure holder as the case may be and shall pay to his cosharers a fair and equitable sum for the use and occupation of the same. The rent payable by the *raiyat* to the other cosharer landlords at the time of the transfer shall be regarded as the fair and equitable sum until otherwise determined in accordance with the principles of this Act regulating the enhancement or reduction of the rents of occupancy-*raiyats*".

This is a significant amendment. The object of the amendment of S. 22 in 1907 was to counteract the ruling in *Jawadul Haq* v. *Ram Das Saha*, 24 Cal. 143: (1 C. W. N. 166) and the Full Bench ruling of the Calcutta High Court in *Ram Mohan Pal* v. *Sheikh Kachu*, 32 Cal. 386: (1 C. L. J. 1 F. B.) and the select Committee observed in their report as follows:

> "The amendments made by them in the section will give effect to the intention of the framers of the Act, by providing that, where a sole landlord acquires an occupancy holding of his *raiyat*, the interests of such landlord and tenant merge into a landlord's interest; and that where one of several cosharer landlords or joint tenure-holders acquires an occupancy right of a tenant of all the cosharers or joint tenure holders, such landlord cannot thereby acquire an occupancy right, or by sub-letting, bar the acquisition of *raiyati* rights by the sub-lessees. At the same time, under the section as modified by us, the landlord will not be prevented from cultivating the land himself, though the holding will not become proprietor's private land. We have inserted an illustration to make the meaning of the section quite clear '.

It is also necessary in this connection to note that if really the intention of the Legislature would have been that the interest of the purchasing co-sharer should not be regarded as a tenancy it would have made the same sort of amendment in sub-s. 2 as it has made in sub-s. 1 and would have expressly said as it has said in case of sub s. 1 that the two interests would coalesce. My opinion is that on a careful reading of the amendments it seems obvious that the word 'rent' was deliberately used by the Legislature and that the intention was to create a tenancy in favour of the purchasing co-shasharer, there being such a thing as an anomalous tenancy which the law can recognise.

[74] The second important consideration is that quite in derogation of the right under the common law the purchasing cosharer is in a position to create a tenancy by sub-letting the *jote* land purchased by him. Sub-section 2 says that if such transferee sub-lets the land to a third person such third person shall be deemed to be a tenure-holder or *raiyat* as the case may be in respect of the land. An illustration has been given in the Act and it runs as follows:

> "*A*, a cosharer landlord, purchases the occupancy holding of a *raiyat X*. *A* is entitled himself to hold the land on payment to his cosharers of the shares of the rent payable to them in respect of the holding. *A* sublets the land to *Y*, who takes it for the purposes of establishing tenants on it; *Y* becomes a tenure-holder in respect of the land. Or *A* sublets it to *Z*, who takes it for the purpose of cultivating it himself, *Z* becomes a *raiyat* in respect of the land".

The word "rent" has been used in this illustration as well.

[75] In *Radha Proshad Wasti* v. *Esuf*, 7 Cal. 414: (9 C. L. R. 76) Sir Richard Garth C. J. observed as follows:

> "When a tenant has been put into possession of *ijmali* property with the consent of all the sharers, or what is the same thing, has been placed there by the managing share holder, who has authority to act for the rest, no one or more of the cosharers, can turn the tenant out without the consent of the others. But no man has a right to intrude upon *ijmali* property against the will of the cosharers or of any of them. If he does so, he may be ejected without notice, either, altogether, if all the co-sharers join in the suit, or partially, if only some of the cosharers wish to eject him; and the legal means by which such a partial ejectment is effected, is by giving the plaintiffs possessions of their shares jointly with the intruder".

The Judicial Committee of the Privy Council in *Midnapur Zamindary Co. Ltd.* v. *Naresh Narayan Roy*, 51 Cal. 631: (A. I. R. [11] 1924 P. C. 144) observed as follows:

> "In Bengal a cosharer has no more power to confer a right of occupancy on a *raiyat* than a middleman would have, and in Bengal a middleman cannot obtain as a middleman a right of occupancy in himself, much less can he create in his tenant a right of occupancy in lands held by him as a middleman. See the judgment delivered by Lord Dunedin in *Midnapore Zamindary Co.* v. *Naresh Narayan Roy*, (48 I. A. 40: A. I. R. (9) 1922 P. C. 241). See also the cases referred to at p. 116 of the commentary on the Bengal Tenancy Act, 1885, by W. Finucane and Ameer Ali (Syed) edited by F. G. Wigley, Calcutta, 1904".

The same question arose in our own Court in the case *Bibi Kaniz Fatma* v. *Hussainuddin Ahmad*, 22 Pat. 382: (A. I. R. [30] 1943 Pat. 194 F. B.) and the questions of law referred to Full Bench were formulated as follows:

> "Whether a person inducted by one co-sharer only on lands belonging to all the cosharers is a *raiyat* under the Bihar Tenancy Act and whether such a person can acquire occupancy right by being in possession of such land for 12 years or upward. Whether the mere fact that a cosharer landlord has been in sole possession of certain land for convenience or by mutual arrangement amongst the cosharer landlords is sufficient to raise an inference that he has implied authority to settle tenants upon the land for convenience of cultivation".

These two questions were answered in the negative and Sinha J. made the following observations:

> "Unless there has been a complete partition, dividing not only possessions but title also, the law cannot assume such an arrangement between the cosharers as would vest one cosharer with the rights of all the cosharers. If the cosharers completely divest themselves of their rights as such, it amounts to a complete

> cessation of community of interest, that is to say, they cease to be tenants in common and each erstwhile cosharer then became the owner of the entire land in respect of which he was clothed with those rights. Hence in my opinion, there is no half-way house between estates in severalty and estates held in tenancy in common. I am fortified in this view by the observations of the Judicial Committee in the case of *Basiram Saha* v. *Ram Ratan*, 54 Cal. 586:(A.I.R. (14) 1927 P. C. 117), in which their Lordships observed as follows: 'It is a view that there is some *tertium quid* between common tenancy and several holding, and that when this *tertium qui* dexists, if any formal partition supervene, it does not affect or interfere with the arrangement under which land-owners who are in some respects still tenants in common may yet have specific shares of the estate allotted to their exclusive enjoyment. The Act does not apparently contemplate any such cases as being possible.' That being the position, if there has been no complete partition of the estate amongst the co-sharer proprietors, the private arrangement by which the co-sharers are allowed to possess specific plots of bakasht lands would not operate to clothe the co-sharer in possession with the full rights of the sole proprietor and divest the other co-sharers of their rights as such. Hence, in my opinion, on general principles, the first two questions referred to the Full Bench should be answered in the negative."

I have cited these cases containing the forceful observations referred to above with a view to show that a co-sharer landlord as such has no right to induct a person upon a land belonging to the entire body of the co-sharers without the consent or authority express or implied of the other co-sharers. If, therefore, the Legislature has authorised the co-sharer purchaser of the occupancy right to sub-let the land to a third person and has further laid down that such third person shall be deemed to be a tenure-holder or raiyat as the case may be in respect of the land, the conclusion is irresistible that the law contemplates that because of the purchase of the occupancy right of the land by the co-sharer purchaser an intermediate interest is created in his favour. The argument is advanced that because of the purchase of the occupancy right by the co-sharer landlord a constructive trust is created and that the co-sharer purchaser on being paid by his other co-sharers the expenditure for which they can be liable in proportion to their shares is bound to return the lands to them. Sherer J. in the case *Anand Prasad Singh* v. *Medni Prasad Singh*, 23 Pat. 291:(A. I. R. (31) 1944 Pat. 313) took this view and his observation runs as follows:

> "I can see no distinction between the case of one of a number of co-lessees, who obtains in his own name a renewal of a lease, and the case of a number of co-lessors, who obtains in his own name and for his own benefit a surrender of a lease. In each case, there arises a constructive trust. If a co-sharer landlord purchases an occupancy holding, which is transferable by custom without the consent of the landlord, the true ground, on which, in my opinion, he is entitled to resist a claim by the other co-sharers to be put in joint possession along with him, is that, as a condition precedent, they are bound to contribute to the expenditure, which he has incurred in purchasing it. If at a subsequent partition, the occupancy holding has, for any reason, to be allotted to the estate formed for another co-sharer, the latter can surely be required to reimburse the purchaser. Partition is an equitable remedy, and at a partition, all equities that may arise as between one co-owner and another can and ought to be adjusted. But the right of the purchsing co-sharer to be re-imbursed is an equitable right, and must be put forward and established in the proceedings in the revenue Court, if the estate is partitioned under the Estates Partition Act."

With the greatest respect for his Lordship's views, I have to point out that there is no provision in law under which such sort of adjustment based on reimbursement can be made. If really, on account of the purchase by the co-sharer landlord of an occupancy right or holding a constructive trust is created with the result that on a partition the entire body of landlords would be entitled to treat the purchased land as an ordinary bakasht land, then there is no reason why such a right cannot be enforced by the other co-sharers before a partition is effected. The statute can very well create an anomaly but we should not do that by means of our judicial interpretation and if we accept the theory of constructive trust then there is no escape from the position that even before the partition the other co-sharers can enforce their right by calling upon the purchasing co-sharer to make over the land to them after making contribution to the expenditure. Certainly this cannot be permitted that if any suit is instituted by the other co-sharers for the possession of the land on payment of the price or the expenditure that suit is bound to be thrown out. Does it stand to reason that while this so-called constructive trust cannot be effective so long as there is no partition the position changes and changes suddenly as soon as a suit for partition is instituted or as soon as an application for partition is filed before the Collector? In my opinion, the argument based on the theory of constructive trust would lead us to reasoning, absolutely fallacious, and to a conclusion, which will be insupportable in law. I can find no justification for the view that the right would remain dormant so long as there is no question of partition and would suddenly assume a shape as soon as the question of partition is raised. Shearer J. agreed with the views of Jwala Prasad J. as put forward in the case, *Ram Prasad* v. *Gopal Chand*, 2 P. L. T. 163 : (A. I. R. (8) 1921 Pat. 341) :

> "It will be anomalous and indeed, unjust to permit a co proprietor, after the kasht lands in the estate have been purchased by another co-proprietor at great expense, to go to the Collectorate partition and to claim the same as bakasht and to share in the acquisition, to which he has not contributed a single farthing."

But he said that he was not satisfied that the law as it stood was powerless to prevent such an injustice. Most respectfully I differ from His Lordship's view that the injustice can be avoided by means of a partition. As Jwala Prasad J. had pointed out, there is no limit of time to the possession of the co-sharer nor is his possession controlled by any event such as the partition of the estate. If really the intention of the Legislature would have been that the co-sharer would remain in possession only so long as the estate is not partitioned it would have clearly said so and it was very easy to add a clause that in the event of partition the land purchased by the co-sharer would be treated as *bakasht* and would be partitioned as such. Apart from what His Lordship Jwala Prasad J. had said as to the injustice to which the co-sharer purchaser will be subjected if his land is partitioned after he has cultivated it for a number of years and spent much capital or labour over it, there is the well-known observation of the Privy Council in *Rovert Watson & Co.* v. *Ram Chand Dutt*, 17 I. A. 110 : (8 Cal. 10 P. C.) which runs as follows:

> "In Bengal the Courts of justice, in cases where no specific rule exists are to act according to justice, equity, and good conscience, and if in a case of shareholders holding lands in common, it should be found that one share-holder is in the act of cultivating a portion of the lands which is not being actually used by another, it would scarcely be consistent with the rule above indicated to restrain him from proceeding with his work, or to allow any other share-holder to appropriate to himself the fruits of the other's labour or capital."

We get two things from this important observation of their Lordships, the first being that in cases where no specific rule of law exists we are to act according to justice, equity and good conscience and the second being that we are not to allow the share-holders to appropriate to themselves the fruit of others' labour or capital. Both these considerations are absolutely relevant in this case and should help us in deciding the points referred to us, when there is no specific rule of law by which on a partition the cosharer purchaser is bound to part with his lands for which he has paid a good price and which he had cultivated for a number of years after spending labour and capital over it.

[76] These are the main grounds on which I am inclined to answer the questions referred to us in the affirmative.

[77] It remains to be considered how far the observations of their Lordships of the Judicial Committee, in the case of *Midnapore Zamindary* v. *Naresh Narayan Roy*, 51 Cal. 631 : (A. I. R. (11) 1924 P. C. 144) can be of help to us in deciding the questions raised. The observations on which reliance can be placed are as follows :

> **"No co-sharer can, as against his co-sharers, obtain any *jote* right, rights of permanent occupancy, in the lands held in common, nor can he create by letting the lands to cultivators as his tenants any right of occupancy of the lands in them.**
>
> **Even if the Midnapore Company purchased any *jote* rights in lands held in common by the cosharers, such a purchase would in law be held to have been a purchase for the benefit of all the cosharers and the *jote* rights so purchased would by the purchase be extinguished."**

[78] My Lord the Chief Justice, who as a Judge of this Court delivered the judgment of the Full Bench Case in *Sunder Mall* v. *Lachhmi Tewari*, 19 Pat. 893 : (A. I. R. (27) 1940 Pat. 467 F.B.) when referring to the dictum laid down by their Lordships observed as follows :

> "In the *Midnapore Zamindary Co. Ltd* v. *Naresh Narayan Roy*, (51 Cal 631 : A. I. R. (11) 1924 P. C. 144) the Midnapur Co had not in fact purchased any occupancy holding, so it may be said that the dictum of their Lordships referred to above was obiter."

Shearer J. pointed out in the case of *Anand Prasad Singh* v. *Medni Prasad Singh*, (23 Pat. 291 : A. I. R (31) 1944 Pat. 313) that there can be no doubt that their Lordships were not construing the provisions of S. 22 (2) as stands after the amendment, but he was of opinion that they had the section in mind, as it stood prior to 1907. Ross J. with whom Das J. agreed, in the case of *Jhapsi Sao* v. *Mt. Bibi Aliman*, 7 P. L. T 170 : (A. I. R. (13) 1926 Pat. 263) while referring to the observation of their Lordships of the Judicial Committee observed as follows:

> "This general statement of the law must be read subject to the provisions of S. 22 (2), Bengal Tenancy Act, where the consequences of the purchase of an occupancy holding by a person jointly interested in the land as proprietor are enacted."

With this observation I respectfully agree. I have read their Lordships' judgment with the greatest care and in my opinion, it is quite clear that their Lordships stated the law only generally and had not in mind S. 22 (2), Bengal Tenancy Act. They could not at any rate think of the section as it stands after the amendment of 1907. Even Shearer J. has said that their Lordships were not construing the provisions of S. 22 (2) and that even if they had this section in mind it was the section as it stood prior to 1907. That their Lordships could not think of of the section as it stands after the amendment of 1907 would be further clear from the following observation of their Lordships :

> "the possession which the plaintiff got in 1902 was within 12 years on 8th August 1912 and the suit was not barred by the law of limitation."

If the plaintiff had got the possession in the year 1902 there cannot be any question of their Lordships having in mind the amended section and, therefore, their Lordships' observation, towards the end of the judgment "until the partition has been effected and possession of land falling on partition to the plaintiff has been delivered to plaintiff" cannot be the deciding factor. I am therefore of the opinion that the Privy Council decision does not at all help us in determining the question raised.

[79] My learned brother Meredith J. has discussed the rulings of this Court which have either directly decided the point raised or which have an indirect bearing upon the question and there is not a single case of this Court in which the view has been taken that the purchasing cosharer loses his rights upon partition. The important cases are those which have been referred in the order of reference and the case of *Babui Dhaneshwari Kuer* v. *Chandradhari Singh*, 17 P. L. T 97 : (A.I.R. (23) 1936 Pat. 317). In *Babu Ram Prasad* v. *Munshi Gopal Chand*, 2 P. L. T. 163 : (A. I. R. (11) 1924 Pat. 341), Jwala Prasad J. held that the mere fact that the estate in which the holding is situated is partitioned among the co-proprietors and the holding is allotted to some other co-proprietor would not entitle the latter to eject the co-proprietor who had purchased the holding. His Lordship during the course of the discussion observed that there was no limit of time to the possession of the purchasing co-proprietor nor was it controlled by any event such as the partition of the estate. He further observed that neither law nor equity would make his position worse than that of a stranger. This case has been followed in subsequent decisions and was noticed even in the Full Bench case, *Sunder Mall* v. *Lachhmi Tewari*, 19 Pat. 893 : (A.I.R. (27) 1940 Pat. 467) and his Lordship Agarwala J. while referring to this case observed that it was not clear whether the purchase had been made before or after 1907. Of course, if the purchase had been made before 1907 then this decision would be taken to have been overruled by the decision in *Sunder Mall* v. *Lachhmi Tewari*, (19 Pat. 893 : (A. I. R. (27) 1940 Pat. 467 F. B.); but if the purchase had been made after 1907 then the decision cannot be taken as overruled. A similar view was taken in *Nand Kishore* v. *Mathura Sahu*, 3 P. L. T. 13: (A. I. R. (9) 1922 Pat. 193) and it was further pointed out in this case that the terms 'kasht' or 'bakasht' are words of art introduced for the purpose of understanding the possession of lands by the proprietors and the tenants. In *Basudeo Narayan* v. *Radha Kishun*, 3 P. L. T 22:(A.I.R. (9) 1922 Pat. 62) the purchase no doubt had taken place prior to 1907. In *Jhapsi Sao* v. *Mt. Aliman*, 5 Pat. 281 : (A. I. R. (13) 1926 Pat. 263) it was held that the allotment of certain lands by the Revenue authorities as *bakasht* lands does not estop the co-sharer holding direct possession of the said lands under S. 22 (2), Bengal Tenancy Act from continuing to keep them in his *khas* possession on payment of rent to the co-sharer to whose *takhta* it has been allotted. The following observations of Ross J. in this case appear to me to be important:

> "He argues that as from the moment of partition there are no longer any co proprietors, the sub-section ceases to have any operation ; and the land must be treated as ordinary *bakasht* land falling to the direct possession of the proprietor of the *takhta* to which it is allotted. In principle I do not see why this consequence should ensue. Section 22 (2) confers a privilege on the purchasing co-sharer which is in derogation of the common law right of the other co-sharers as stated in the judgment of the Judicial Committee quoted above. I do not see what there is in partition to take away that privilege. On the contrary, it would appear that the partition only removes the necessity for the limitation on the effect of the purchase and would set free the holding to be operated upon by the oridinary provisions of the law. In other words, S. 22 (2) imposes a limitation on the rights of the co sharers for the benefit of the purchasing co-sharer; and there is no reason why this limitation should be removed by reason only of a partition taking place."

An important observation has also been made in the case reported in *Dhaneshwari Kuer* v. *Chandradhari Singh*, 17 P. L. T. 97 : (A. I. R. (23) 1936 Pat. 317) in which the same view was taken and the observation is as follows:

> "As my Lord the Chief Justice pointed out during the course of the argument, what the learned Advocate for the appellant has endeavoured to do is to read into the affirmative proposition contained in cl. (2) of S. 22 a negative provision that the purchasing co-sharer will have no right at all to the land as soon as he ceases to be a cosharer by reason of the partition. But it is only as long as there are others interested in the land as co-proprietors that it is necessary to deal specially with the purchasing co-sharer's right to hold the land. The partition does not put an end to that right or make a present of it to the co-proprietors who purchased nothing. What is really available for partition is not the land itself but the rent that would have been paid for the land by the occupancy *raiyats* whose place has now been taken by the purchasing co-proprietor, with the result that he becomes liable until partition to pay a proportionate share of the rent to the other co-proprietor or co-proprietors. These rents would be taken into account in the partition, but not the land purchased by the respondent."

I need not refer to the other authorities which have a direct or indirect bearing on the question, especially when almost all the cases have been referred in the judgment of my learned brother. I think if we act according to the principle of *stare decisis* we cannot depart from the principles which have been laid down in the several decisions of this Court and specially when there is no direct ruling to the contrary.

[80] I think I ought to refer to the case of *Bambahadur Lal* v. *Mt Gungora Kuer*, 7 P. L. T. 87: (A. I. R. (12) 1925 Pat. 547) a decision which in the opinion of my learned brother is wrong. With the greatest respect for his Lordship's views I am not able to go so far as to say that this decision is absolutely wrong. After all an anomalous position has been created and

when there is an anomaly such results can follow. It is to my mind not incorrect to say, in view of the provision of law as it stands, that the anomalous tenancy can last only so long as the proprietor continues to possess his proprietary interest. After the partition, as has been pointed out in several rulings, the interest of the co-sharer purchaser does not cease, but it does cease after his proprietary interest is sold and therefore the question arises whether he can retain the land after he has parted with the proprietary interest.

[81] In the case of *Ram Krishna Jha* v. *Jainandan Jha*, 14 Pat. 672:(A.I.R. (22) 1935 Pat. 291 F. B.) a Full Bench of this Court discussed the principle of *cursus curiae* and his Lordship Wort J. quoted the following observations made by Lord Cottenham and Lord Westbury. Lord Cottenham:

> "If there has been a course of decision and the decision first made has been adhered to and confirmed by other decisions, that is, what is called a current of authorities too strong to be resisted."

Lord Westbury:

> "If we find a uniform interpretation of a statute upon a question materially affecting property, and perpetually recurring, and which has been adhered to without interruption, it would be impossible for us to introduce the precedent of disregarding that interpretation."

After quoting these authorities Wort J. observed as follows:

> "I gathered from these authorities that the principle *cursus curiae* or the rule of practice, in the sense of the practice of the Court to decide the construction in a certain way, can only be applied when, first, the statute is ambiguous, secondly, when the decisions are consistent throughout; thirdly, when titles are dependent upon those decisions.'

These principles are, to my mind fully applicable in this case. There can be no doubt that the decisions of this Court have been consistent throughout and that titles have been dependent on those decisions. It appears to me to be a bit hard that we should now depart from the view which we have consistently held so long and I have already said that the use of the word "rent" in the sub-section which we are considering should alone lead us to answer the question referred to us in the affirmative.

[82] In the question 1 we find a mention of "non-transferable occupancy holding" as well, but a question about non-transferable occupancy holdings now will be purely an academic question. According to S. 26N, Bihar Tenancy Act, it makes no difference whether the lands in question are transferable or non-transferable holdings provided the purchase was made prior to 1st January 1923 as in this present case. Of course though the existing law is that a transfer made before 1st January 1923 would be binding upon the landlord and no notice shall be necessary and no landlord's registration fee shall be payable, the old law was that S. 22 (2) had no application in the case of non-transferable occupancy holding.

[83] My conclusion therefore is that both the question referred us should be answered in the affirmative.

V.R.B. *Reference answered.*

A. I. R. (37) 1950 Patna 134 *[C. N. 32.]*

SINHA AND MAHABIR PRASAD JJ.

Kamakshya Narainsingh—Plaintiff—Appellant v. *Karanpura Development Co. Ltd.—Defendant—Respondent.*

A. F. O. D. Nos. 125 and 127 of 1943, decided on 27th October 1949, from decision of Addl. Sub-Judge, Hazaribagh, D/- 30th April 1943.

(a) Bengal Court of Wards Act (IX [9] of 1879), S. 18—Court of Wards has power to enter into contract to lease—Concluding words of section are wide enough to include such power—Test is benefit of estate.

The provisions of S. 18 confer a power on the Court of Wards to enter into a contract to lease or sell. The section by its concluding portion clearly empowers the Court to do all other acts, the only limitation being that those acts must be, what the Court after applying its mind, judges as being "most for the benefit of the property and the advantage of the ward". In other words, if the entering into a contract to lease is, in the circumstances of the case, judged by the Court to be necessary to benefit the property and to confer advantage on the ward, the Court will be acting within its power in entering into such a contract. Even conceding that statutory power must be construed strictly and that the power to lease does not include a power to contract to lease there is no difficulty in construing the last clause of S. 18, as conferring upon the Court of Wards a power to enter into an executory contract of this nature, if a situation arises which calls for the exercise of such power for the benefit of the property and the advantage of the ward. The test to be applied for the purpose of finding as to whether the Court has such a power is whether the contract to lease is one which the Court of Wards can be said to have judged as being most for the benefit of the property and the advantage of the ward. A. I. R. (12) 1925 Pat. 259; *Approved*; 39 Cal. 232 (P.C.), *Disting*; A.I.R. (35) 1948 P.C. 95, *Rel. on.* [Para 32]

Moreover a power to sell includes the power to enter into a contract of sale. A. I. R. (17) 1930 Pat. 181 and (1900) 2 Ch. D. 267, *Rel. on.* [Para 32]

(b) Bengal Court of Wards Act (IX [9] of 1879), S. 18 — Contract to grant mining lease by Court of Wards on behalf of estate of ward—Benefit of estate — Rates of salami and royalty — Market rate not considered—As a consequence lease granted at low rates—Non-consideration of prevailing market rates held sad omission on part of Court of Wards, amounting to failure to exercise judgment, and thus, vitiating the transaction as not being one for benefit of property and the advantage of ward. [Para 38]

(c) Bengal Court of Wards Act (IX [9] of 1879), S. 18—Court of Wards entering into contract to grant mineral lease—Cess clause in unusual form—Clause found to be not for benefit of estate or ward—Court of Wards not giving any thought, to consequences—Failure to bring judgment to bear upon question of cess and taxes—Last part of section held

utterly disregarded—While negligence on the part of the Court of Wards leading it to a wrong judgment as to what was for the benefit of the property and the advantage of the ward would not make the transaction void and as of no effect against the ward, negligence to take any thought as to what was beneficial for the property and advantageous to the ward held would bring about that result—Contract held in excess of powers of Court of Wards and ultra vires—Existence of clause causing considerable loss to estate—Clause not separable—Entire contract held void and not enforceable—Ward held not bound by it : 23 All. 394 (P.C.), *Rel. on.* [Paras 41, 46, 47]

(d) Bengal Court of Wards Act (IX [9] of 1879), S. 41 (g) and Rr. 238 and 242 under S. 70—Manager, Court of Wards is authorized to sign leases and contracts to lease of the property of the ward without making the ward party to the lease or making him real lessor. [Para 48]

(e) Bengal Court of Wards Act (IX [9] of 1879), S. 70-Rules under, R. 242—Prospecting license of minerals on behalf of ward—Variation—Sanction of Board of Revenue—Board by letter approving terms but asking for trial draft for being scrutinized by Legal Remembrancer—Letter held did not amount to sanction—Deed of variation held void for want of sanction.

Negotiations for the variation of the prospecting license for the minerals granted to a company by the Court of Wards on behalf of the ward were going on between the officers of the company and the Court of Wards. After the preliminaries were over, the matter was referred to the Board of Revenue for necessary sanction. Secretary of the Board wrote back to the Commissioner. The relevant portion of the letter ran as under: "I am directed to say that the Board accepts generally the recommendations of the Deputy Commissioner which have your support, but that the draft deeds embodying the proposed terms should be submitted to it, in order that they may be scrutinized by the Legal Remembrancer." The matter ultimately came to be referred to the Legal Remembrancer and the Solicitor, Government of India, both of whom had raised certain controversies. On receipt of the Legal Remembrancer's letter, the Board of Revenue wrote back to the Commissioner enclosing the Legal Remembrancer's letter, the letter of the Solicitor to the Government of India to the Legal Remembrancer, and the Board's letter to the Legal Remembrancer, which all had raised certain controversies as regards the exact terms of the alterations to be made in the original prospecting licence. These letters were enclosed by the Board to the Commissioner "for information and such action as may be considered necessary". The question was whether the Board's first letter and the second communication, each by itself, amounted to sanction :

Held that the first letter of the Board did not amount to sanction to the document as finally drawn up;

Held also that the second communication also did not amount to necessary sanction. This memorandum was routine communication from the higher authority to the subordinate authority for consideration of the matter raised in the letter of the Legal Remembrancer and the Solicitor to the Government of India. The Board itself and not the Manager, or the Deputy Commissioner, could have been the final authority to dispose of that matter and the Manager, or the Deputy Commissioner, could have only indicated their reasons for the conclusions they had arrived at. The Board had not delegated its power to the Deputy Commissioner, or to the Manager, to decide finally the questions in controversy raised by them, and which had not been accepted by the company or their solicitors in their entirety. [Para 52]

Certain controversies had to be settled and it could not be said that nothing was left to be done. Moreover R. 242 framed under S. 70 required the sanction to be incorporated in the deed evidencing the transaction: 40 Cal. 784 (P.C.) and A. I. R. (2) 1915 P. C. 27, *Disting.* [Para 54]

Deed of variation was therefore void for want of sanction. [Para 70]

(f) Bengal Court of Wards Act (IX [9] of 1879), S. 18—Benefit of ward or estate — Prospecting license for working mines granted by Court of Wards on behalf of ward—Negotiations for variation of terms in matter of royalty in respect of additional areas—Officers of Court of Wards throughout thinking in terms of benefit of grantee, company — Officers never considering whether giving up claim to minimum royalty would be of benefit to estate — Variation held void and not binding on ward — Sanction granted for such contract is vitiated by the fact that the transaction virtually amounted to a free gift to grantee, and thus being beyond the powers of Revenue Board—Bengal Court of Wards Act (IX [9] of 1879), S. 70—Rules under, R. 242. [Paras 65, 70]

(g) Bengal Court of Wards Act (IX [9] of 1879), S. 70 — Rules under, R. 242 — Sanction given by Revenue Board for exemption from payment of minimum royalty of mining leases— Sanction conditional upon fulfilment of certain condition by grantee—Condition not fulfilled within time—Fresh sanction is necessary — Lease executed without fresh sanction is void as being executed without sanction. [Para 68]

(h) Bengal Court of Wards Act (IX [9] of 1879), S. 70—Rules under, R. 242— Sanction for contract to lease coal fields obtained from Revenue Board, by misrepresentation of facts— Sanction is vitiated. [Para 69]

(i) Civil P. C. (1908), O. 1, R. 3 — Suit against company with whom Court of Wards entered into contract to lease on behalf of ward, for declaration that transaction was void and not binding on ward and for possession—Suit not based on negligence or fraud of Court of Wards, though negligence alleged and proved as ancillary—Suit against company alone is maintainable.

The Court of Wards on behalf of the ward entered into a contract to lease mining rights with the defendant company. In an action against the company by the ward upon his attaining majority, for a declaration that the contract was void being beyond the powers of the Court of Wards and not binding on the ward and for possession, the plaintiff had alleged and proved negligence on the part of the Court of Wards and its officers, only as ancillary to his claim for the declaration. Negligence or fraud was not the cause of action, but it had been alleged to show that the Court of Wards had not acted as a prudent man of business would do in management of his property :

Held that the action against the company alone was maintainable. [Para 73]

Annotation : ('44-Com.) Civil P. C., O. 1, R. 3, N. 3 and 6.

(j) Limitation Act (1908), Art. 144—Licence to dig and search for coal — Casual acts of digging and boring — Such possession does not attract rule of adverse possession.

A licence to dig and search for coal does not create interest in licensee in the land itself. Casual and spasmodic acts of digging or boring holes on different spots within the coal area cannot be said to be such possession as to attract the rule of adverse possession. [Para 74]

Annotation : ('42-Com.) Limitation Act, Arts. 142 and 144, N. 7, 11.

(k) Evidence Act (1872), S. 5 — Documents irrelevant —No objection to their admissibility—Documents are not made admissible.

Where the documents are not relevant under the Evidence Act, mere want of objection to their admissibility will not make them admissible. [Para 76]

Annotation : ('46-Man.) Evidence Act, S. 5, N. 4.

P. R. Das, L. K. Jha, S. P. Singh, A. B. Jha, Harinandan Singh, K. B. N. Singh, Angad Ojha, Bishun Kumar Singh and Balbhadra Prasad Singh — for Appellant.

S. M. Bose, S. K. Mitra, K. C. Mukherji, U. N. Sinha, Bimal Bhusan Sen, R. K. Bagchi, Government Pleader and A. K. Mittar — for Respondent.

Judgment.— These two appeals arise out of two suits decided by one judgment of the Additional Subordinate Judge of Hazaribagh, dated 30th April 1943. They raise identical questions regarding the validity of transactions entered into by the Court of Wards on behalf of Raja Kamakshya Narain Singh Bahadur of Ramgarh (who will hereafter be called the appellant Raja) with Messrs. Bird & Co. On behalf of the Karanpura Development Company Limited (who will hereafter be called the respondent Company) evidenced by a prospecting license in respect of extensive coal lands lying within the estate of the appellant Raja accompanied by an agreement to lease, dated 26th March 1915, and two subsequent deeds, dated 23rd November 1917, and 1st June 1937, and number of leases granted to the respondent company, in pursuance of the prospecting license as varied by the deeds of variation, just mentioned.

[2] First Appeal No. 125 of 1943 arises out of suit No. 82 of 1940 by the appellant Raja against the respondent Company for a declaration that the transactions evidenced by the deeds, just mentioned, were void and inoperative in law, and for possession of the lands covered by them, as also for mesne profits to the tune of about two crores of rupees as being the price of coal extracted by the lessees of the respondent Company during the period that they have been in possession of the lands under the leases granted in pursuance of the impugned prospecting license.

[3] The learned Subordinate Judge held that the deed of prospecting license with the agreement to lease and the deed of variation dated 23rd November 1917, were valid transactions binding on the appellant Raja. He, however, held that the deed of variation dated 1st June 1937, was void and inoperative in law. He accordingly dismissed the suit except with regard to the deed of variation of 1937. The Raja therefore has appealed to this Court against the part of the decree dismissing his suit and the Company has filed a cross-objection to the part of the decree holding that the deed of variation of 1937 was void and inoperative

[4] First Appeal No. 127 of 1943 arises out of Suit No. 28 of 1940 instituted by the respondent Company against the appellant Raja for a declaration that the transactions covered by the deeds in question were valid and for specific performance of the agreement to lease contained in the deed of prospecting license dated 26th March 1915, as varied by the deeds of 1917 and 1937. The Subordinate Judge decreed the suit of the respondent Company so far as it related to the prospecting license of 1915 and the deed of variation of 1917 but dismissed the suit in respect of the deed of variation of 1937. He ordered that the Company's possession over the lease-hold properties be confirmed and the Raja be ordered to execute, register and perfect in favour of the Company a lease in respect of 250 bighas of land as prayed for in the plaint. He has also issued an injunction restraining the Raja from interfering with the Company in exercise of its rights under the prospecting license of 1915 and the variation deed of 1917 The Raja has appealed.

[5] The main question, which arises for consideration in these appeals, is, whether the Court of Wards had power to enter into a transaction like that of a prospecting license with an agreement to lease, and, if so, whether it acted in so doing and in varying its terms from time to time within the ambit of its powers as defined in the Court of Wards Act (Act IX [9] B. C. of 1879 to be referred to hereafter as the Act). It is conceded that if it is held that the impugned deeds were executed by the Court of Wards in excess of its powers under the Act, they will be void and inoperative in law, and that the respondent Company will have no title to the lands in their possession and will be mere trespassers and liable to be ejected.

[6] The facts leading up to the execution of the deed of prospecting license of 1915 are these: Maharaja Ram Narain Singh Bahadur was the grand father of the appellant Raja. While he was in possession of the estate, he granted a prospecting license in respect of another coal field known as Bokaro Ramgarh to two persons Mr. Bannstz and Mr. Mitchell, who were acting on behalf of an unincorporated syndicate known as the Bokaro Coal Syndicate on terms and conditions as detailed in Ex. A (g), dated 26th November 1907. It appears that about the same time the agents of Bird and Co. and Beg Dunlop and Co., approached Maharaja Ram Narain Singh Bahadur for prospecting license in respect of the coal fields in question known as Karanpura coal fields. Jugal Kishore Prasad, witness No. 4

for the appellant Raja, states that when the late Raja's manager and and other officials were at Calcutta in connection with the execution of an indenture relating to the Bokaro Ramgarh Company, just mentioned, they were approached on behalf of Messrs. Bird & Co. and Beg Dunlop & Co. for a prospecting license in respect of the Karanpur coal fields and the agents of the company later came to Padma to carry on negotiations with the Raja. He also states that when they failed to persuade the Raja to agree to give them the prospecting license they were asking for they held out a threat that they would get the mines in spite of the Raja somehow by hook or by crook.

[7] It appears that the members of the junior branches of Raja held *Khorposh* grants under him which comprised certain villages covering portions of Karanpura coal fields. These jagir estates were then under the management of the manager appointed under the Encumbered Estates Act. Bird & Co. along with Beg Dunlop & Co. approached the manager of the Encumbered Estates and started negotiations for prospecting licenses in respect of the coal lands comprised in the estates under his charge. They succeeded in obtaining four prospecting licenses in respect of encumbered estate, (1) Hossir (2) Kathemderi and Kothas under four deeds of the same date, 23rd February 1909.

[8] Maharaja Ram Narain Singh Bahadur having come to know of these deeds, wrote to the Commissioner, Chota Nagpur Division, objecting to the grant of these prospecting licenses by the manager, Encumbered Estates to Bird & Co. The letter is EX. A (h) I, dated 9th October 1908. He stated in the letter that the persons holding villages given in *jagir*, *khairat* and *Khorposh* had no underground rights, that the Board of Revenue in sanctioning the leases in respect of the minerals by the encumbered estates would be acting entirely prejudicially to his interest and that he expected that the authorities would not do anything to injure his interest. This protest seems to have gone unheeded. Maharaja Ram Narain Singh was, therefore, compelled to institute four title suits in October 1909, against the *khoposhdars* and their licensees. Messrs. Bird & Co., contesting the right of the *khorposhdars* to the minerals and praying that the prospecting licenses, granted by the Encumbered Estates be declared to be void and inoperative and for a perpetual injunction against the licensees, Messrs. Bird & Co.. restraining them from prospecting for coal and opening mines and quarries. While these suits were pending the decision of the Privy Council in the case of *Hari Narayan Singh* v. *Sriram Chakravarti*, 37 I. A. 136: (37 Cal. 723 P. C.) was given holding that the right to minerals did not, unless expressly granted, pass to the jagirdars or tenure holders and remained with the proprietor.

[9] It appears that on 10th June 1910, Mr. Geake, Commissioner of Chota Nagpur wrote the letter (EX. 155-A) to the Raja that it would be "in the interest both of the district and of the parties concerned that if possible a reasonable compromise should be arrived at", in the litigation then pending between him and the jagirdars in respect of the mineral rights. He asked the Raja to attend a conference at which the matter of compromise could be discussed informally and entirely without prejudice. In reply the Raja informed the Commissioner that he was not willing to compromise the suit, by a letter, dated 26th June 1910 (EX. A (h) 2). He mentioned in the letter the then recent decision of the Privy Council, *Hari Narayan* v. *Sri Ram*, 37 I. A. 136: (37 Cal. 723 P. C.) and stated that in view of that decision, he was advised by his lawyers of Calcutta that he had the fullest right to all minerals in the zamindari as he or his ancestors had not parted with that right in favour of the tenure-holders by any express contract to that effect.

[10] On receipt of this reply Mr. Geake wrote a letter (EX. A (i) (2)) to Mr. Slacks, Member, Board of Revenue, dated 29th June 1910, in which he enclosed a copy of his letter to the Raja and his reply and stated that he felt that the Bokaro Ramgarh Company was responsible for the attitude which the Raja had adopted and further that the Privy Council ruling in the Patna case (referred to above) had "rather knocked the bottom out of any hopes of amicable compromise."

[11] The correspondence between the Commissioner and the Raja regarding the amicable settlement of the suits which were pending was occasioned, it is contended on behalf of the appellant Raja at the instance of Sir Southerland who was a partner of Beg Dunlop Company which Company also was interested in the prospecting licenses which were in question in those suits. The suggestion on behalf of the appellant Raja is that the Commissioner and the Member, Board of Revenue, and other officials of the Government of Bengal happened to be within easy approach of the top-most European officers of Messrs. Bird & Co. and Beg Dunlop Co. and these companies attempted to coerce the then Raja of Ramgarh into an amicable settlement of the suits through the intervention of these officers. They knew perfectly well that as a result of the aforesaid decision of the Privy Council the suits were bound to be decreed and they were bound to be turned out of possession

of the lands they held under those illegal prospecting licenses.

[12] While these suits were pending, Raja Ram Narayan Singh died on 26th January 1913. His son Kumar Lakshmi Narain Singh was yet a minor. The Court of Wards took over the management of the estate. It appears that Messrs. Bird & Co. took the earliest opportunity to approach the Board of Revenue for acquisition of underground mineral rights in the Karanpura fields which they had failed to acquire so long as Raja Ram Narain Singh was alive.

[13] On 15th March 1913, Messrs. Bird & Co. wrote to the Board of Revenue (Ex. 130) stating that they understood that the estate of the late Raja of Padma had been taken over by the Court of Wards and that they desired to negotiate for the acquisition of all underground mineral rights in the Karanpura field, and they trusted that the Government would not make a settlement of mining rights with any other party without taking cognizance of their application. They addressed a similar letter (Ex. 130-B) to the Deputy Commissioner, Hazaribagh.

[14] One Mr. W. O. MacGregor (of whom more will have to be said later) came to be appointed manager of the Ramgarh Estate under the Court of Wards, and he took over charge of the estate on 2nd July 1913. He replied to Messrs. Bird & Co. by a letter (Ex. 125), dated 4th September 1913, that the Court of Wards were ready to enter into negotiation for a lease of the whole of the Karanpura coal-fields and asked them to state the terms on which they were willing to take a lease. He further informed Messrs. Bird & Co. that there were other applicants for lease, and that the estate being involved and anxious to pay off the debts, one of the conditions of the lease was to be an advance of about eight to eleven lakhs to the estate on the same terms as the loan advanced by the Bokaro Ramgarh Company. On the subject of this proposed lease, the Deputy Commissioner appears to have written to the Manager, Ramgarh Estate on 10th October 1913, a memo, (Ex. P15), stating that the terms offered by one Mr. Bommertz should afford a suitable basis for negotiations.

[15] One Mr. Ironside belonging to Messrs. Bird & Co. wrote to the Deputy Commissioner, Hazaribagh, on 26th November 1913 (Ex. 130d), that they were making preparations for a resumption of the suits brought against the Manager, Encumbered Estates, by the Ramgarh Raja, and that they were ready for all eventualities. He also mentioned that Mr. MacGregor, the newly appointed manager of the estate, had written to them on being approached by their Kodarma agent that he was willing to grant a prospecting license of the Karanpura field on certain terms, and that it seemed to his firm that as this might be a means for eventually bringing about a settlement of the present conflicting interests and assisting in the development of the country, he would visit Hazaribagh with a view to discussing the matter with him, and they felt that it was impossible for them to consider Mr. MacGregor's proposal until they had an opportunity of placing their views before him. It was suggested on behalf of the appellant Raja that from the tone of this letter, and from the events which had happened in the lifetime of the late Raja, it was clear that the prospecting licence which Messrs. Bird & Co. obtained from the Encumbered Estates was with a view to bring pressure to bear on Ramgarh Raj to agree to give them a prospecting license of the Karanpura coal fields on their terms. Mr. Ironside's letter, just mentioned, the learned Subordinate Judge has rightly observed, leaves no doubt that his intention was to use the pending ligation as a means of achieving the object that the Company always had in view, namely, securing prospecting license of the Karanpura coal-fields.

[16] On 12th December 1913 Anderson Wright & Co. wrote to the Manager, Ramgarh Wards Estate, (Ex P (13)), that they understood that the Court of Wards was prepared to consider offers for a prospecting license with regard to the supposed coal deposits in Karanpura, and that the Syndicate they represented had obtained from the late Raja a *parwana* on payment of Rs. 25,000 entitling them to a prospecting license on certain terms, and that they had the right under the *parwana* of first refusal before any settlement with any other party was concluded. In the circumstances, they requested that the Syndicate should be given a fair opportunity of putting forward its proposals. They wrote again on 20th December 1913 to Mr. MacGregor (Ex. P (14)) asking on what terms he would be prepared to grant a concession for the coal rights in Karanpura, to which by a letter (Ex. P (12)) dated 30th December 1913, MacGregor replied that it was for them to make some definite offer in the absence of which it was impossible for the Court of Wards to consider their case. The matter seems to have rested there. On 10th March 1914 the Manager, Wards and Encumbered Estates, appears to have written to Messrs. Bird & Co. that the proprietor of the Hosir II Encumbered Estate was prepared to sell his claim to the underground minerals in his estate for the consideration detailed in the letter, and that if the Company were prepared to purchase it, the Deputy Commissioner would be prepared to recommend the proposals to the Government for

sanction. Messrs. Bird & Co. replied through their solicitors, Orr Digham & Co (Ex. 130 (f), that they would possibly have no objection to the terms on which the offer of sale of the claim to the underground minerals was made except one regarding which one of their agents would meet him and discuss.

[17] It appears that on 1st and 2nd April 1914 a conference was held at Hazaribagh at which Messrs. Witlock and White for Messrs. Bird & Co., Manager, Encumbered Estates, Ramgarh Estate, and Mr. Lister, Deputy Commissioner, were present. At this conference terms of the withdrawal of the suits pending between the Ramgarh Estate represented by the Court of Wards on one side, and the Manager, Encumbered Estates. and Messrs Bird & Co. on the other, as also the terms on which the Ramgarh Estate would be prepared to grant prospecting license to Messrs Bird & Co. were discussed. The memorandum of discussions held at this conference was kept by Mr. Lister which he sent as an enclosure to a letter which he addressed to Messrs. Bird & Co., dated 7th April 1914 (Ex. 130 (i)). There seems to be a serious controversy between the parties as to the exact nature and scope of the discussion at this conference. It is contended on behalf of the respondent Company that but for the Court of Wards agreeing to grant them the prospecting license in respect of the Karanpura Coal Fields on the terms discussed and agreed to at this conference, they would not have compromised the suits pending between them and the Court of Wards regarding underground rights in the *khorposh* grants in respect of which they had already obtained licenses from the *jagirdars*. On the other hand, it is urged on behalf of the appellant Raja that the suits after the decision of the Privy Council, already referred to, had no legs to stand upon, and Messrs. Bird & Co. were bound to go out of the litigation and leave the proprietors of the encumbered estates to their resources to fight the Court of Wards which had much larger resources; and it is wrong to say that the compromise of these suits could ever form a consideration for granting a prospecting license of the Karanpura coal-fields to Messrs. Bird & Co. Mr. P. R. Das appearing for the appellant Raja has drawn our attention to the fact that at the conference the two matters, namely, the suits and granting of the prospecting license to Messrs. Bird & Co. were discussed separately and were kept independent of one another. Our attention has been further drawn to the expression in Ex. 130 (i), namely, "Messrs. Bird & Co. will *in any case* not go on with this litigation," and it has been contended that it is clear that the going out of Messrs. Bird & Co. of the litigation was not dependent on the Court of Wards agreeing to grant the prospecting license in question and regard being had to the strength which the suits had received on account of the then recent decision of the Privy Council in the case of *Hari Narayan* v *Sriram Chakravarti*, 37 I. A. 136: (37 Cal. 723 P. C.), the Court of Wards was under no compelling necessity to enter into any compromise in regard to these suits. It is contended that two out of the four suits were in fact not compromised, and the Court of Wards had to incur expense in litigation and ultimately succeeded in obtaining a contested decree in those cases. It may be necessary to say more about this compromise when dealing with the question as to whether or not the Court of Wards acted as a prudent owner would have done in the matter of granting the prospecting license in question to the respondent Company.

[18] To continue the chronological narrative of events. It appears that on 4th April 1914, Rani Rikhi Nath Kumari, the widow of the late Raja Ram Narain Singh, having come to know of the conference at which the granting of the prospecting license to Messrs. Bird & Co., was decided, addressed a letter (Ex. P-3) to the Deputy Commissioner of Hazaribagh, in which she stated that the suits pending against the *Jagirdars* and *Khairatdars* in respect of the underground rights should not be compromised and the Karanpura coal field should not be settled with Messrs. Bird & Co. She brought to the notice of the authorities that Messrs. Bird & Co., had fostered the dispute between the Ramgarh Estate and the Encumbered Estates, and that but for them it would not have been necessary for her husband to have instituted these suits. She further stated that she was definitely of the opinion that it would be harmful to the estate if the Karanpura coal fields were settled with Messrs. Bird & Co. She also stated that to her knowledge there were, besides Messrs. Bird & Co., other applicants who were desirous of taking the settlement of the Karanpura coal-fields, and that there was no reason why the settlement should be made with Messrs. Bird & Co. She appealed to the Government to save the property of the ward and not to compromise the suits and settle the Karanpura coal-fields with the respondent Company. Memo to this letter of the Rani, forwarding it to the Manager, Ramgarh Wards Estate, seems to indicate that the Deputy Commissioner presumed that Babu Saroda Charan Mitra who happened to be the lawyer for the estate had communicated with the Rani and had explained matters to her to allay her apprehensions.

[19] It appears from a letter dated 11th April 1914, from the Deputy Commissioner, Hazaribagh, to Messrs Bird & Co., that the proposals which were discussed at the conference held on

1st April were submitted to the Hon'ble Member, Board of Revenue, on 8th April, and that the Board was not averse to the settlement of the Karanpura coal-lands litigation on the lines specified in the note mentioned therein. The precaution was to be taken that the terms of the compromise should be so expressed as not to prejudice either the Ramgarh Estate or Messrs. Bird & Co., in any similar litigation regarding mineral rights against other tenure-holders. In reply to this letter, Messrs. Bird & Co., wrote to the Deputy Commissioner on 15th April 1914, (Ex. A (j) (3)) that they presumed that they correctly read the letter, as formally conveying to them the Board's sanction to the terms re: Karanpura as arrived at the meeting of 1st and 2nd instant. This letter was replied to by the Deputy Commissioner on 17th April (Ex. 130 (j)). He stated in reply:

> "My letter is to be understood to mean that the terms regarding Karanpura as arrived at, at the meeting of 1st and 2nd instant have been approved by the Board as right and proper. Their formal sanction cannot be given until the terms are embodied in a formal document."

[20] On 17th April 1914, the Manager, Mr. MacGregor wrote to Mr. S. C. Mitra regarding the proposed compromise of the mineral suits pending in the Courts at Hazaribagh and gave him instructions for drawing up petitions to be filed by both parties, and cautioned that the petitions had to be so drafted as not to prejudice the interest of the estate in any manner in suits of similar nature that may have to be filed thereafter.

[21] Just about this time, by a letter dated 24th April 1914 (Ex. A (i) (5)), Messrs. Andrew Yule & Co., made an offer of taking a licence to prospect the Karanpura coal-fields and stated their terms. On 27th April 1914, it appears that Hon'ble Mr. S. C. Sen on behalf of the Company interviewed the Deputy Commissioner, Hazaribagh, in this connection and offered some terms. On 2nd May 1914, Messrs. Andrew Yule & Co., wrote to the Manager, Ramgarh Estate; stating that their offer was a provisional one, and they were quite prepared to modify the same to meet the views of the Deputy Commissioner and all that they wanted was an opportunity of doing so before closing the business with other parties.

[22] From a note (Ex. 147) of Mr. Walsh dated 10th July 1914, it appears that he considered the offers of the other parties for the lease of the mineral right of the Karanpura coal-field, and he came to the conclusion that the terms offered by Messrs. Bird & Co., were more advantageous to the estate than those offered by Messrs. Andrew Yule Co. as also that of Messrs. Anderson Wright & Co., and stated that there was no reason to modify the decision already arrived at to grant the license of the Karanpura coal-field to Messrs. Bird & Co.

[23] By a letter dated 14th May 1914, the Board of Revenue through its Secretary informed Messrs. Andrew Yule & Co., that

> "negotiation for a concession in respect of the mineral rights in Karanpura appertaining to the Ramgarh Wards Estate in the district of Hazaribagh are with the Board's approval in progress with another firm and have already reached an advance state."

It is to be noticed that the Board did not tell Messrs. Andrew Yule & Co., that their offer was not up to the mark, and, therefore, merited no consideration. The correspondence relating to offer of Messrs. Andrew Yule & Co., will have to be again referred to later when discussing the question raised on behalf of the appellant Raja, that the authorities of the Court of Wards were bent upon giving the prospecting license to Messrs Bird & Co., and therefore, they did not allow any other offer to materialise and to use the expression of Mr. P. R. Das such other offer as were made were choked off.

[24] It appears that Messrs. Bird & Co. submitted to the Manager drafts of prospecting license, mining lease and agreement for mortgage as enclosures to their letter dated 12th May 1914, (Ex. 125 D). They stated in the letter that the documents were based on Messrs. Anderson Wright & Co.'s Bokaro Ramagarh lease and the notes drawn up by the Deputy Commissioner at the joint interview. They suggested that the period during which the land was to be held under the prospecting license free from the minimum royalty should be raised from one year to three years. Mr. MacGregor in reply to this letter wrote to Messrs. Bird & Co., on 16th May 1914, (Ex. 125 E). He stated that from a cursory glance, the agreement appeared to differ entirely from the terms of Bokaro Ramgarh deed in the matter of the mortgage, and that he was unable to recommend any departure from the terms arrived at in their previous discussions because it was unlikely that the Court of Wards would agree to any such modifications. He also informed the Company that proposal for such modifications would open the door to other parties who were already approaching the Board and Government with gradually increasing offers. Messrs Bird & Co., in their letter (Ex. P. 10), dated 18th May 1914, wrote to the Manager stating that there was no question of departure from the terms arrived at between them, and that they had no desire for any such departure.

[25] It appears that on 25th July 1914, the Commissioner wrote to the Secretary to the Board of Revenue (Ex. 131-B) informing him that the terms between themselves and Messrs. Bird and Co., have been finally agreed, and asking that the documents drawn up by Messrs. Orr Dignam

& Co., as approved by Sarda Charan Mitter be now formally approved. On 27th July 1914, (Ex. 130-P), Messrs. Orr Dignam & Co., Solicitors to Messrs Bird & Co., informed the Manager, Wards and Encumbered Estates, that Messrs. Bird & Co. withdrew from defence of the suits regarding mineral rights. On 28th July 1914, the Board intimated by a telegram (Ex. 130 S) to the District Magistrate, Hazaribagh, its approval of Karanpura agreements. The Deputy Commissioner, Hazaribagh, wrote to the Commissioner, Chota-Nagpur, on 9th September 1914 (Ex. S) that owing to the War Messrs. Bird & Co., wanted to pay only rupees one lakh out of the total sum of rupees ten lakhs, and the balance to be paid as soon as international finance became normal, with the right of immediate commencement of prospecting. On 14th October 1914, (Ex. 125 F) Messrs. Bird and Co., paid rupees one lakh. On 16th November 1914, (Ex. 130-z), Messrs. Bird & Co. paid Rs. 1,22,750 to the Encumbered Estates payable by them as one of the terms of the compromise of the mining suits. Messrs. Bird & Co., had asked for a postponement of prospecting for one year owing to the difficulties created by War, and the Board agreed to the postponement by its letter (Ex. P 9), dated 25th November 1914. On 30th November 1914, consent decrees in suits Nos. 303 and 304 were passed. On 27th February 1915, and on 30th March 1915, contested decrees in suits Nos. 301 and 303 were made. On 25th March 1915, the prospecting license in question was executed and rupees nine lakhs as agreed was advanced.

[26] Messrs. Bird & Co. floated the respondent Company of which they themselves became the Managing Agents. The prospecting license was transferred to the respondent Company.

[27] This prospecting license accompanied by an agreement to grant leases was for a period of six years in respect of coal lands comprised in 312 villages known as the Karanpura coal fields. It may be stated that in Ramgarh Raj there are large areas of coal bearing lands. These lands have been divided by the Geological survey of the district into three broad divisions. The Bokaro Jharia Coal Fields, the Bokaro Ramgarh Coal Fields and the Karanpura Coal Fields. The prospecting license, as already stated covered the last of them, the Karanpura Coal Fields.

[28] Under the terms of this license, Messrs. Bird & Co., had to take up on mining lease in one lot or in parcels either at one time or from time to time within a period of six years an aggregate area of not less than 10,000 bighas, but the Company was at liberty to take up such further area in excess of 10,000 bighas as it might think fit. Further, under the terms of the indenture upon the execution of every such lease the lessee was to pay salami at the rate of Rs. 40 per bigha and a minimum royalty at the rate of Rs. 5 per bigha, provided that, if at the time of taking the lease no railway connection or railway facilities were available for despatch from the mouth of the pit the coal won from the mines, no salami or premium was to be payable in respect of such coal mines or lands until such time as railway connection and railway facilities should be available. Simultaneously with the execution of the prospecting license, Messrs. Bird & Co., advanced, as already stated a sum of Rs. 9 lakhs. As security for the payment of this sum the Court of Wards, through the Manager, mortgaged to Messrs. Bird & Co., the zamindary interest in 312 villages covered by the prospecting license. The terms regarding the period for which the license was to remain in operation and regarding minimum royalty in respect of any area or areas in excess of 10,000 bighas were subsequently varied by two deeds, which deeds are also impugned and will be dealt with later. It may be stated that no mining leases were taken by the respondent Company during the period of six years from the date of the prospecting license. The terms on which the leases were to be granted in pursuance of the agreement to lease as included in the prospecting license were substantially those as contained in the draft lease incorporated in Bokaro Ramgarh prospecting license, except the cess clause which, instead of making the lessee liable to pay all impositions by way of cess and taxes made them liable to pay only their own share of cesses and taxes, and the lessor, the appellant Raja, liable to pay all such cesses and other taxes as may be imposed upon him in respect of the leasehold property.

[29] Before the grounds on which this deed is attacked on behalf of the appellant Raja are stated and dealt with, it will perhaps be better to give an idea of what this Karanpura Coal Field is like.

[30] The Karanpura Coal Fields are divided into two portions known as North Karanpura Coal Field and the South Karanpura Coal Field. The south portion of the field is 77 square miles while the north portion which is much larger in area is 473 square miles. The total area of the entire Karanpura Coal Fields is 550 square miles. Out of the entire fields. Ramgarh Estate has got 350 square miles in North Karanpura and 65 square miles in South Karanpura, the total being 415 square miles. Dr. Jowett in his report (Ex. 153-K) states at p. 144 that in these fields some first class coal seams had been discovered and a greater number of second class seams, which were estimated by him to be between 5000 and 10,000 millions of tons at least without

considering any coal below 2000 feet from the surface. It appears that other coal fields like Raniganj and Jharia were opened in 1830 or 1840 and 1890 respectively and that both of them have been thoroughly explored and developed. Mr. Russell, the then Deputy Commissioner, Hazaribagh, was perfectly justified in stating in the year 1934 (Ex. 95) that the total deposits of Ramgarh Estate would be one of the most important coal fields in India. Dr. Jowett described Karanpura as one of the principal coal fields of country. There can be no doubt, therefore, that the properties which are the subject-matter of the present suits are very valuable and Mr. Roberts, a partner of Messrs. Bird & Co. could not but say in his evidence that the prospecting license held by the respondent Company was a valuable concession.

[31] Mr. Das, for the appellant Raja, attacks this deed, in the first place, on the ground that the prospecting license in question also contained a contract to lease and a draft of such a lease, which the Court of Wards had to adopt if the respondent Company applied for a lease within the next six years and the Court of Wards which was in the position of a guardian of a minor had no power to bind the ward by a contract to lease in future. He contends that it is settled law that no guardian can bind a ward or the estate of a ward by a contract to sell or lease. Reliance is placed on the case of *Mir. Sarwarjan* v. *Fakkruddin Mahomad*, 39 I. A. 1 : (39 Cal. 232 P. C.) for the proposition that

> "It is not within the competence of a manager of a minor's estate, within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property."

It was, however, conceded by Mr. Das that if power to enter into a contract is conferred by a statute, this rule of common law is abrogated and the guardian will be competent to bind the minor or his estate by a contract to sell or lease. The question, therefore, is whether any of the provisions of the Court of Wards Act confers a power on the Court of Wards to enter into such a contract. None of the sections of the Court of Wards Act (Act IX [9] (B. C.) of 1879) in specific terms confer on the Court of Wards power to enter into an agreement to lease. Section 18 of the Act provides :

> "The Court may sanction the giving of leases or farms of the whole or part of any property under its charge, and may direct the mortgage or sale of any part of such property, and may direct the doing of all such other acts as it may judge to be most for the benefit of the property and the advantage of the ward."

Section 14 of the Act provides:-

> "Subject to the provisions of this Act the Court may, through its Manager, do all such things requisite for the proper care and management of any property...as the proprietor of any such property, if not disqualified, might do for its care and management."

Are these provisions wide enough to include by necessary implication the power to enter into an agreement to lease? Mr. Das submits that they are not. The expression "do all such things as the proprietor of any such property, if not disqualified, might do" in s. 14 cannot be said to confer such a power as to enter into a contract to give leases in future and cannot be said to be an Act necessary for the care and management of the property. Section 14, therefore, according to his submission, does not even impliedly confer power on the Court of Wards to enter into an agreement to lease. He next contended that the power to lease conferred by s. 18 of the Act did not include the power to contract to execute a lease. He cited a passage in "Farwell on Power" (p. 394, 3rd Edition):

> "If an Act of Parliament speaks of a lease, it means lease and not an agreement to lease."

He also relied on the case of *Hukumchand* v. *Raja Ran Bahadur Singh*, 4 P. L. J. 580 at pp. 603, 604 : (A. I. R. (6) 1919 Pat. 146) where Sir Dawson-Miller C. J., after citing Farwell on Power, held that the power conferred by s. 17, Encumbered Estates Act (Act VI [6] of 1876) on the manager to grant leases did not include the power to enter into an executory contract to grant leases in future. The question whether the Court of Wards Act empowered the Court to enter into an agreement for leases, however, arose in the case of *Rudradas Chakravarty* v. *Kamakhya Narayan Singh*, 3 Pat. 968 · (A. I. R. (12) 1925 Pat. 259) and it was held by Kulwant Sahay, J. who delivered the judgment of the Court that on a careful consideration of the provisions of the Court of Wards Act the Court of Wards had power to enter into an agreement to grant a lease. The case of *Hukumchand* v. *Raja Ran Bahadur Singh*, 4 P. L. J. 580 : (A. I. R. (6) 1919 Pat. 146) was considered and distinguished. It is pointed out by Mr. Das that the case of *Hukumchand*, (4 P. L. J. 580 : A. I. R. (6) 1919 Pat. 146) went up to the Privy Council and the judgment of this Court was affirmed: *Hukumchand* v. *Ran Bahadur Singh*, 51 I. A. 208 at pp. 216 and 219 : (A. I. R. (11) 1924 P. C. 156). So far as the decision in the case of *Rudradas Chakravarty*, 3 Pat. 968:(A. I. R. (12) 1925 Pat. 259) on the question at issue is concerned, he rightly contends that it is obiter. The suit for specific performance of a contract was dsimissed on other grounds. It was held in that case that there was no concluded agreement, that there was no sanction by the Board, and that the contract was incomplete as no date was fixed for the commencement of the lease. The determination of the question as to whether the Court of Wards had the power to enter into a contract to lease was not necessary for the decision of the case.

[32] Looking, however, afresh at the question whether the Court of Wards Act empowers the Court to enter into a contract of this description, it appears to us that the view taken by Kulwant Sahay, J. in the case of *Rudra Das*, 3 Pat. 968: (A. I. R. (12) 1925 Pat. 259) is the correct view. The concluding words of S. 18, Court of Wards Act

> "the Court may direct the doing of all such other acts as it may judge to be most for the benefit of the property and the advantage of the ward",

are wide enough to include within their ambit the power to enter into a contract to lease. "Such other acts" it was contended by Mr., Das should be construed *ejusdem generis* with "the giving of leases or farms" the words used in the first part of the section. We are not inclined to accede to this contention. The section by its concluding portion clearly empowers the Court to do all other acts, the only limitation being that those acts must be, what the Court after applying its mind, judges as being "most for the benefit of the property and the advantage of the ward". In other words, if the entering into a contract to lease is, in the circumstances of the case, judged by the Court to be necessary to benefit the property and to confer advantage on the ward, the Court will be acting within its power in entering into such a contract. Even conceding to the contention that statutory power must be construed strictly and power to lease does not include a power to contract to lease, there is no difficulty in construing the last clause of S. 18 as confering upon the Court a power to enter into an executory contract of this nature, if a situation arises which calls for the exercise of such power for the benefit of the property and the advantage of the ward. The test to be applied for the purpose of finding as to whether the Court has such a power seems to be whether the contract to lease is one which the Court can be said to have judged as being most for the benefit of the property and the advantage of the ward. It may also be added that the decision of their Lordships of the Judicial Committee in the case of *Mir Sarwarjan* v. *Fakhruddin Mahomed Choudhuri*, 39 I. A. 1: (39 Cal. 232 P. C.) is not meant to be of universal application. That was a case of a Muslim. The case of a Hindu may present differentiating characteristics in so far as considerations of benefit to the minor may easily be available to the other party who has entered into a contract with the minor's guardian. The latest decision of their Lordships of the Judicial Committee in the case of *Subrahmanyam* v. *K. Subba Rao*, 75 I. A. 115: (A. I. R. (35) 1948 P. C. 95) may be referred to with advantage. It may also be added that Mr. Das's contention that a power to sell does not include the power to enter into a contract of sale is not sound. Apart from authority it is manifest that, if a person is authorized to sell another person's property, he is also clothed with the authority to enter into a contract of sale which invariably precedes a sale. The observations of a Division Bench of this Court in the case of *Loknath Prasad Singh* v. *Wahib Hussain*, 11 P. L. T., 121 at p. 129: (A. I. R. (17) 1930 Pat. 181) support the same conclusion. The observations of Buckely J. in the case of *Rosenbaum* v. *Belson*, (1900) 2 Ch. 267 at p. 271: (69 L. J. Ch. 569), to the following effect are also in point:

> "I have been unable to find any case in which it has been held that instructions given by *A B* to sell for him his house, and an agreement to pay so much on ,the purchase price accepted, are not an authority to make a binding contract, including an authority to sign an agreement. If a power of attorney were given to *A B* to sell an estate, he would, in my opinion, be entitled, in the absence of anything narrowing the meaning of the word 'sell', not only to negotiate for but to sign an agreement for sale; and that would give to the word 'sell' the full meaning—namely, to conclude a binding agreement for sale."

It must therefore be held that Mr. Das's contention that the power to grant a lease given by the Court of Wards to the manager, or the higher officials of the Court of Wards, does not include the power to enter into a contract to lease is not sound.

[33] The question to be put and answered in each case is this. Did the Court of Wards in the circumstances of the case judge that to enter into a contract to lease is most for the the benefit of the property and the advantage of the ward? If so, it must be held that the final words of S. 18, Court of Wards Act, empower the Court to direct the entering into such a contract. On the other hand, if the Court without taking thought and exercising its judgment regarding the benefit of the estate and the advantage of the ward sanctioned such a contract, it must be held that it acted in excess of the power conferred by the statute, as also beyond the powers of a trustee or guardian of a minor and the transaction is void and not binding on the ward.

[34] In this view of the matter, it seems unnecessary to refer to and to discuss at length the authorities cited by Mr. Das for the proposition that *cestui que trust* cannot be bound by a personal contract of the trustee or that the minor cannot be so bound by the contract of his guardian such as, cases of *Zeebunnissa* v. *Mrs. H. B. Danagher* 59 Mad. 942: (A. I. R. (23) 1936 Mad. 564), *Oceanic Steam Navigation Co.* v. *Sutherberry*, (1881) 16 Ch. D. 236: (50 L. J. Ch. 308), Trevelyan on Minors p. 186, *Waghela Rajsanji* v. *Sheikh Masludin*, 14 I. A. 89: (11 Bom. 551 P. C.), *Indur Chunder*

Singh v. *Radhakishore Ghose*, 19 I. A. 90: (19 Cal. 507 P. C.) *Ranmalsinghji* v. *Vadilal*, 20 Bom. 61 and *Fatma Bibi* v. *Debnauth Shah*, 20 Cal. 508.

[35] The question, therefore, which falls to be decided is whether the transaction in question was judged by the Court of Wards as being most for the benefit of the property and the advantage of the ward, or was entered into without any thought having been taken as to what was beneficial to the ward or his estate. The grounds on which it is contended by Mr. Das for the appellant Raja that no such thought was taken are: (1) The Court of Wards preferred Messrs. Bird and Co. to other applicants without any judgment of their respective merits; (2) it did not apply its mind to the question of the market rate of *salami* and royalty obtaining in 1915 when the transaction was entered into and agreed to the rates prevalent in 1907; and (3) it departed from the cess clause from that in Bokaro leases in that it did not make the respondent Company liable for the whole of the cesses, taxes and other impositions on the lease hold property. (After reviewing the evidence their Lordships proceeded).

[36] In the state of evidence on the record, it is difficult to accede to the contention of Mr. Das that the Court of Wards before accepting the offer of Messrs. Bird & Co. did not apply its mind to the question of the respective merits of all the applications for this concession Ex. 147, clearly shows that such applications as were made for taking up this concession were analysed by the Commissioner of the Chotanagpur Division who after giving thoughts to their respective merits, came to the conclusion that the terms which had been agreed upon by Messrs. Bird & Co., were distinctly more advantageous than those offered by others. The offer of Messrs. Anderson Wright & Co., who had obtained a parwana from the late Raja on payment of Rs. 25,000 that they would have the first refusal in the matter of this concession was disposed of on the ground that the syndicate which Messrs. Anderson Wright & Co., represented had definitely reported their inability to pay the very high initial salami and advance which were required for this concession. The application of Messrs. Andrew Yule & Co. was disposed of on the assumption that the proposals contained in that Company's letter of 24th April and 2nd May 1914, represented the highest term which that company was willing to offer That company had offered salami of Rs. 20 per bigha and although willing to pay a salami for prospecting license of Rs. 2 lakhs, the advance of Rs. 10 lakhs was to be made at the end of three years and that also only if the company thought it worthwhile to take up the concession. So far as the offer of the Railway Board was concerned, the letter of the Bihar Government shows that they wanted certain informations from the Board of Revenue before entertaining the offer of the Railway Board. The Board of Revenue having already informally approved of the granting of this concession to Messrs. Bird & Co., could not invite the Bihar Government to start negotiations with the Railway Board. It appears that the Bihar Government having been informed by the Board of Revenue in their letter of 24th July that the draft deeds of the license and other documents in connection with this transaction had already been approved unofficially, it dit not take any steps because it thought it was no use opening up fresh negotiations. Mr. Das has however contended that none of the reasons given for preferring the offer of Messrs. Bird & Co., was a valid reason. To say that this prospecting license was granted to Messrs. Bird & Co., in consideration of the settlement of the litigation regarding mineral rights was a myth. The question is not as to whether the Court of Wards should have agreed to grant this license to Messrs. Bird & Co., for ending the litigation which was bound to be decided in favour of the estate, but that the Court of Wards on a consideration of the circumstances then prevailing, came to the conclusion that everything being equal, the granting of the license to Messrs. Bird & Co., was going to end the litigation regarding mineral rights. In the note (Ex. 147) it was stated that the compromise with Messrs. Bird & Co., was itself pecuniary consideration to the estate as whatever the ultimate result of the litigation, if it were to be carried in appeal the expenses to be incurred by the estate would be considerable. This aspect of the question, the learned Subordinate Judge rightly observes could not be ignored at a time when the estate was heavily involved in debts. It appears, therefore, that so far as this ground is concerned, it cannot be said that the Court of Wards accepted the offer of Bird & Co., without applying its mind to the merits of the other offers before it and without rightly or wrongly judging that it was the most advantageous to the estate.

[37] But the matter stands differently so far as the second ground is concerned. It has to be held that no thought was given by the Court of Wards to the prevailing market rates of salami and royalty on which such mining leases could be given in the year 1915 at the time of the transaction. The Court of Wards, Mr. Das submitted, never applied its mind as to what the market rate of salami and minimum royalty in respect of such mining leases in 1915, when this concession was going to be granted.

It agreed without any demur to grant this concession on the same rate of salami and minimum royalty as were considered good enough in the year 1907 at the time when Bokaro Ramgarh license was executed.

[38] The Court of Wards agreed to give leases on a salami of Rs. 40 per bigha and royalties of four annas per ton on steam coal, three annas per ton on rubble coal, two annas per ton on dust coal and 8 annas per ton on hard coke the rates at which Bokaro Ramgarh leases were given in 1907. There is evidence to show that the rates at which leases could be given in the year 1915 were Rs. 300 per bigha as salami and royalties of eight annas per ton on steam coal, six annas per ton on rubble and four annas per ton on all dust coal raised and despatched and twelve annas per ton on all hard coke and ten annas per ton on all soft coke. Ex. 152 (a) mining lease between Bokaro and Ramgarh Ltd. and G. I. P. Railway dated 1st November 1915, may be referred to in this connection. It is argued that there is nothing to indicate why the Court of Wards agreed to adopt the rates of the leases of 1907 and not the market rates obtaining in the year 1915, at the time when the transaction in question was entered. Mr. Das rightly contends that if the Court of Wards had applied its mind to the question as to whether it should agree to lease at the rates prevalent in the year 1907 or at the rate then obtaining, and if it found that the situation was that the estate was under compelling necessity to lease out the coal field in question and no one was available to take it at the market rate then obtaining, it could then be said that the Court of Wards having regard to the situation then prevailing acted to the best of its judgment in entering into the transaction in question, and exercised its power to enter into such a contract within the terms of the statute. It must be held that there is clear absence of material to show that any thought was given by the Court of Wards to what was the highest rate of salami and royalty at which the leases could be given in the year 1915, keeping in view the fact that the deposit of coal in Karanpura fields was of a higher and superior quality. From the documents on the record, it appears that the sub-leases of parts of the very same coal fields which were covered by the prospecting license in question were given by Messrs Bird & Co. to other parties at the rate of salami and royalties very much higher than the rates at which Messrs. Bird & Co. had obtained this license. Exhibit C is the sub-lease of the very same area which Messrs. Bird & Co obtained from the Court of Wards on payment of Rs. 2 Lakhs of salami at Rs. 40 per bigha. This sub lease was granted by the respondent Company in favour of the Secretary of State for India with effect from 17th October 1922, at the salami of Rs. 11,70,000 at the rate of Rs. 175 per bigha. Exhibit E is a sub-lease of B. N. Railway in respect of the same area which Messrs. Bird & Co. had taken from the Court of Wards on 19th March 1924, paying a salami of Rs. 92,000 at the rate of Rs. 40 per bigha. The respondent company received a salami of Rs. 7,50,000 at the rate of Rs. 175 per bigha with effect from the date of the head-lease (Ex. 6). Similarly, Ex. F is a sub-lease to B. B. & C. I. Railway on a salami of Rs. 14,15,000 and odd in respect of the area which Messrs. Bird & Co took from the Court of Wards on paying a salami of Rs. 1,64,000 and odd at Rs. 40 per bigha. It is clear that if the Court of Wards had applied its mind as to what should have been the proper rates of salami and royalty for a lease of the mining rights at the time when this concession in question was granted it could not but have found that the rates at which Bokaro Ramgarh leases were given in the year 1907 were not the highest rates then obtaining. Non-consideration of the market rate prevailing at the time of the leases was certainly a sad omission on the part of the Court of Wards and there is no escape from the conclusion that the Court of Wards failed to exercise its judgment in this matter. Its failure to do so vitiates the transaction in question for it cannot be said that the transaction was one which in the judgment of the Court of Wards was most for the benefit of the property and the advantage of the ward.

[39] Coming now to the third ground regarding the negligence on the part of the Court of Wards in accepting the cess clause as drafted by the solicitors of Messrs. Bird & Co. different from what it was in Bokaro Ramgarh leases, it must be said that there is nothing to indicate as to why the variation against the interest of the ward was made. Mr. Das urged that there was no trace to be found in the voluminous correspondence on the record for any justifiable or unjustifiable reason for its having agreed to execute this document with the cess clause so drafted as to relieve the respondent Company from its liability to pay whole of taxes and cesses, unlike the cess clause in Bokaro Ramgarh leases or other leases executed by the Court of Wards. Mr. Das, therefore, argued that the Court of Wards was grossly negligent and guilty of omission to take care in the matter of entering into this transaction and exceeded it powers as conferred upon it by the Act, which in substance were no larger than the powers of a trustee. What was required of the Court of Wards, he submitted, by the provisions of Ss. 14 and 18, Court of Wards Act, was the same degree

of diligence on its part as the proprietor of any such property, in other words, a man of ordinary prudence would exercise in the management of his own property. (Reviewing the evidence their Lordships continued:)

[40] It has been contended on behalf of the respondent Company that the draft of the document was examined by Mr. Sarda Charan Mitra, counsel for the Court of Wards and was approved by him before it was executed. The Court of Wards, therefore, cannot be held guilty of negligence. It had the document examined carefully by its legal adviser and is, therefore, protected. Exhibit 152, the original draft bears the endorsement "approved" signed by S. C. Mitra. Whether the consequences of this negligence on the part of the Court of Wards can be avoided by showing that the draft of the document was scrutinised and approved by its legal adviser requires consideration. There is no evidence that S. C. Mitra was told as to what the terms agreed between the parties were. There is no evidence that he knew that agreement between the parties was that all the covenants incorporated in the draft lease attached to the Bokaro Ramgarh prospecting license except those which were specifically agreed to be varied had to be incorporated in the draft lease attached to the prospecting license in question. There is nothing to show that he was told as to what the agreement between the parties was in regard to the cess clause. Mr. Das argues that in absence of such evidence, approval of the draft by Mr. Sharda Charan Mitra cannot absolve the Court of Wards of its gross negligence in not applying its mind to this very important term of the agreement which has resulted in considerable loss to the Estate. Reliance was placed by Mr. Das on the case of *Devy* v. *Thornton*, 68 E. R. 488, for the proposition that opinion of a counsel cannot exonerate a trustee unless it is known what data were given to the counsel for advice. Assuming, however, that S. C. Mitra had full knowledge of all relevant facts, Mr. Das argued, even then the Court of Wards is not protected. He submits that the trustee cannot free himself from the charge of negligence by merely producing counsel's opinion, and it makes no difference that the trustee acted negligently on the advice of a counsel. For this proposition he relies on *Peers* v. *Ceeley*, (1852) 51 E. R 517: (15 Beav. 209), in which the Master of Rolls made the following observations:

> "The Court can never sanction the proposition, that a party, having acted in a manner which the Court has decided to be improper, can protect himself by shewing that he had received bad advice, however eminent the person may be who gave it."

See also *In re Knight's Trusts*, (1859) 54 E. R. 18: (27 Beav. 45) and *National Trustees Co., Australasia* v. *General Finance Co., Australasia*, (1905) A. C. 373 at p. 377: (74 L. J. P. C. 73).

[41] To us it appears that the question which has to be decided in the present case is not whether a trustee can escape the consequences of his negligence. The appellant Raja by this suit is not pursuing the Court of Wards for having neglected to protect his interest. What has to be decided in the present case is whether by reason of the negligence of the Court of Wards in not detecting the cess clause drafted by the solicitors of the respondent Company as not rightly incorporating the agreement arrived at between the parties, the document in question is vitiated to such an extent as to cease to be binding on the appellant Raja. Secondly, if the cess clause as incorporated in the document did represent accurately what was agreed between the Court of Wards acting for the appellant Raja and Messrs. Bird & Co., whether such an agreement in regard to the cess clause was arrived at after the Court of Wards had applied its mind to the question and in its judgment it was for the benefit of the property and advantage of the ward that the taxes and cesses were not to be wholly payable by the lessee. It is clear that the cess clause, as it stands in the document in question, was agreed to by the Court of Wards without any thought having been given to its consequences. The Court of Wards acted *in* utter violation of the last clause of S. 18 of the Act in not bringing to bear its judgment upon the question of payment of taxes and cesses, and the contract to lease with the cess clause in the unusual form contained in the prospecting license in question has to be held to be in excess of its powers and *ultra vires*.

[42] Their Lordships of the Privy Council in the case of *Raja Mohammad Mumtaz Ali Khan* v. *Sakhawat Ali Khan*, 28 I. A. 190: (23 ALL. 394 P. C.), which was a suit for possession by a ward on his attaining majority of the properties alienated by the Court of Wards held that the plaintiff was entitled to recover possession of the property, the act of the Court of Wards being *ultra vires* of its power under S. 172, Oudh Land Revenue Act, 1876. It will be seen that the final words of S. 172 provided exactly in the same terms as those of S. 18, Court of Wards Act that

> "the Court of Wards shall have power to give such leases or farms of the whole or part of the immovable property under its charge and to mortgage or sell any part of such property, and to do all such other acts as it may judge to be most for the benefit of the property and the advantage of the disqualified proprietors."

What had happened in that case was that the junior members of the family of the Raja were held entitled to receive from the estate maintenance allowance by an award of the arbitrators. The arbitrators had also held that two villages were to be allotted to these persons in lieu of their maintenance. The Court of Wards in pursuance of that award allotted two villages to the defendants and put them in possession. The plaintiff brought the suit to recover possession of the villages so allotted to the defendants. The transaction was attempted to be justified under S. 172 of the Act as having been most for the benefit of the property and the advantage of the plaintiff. There Lordships of the Judicial Committee held:

> "Nor can the assignment of the villages to the respondents be justified under S. 172 of the Act. Clearly it cannot, unless it comes within the final words, that the Court may do all such acts as it may judge to be most for the benefit of the property and the advantage of the infant. It was not for the advantage of the appellant or the benefit of his property that two considerable portions of his estate should be disposed of without consideration. And there is not any trace throughout the proceedings of any thought having been taken as to what was beneficial to him or his estate."

[43] The position here is no different. Clearly it was not for the advantage of the appellant Raja or the benefit of his property that it was agreed that the cess clause should be in the form in which it stands and to use the language of the Judicial Committee, there is not any trace throughout the proceedings of any thought haveing been taken as to what was beneficial to him or his estate so far as the question of payment of cesses and taxes was concerned. There is, therefore, no escape from the conclusion that the transaction in question cannot be justified under the final words of S. 18 of the Act.

[44] There is, however, the question if by sheer oversight the cess clause remained in the document in a form different than that in Bokaro Ramgarh document, contrary to the agreement between the Court of Wards and Messrs. Bird & Co., whether such negligence vitiates the transaction. Mr. Das for the appellant Raja argues that if the guardian is negligent in looking after the interest of the minor, there is no identity of interest and he ceases to represent the ward. He relies upon the decisions of *Mathura Singh* v. *Ram Rudra Prasad Sinha*, 14 Pat. 824 at p. 834: (A. I. R. (23) 1936 Pat. 231) and *Siraj Fatma* v. *Mahmud Ali*, 54 ALL. 646 at p. 658: (A.I.R. (19) 1932 ALL. 293 F. B.), which held that where the ward is a party to the suit and the decree is passed against him, and if it is found in a subsequent suit by the ward that the Court of Wards was negligent in looking after the interest of the minor, the Court of Wards ceases to represent the ward and the decree passed against the ward is a nullity. Mr. Das submitted that the same principle will apply to a transaction entered into by the Court of Wards on behalf of the ward, if the Court of Wards is found guilty of negligence in the matter of that transaction. In the circumstances of the present case, he argued, it must be held that the omission on the part of the Court of Wards to detect that the document it was going to sign on behalf of the minor did not correctly represent the terms to which it had agreed, must have the consequence of vitiating the transaction to such an extent as to make it cease to be a transaction to which the ward can be said to have been a party, and the deed void *ab initio* and as of no effect against the ward.

[45] The learned Subordinate Judge has not accepted this contention. His view is that mere negligence or gross negligence on the part of the Court of Wards does not entitle the ward to challenge the transaction as being void and not binding upon him.

[46] It is hardly necessary to consider the question in abstract and in such a general form. What calls for decision in this particular case is whether regard being had to the terms of S. 18, Court of Wards Act, the negligence on the part of the Court of Wards to judge whether the terms it agreed to were for the benefit of the property or the advantage of the ward will vitiate the transaction. While it may be true that negligence on the part of the Court of Wards leading it to a wrong judgment as to what was for the benefit of the property and the advantage of the ward will not make the transaction void and as of no effect against the ward, negligence to take any thought as to what was beneficial for the property and advantageous to the ward will bring about that result. The learned Subordinate Judge noticed that Lister's note of 1st and 2nd April and Mr. Walsh's letter of 6th July 1914, (Exs. 130 (1) and 131 (a)) which contained a full report of the discussion and showed how far it agreed to modify the terms of the agreement of Bokaro Ramgarh Co., did not show that it was agreed that the cess clause was to be modified, and that it was not the case of the respondent Company that there was any intention to modify the clause. It is clear, therefore, that failure of the Court of Wards, its officers and its legal advisers to detect that the cess clause in the deed did not correctly incorporate the agreement between the parties or, if it did, their failure to judge whether it was beneficial for the property and advantageous for the ward that the cess clause should be so modified was a kind of negligence which went to the root of the power of the Court of Wards to enter into such a transaction and rendered the deed void and not binding on the appellant Raja.

[47] The learned Subordinate Judge thought that even if the modification of the cess clause was due to the negligence on the part of the Court of

Wards, the whole transaction cannot be said to be void for that reason, and held that the cess clause did not go to the root of the transaction and it could not affect its validity. The learned Subordinate Judge seems to be clearly wrong in his conclusion in this behalf. It is in evidence that in consequence of the cess clause being what it is, the estate has already suffered loss of lakhs of rupees, and if it is held that the transaction is binding upon the ward, the leases to be granted in pursuance of this agreement to lease, up to 1951 will have to leave the cess clause in this form, causing considerable loss to the estate in future. What the learned Subordinate Judge failed to realise is that if any of the covenants of the lease, specially one which means loss of such a considerable amount either to one or the other party, is held void, the covenants of the lease being inter-dependent and not separable, the transaction as a whole becomes void and unenforceable in law.

[48] There remains to consider one other point raised on behalf of the appellant Raja. It was contended by Mr. Das that this deed in question should have been executed by the Manager on behalf of the ward and not on behalf of the Court of Wards which was not the owner of the property. The argument is that there is no provision in the Court of Wards Act vesting the property of the ward in the Court of Wards, and, therefore, the Court of Wards is not entitled to deal with the property of the ward on its own behalf. Our attention has been drawn to S. 51, Court of Wards Act, under which suits brought by or against a ward have to be instituted in the name of the ward, and the manager or the Collector of the district, as the case may be, has to be named as the next friend or guardian for the suit. On the analogy of the provisions of this section, it was contended that the ward should have been described in the deed in question as the executant. The learned Subordinate Judge has rightly dealt with this contention. It appears that R. 242, framed under S 70, Court of Wards Act prescribes that all leases appertaining to estates under the Court of Wards should be executed by the Manager in accordance with the opinion of the Legal Remembrancer. Such opinion was to the effect that it was not desirable to make the proprietors parties to the lease or to make the proprietors the real lessors. The official acts have to be presumed to have been performed regularly and legally, and there is nothing to show that R. 242 was not in force at the time when the deed of this prospecting license was executed. It may also be added that S 7, Transfer of Property Act, contemplates the transfer by another person of property not his own, if that person is authorized to transfer such property by any law for the time being in force. Under S. 14 read with S. 18, Court of Wards Act, the manager could be competent to enter into a transaction of lease, or to contract to grant a lease, if the Court of Wards judged the transaction or the contract to be most for the benefit of the property and the advantage of the ward. Section 41 (g) authorizes the Manager to sign deeds or documents which may be executed by him by virtue of his office and Rr. 238 and 242 made under S. 70, Court of Wards Act, are apparently meant to carry out the provisions of the sections referred to above. Hence, it cannot be said that there was any irregularity in the execution of the documents impugned in this case.

[49] The conclusions which we reach, so far as the deed of the prospecting license of 1915 is concerned may be summed up as these: (1) Although it may be that a guardian of a minor or a trustee is not entitled under the common law to bind a minor or a *cestui que trust* by a personal contract to lease in future, the Court of Wards is empowered under the concluding words of S. 18, Court of Wards Act, to enter into such contract provided it judges that to do so is most for the benefit of the property and the advantage of the ward; (2) While the Court of Wards applied its mind to the question whether it was advantageous to the ward to prefer Messrs. Bird and Co., to other applicants for this concession and rightly or wrongly came to the conclusion that it was so, no thought was taken as to whether the terms regarding the rates of salami and royalty were the highest which could be obtained at the time when this concession was given, and the term regarding the payment of cesses and taxes should have been any different than what was usual and incorporated in Bokaro Ramgarh concession; (3) the failure of the Court of Wards, its officers and its legal advisers to have applied their mind to, and judged that the terms regarding salami, royalty and payment of taxes, which *prima facie* are not the best available at the time, puts this transaction beyond the powers conferred by the concluding words of S. 18 of the Act, and renders this deed void and inoperative in law; (4) the deed of prospecting license was executed by the Court of Wards in excess of its power and conferred no title on the respondent Company to the lands in their possession; and (5) the Civil Court has, in the circumstances, complete jurisdiction to pass a decree of ejectment in favour of the appellant Raja.

[50] On the finding just arrived at by us that the prospecting licence granted by the Court of Wards to the Company under the deed dated 3rd August 1915 is not binding on the appellant Raja, the whole fabric of the Company's title

falls to the ground. If we are right in so holding no further question arises between the parties, the very foundation of the Company's title having been found to be not only defective but entirely lacking in validity. The first variation of the licence of 1915, or, as it has been characterized in the course of the arguments at the Bar, the first extension of the licence, is evidenced by the deed dated 23rd November 1917. By this document, the Company got an unconditional extension of the terms of the licence from six years to twelve years, that is, up to 26th March 1927, and a further extension of twelve years, if ten thousand bighas more of coal lands were taken on lease by the Company. Further, and this is the more objectionable part of the transaction, no minimum royalty for an area above ten thousand bighas was payable before 26th March 1939 unless railway communication was available earlier. The terms of this transaction have been attacked by Mr. Das for the appellant Raja on the grounds, (1) that they were entirely for the benefit of the Company without due and proper regard having been paid to the interest of the ward, or the benefit of the property, (2) that the extension was obtained on false pretences; (3) that there was no sanction of the Court of Wards, that is to say, the Board of Revenue, for the terms of the document as finally drawn up; and (4) that, in any view of the matter, the Court of Wards acted beyond its powers in virtually making a gift of large sums of money to the Company in the shape of minimum royalty in so far as it was payable after 26th March 1939 or earlier, only if railway facilities became available, without the Court of Wards insisting upon the railway company giving an undertaking to the effect that they would introduce railway facilities within a certain specified time.

[51] It would appear that, about four months after the prospecting licence was granted on 25th March 1915 the Company applied for modification of the terms of the prospecting licence by extending the period of the licence, as also deferring the payment of minimum royalty for additional areas to be taken by the Company, until 26th March 1939, or until the introduction of railway facilities, if they became available earlier. To this end, the Company addressed the letter Ex. H (2), dated 3rd August 1915 to the Manager, Court of Wards. In this letter, the Company purported to say that the terms of the licence of 1915 were highly favourable to the Ramgarh Estate, whereas the Company were out of pocket to the extent of ten lacs of rupees without immediate prospects of a fair return from the capital thus invested by them. The Company also stressed the urgency of extension of railway facilities to the coal area necessitating an outlay of at least one and a half million pounds sterling, besides the cost of prospecting, which they estimated at thirty thousand pounds. They pointed out the difficulties in raising the necessary capital owing to the then prevailing war conditions. They further purported to say that the interests of the Company and of the Estate were identical with those circumstances in the background, the Company stated that they were amply justified in "asking for a drastic modification of the present prohibitive terms" of the licence. They, therefore, asked for extension of the six years' term of the licence to twelve years. They also asked for an option to continue the licence for a further period of twelve years, if they took a lease of at least ten thousand standard bighas of coal-bearing lands in the first period of twelve years. And further they asked for an additional period of twelve years, thus making a total period of thirty-six years in all, so that the licence would extend up to the year 1951. As regards minimum royalty, the Company submitted that it should not be asked for until railway facilities were available; but, in the end, they limited their request by stating that no minimum royalty be made payable during the first period of twelve years of the prospecting licence. Mr. Lister, as Deputy Commissioner of Hazaribagh, recorded certain notes on the proposals by the Company, referred to above. Exhibit 130 (AU) contains those notes. Mr. Lister thought that the extension from six to twelve years was justifiable. As regards the request for a total extension of thirty-six years, he thought that that long period was in excess of actual requirements. In his opinion, a total extension of twenty-four years, that is, up to 1939, was justifiable. On the question of minimum royalty, Mr. Lister pointed out that the Estate would suffer a loss of fifty thousand rupees a year for six years. In his view, the provision in a prospecting licence for the payment of minimum royalty was in the nature of a penalty against a lessee who unduly put off the raising of coal. In his view, Messrs Bird and Co. could not be expected to be guilty of any such procrastination. He thought that the loss might be divided between the two parties half and half. He, therefore, took the view that Rs. 2-8 a bigha, instead of Rs. 5 per bigha, might be fixed as the minimum royalty. Mr. W. C. MacGregor, the Manager of the Ramgarh Estate under the Court of Wards, sent the Company's application to the Government pleader of Hazaribagh, expressing his own opinion on the matter. Mr. MacGregor appears to have agreed with Mr. Lister that the extension of

the licence might be granted. Regarding the question of minimum royalty, he observed as follows:

> "I am in great doubt as to whether the Court of Wards would be justified in giving what practically comes to a remission of a large sum of money on what could be considered equitable grounds for doing so if the lessees and Government were only concerned, but in the present case there is a third party, a minor, and the Court of Wards is only acting as his trustee during his minority and has to be very careful in dealing with a question of this kind." . . . . *(Vide)* Ex. 130 (AV).

As regards Mr. Lister's proposal of dividing the loss of minimum royalty half and half between the parties, Mr. MacGregor took the view that it might be justifiable from the point of view of the State, or the Provincial Government, of a wider point of view, thereby suggesting that it was not in the interest of the ward himself. Nor did Mr. MacGregor agree with Mr. Lister's observations, which are by no means easily intelligible, on the calculations of the ultimate benefit to the Estate, irrespective of immediate gain to the ward. This note, contained in Ex. 130 (AV), was also forwarded to the Government pleader for his opinion. The Government Pleader, for one reason or the other, did not give any categorical opinion on the question submitted to him, but took the view that a legislative enactment offered the only solution of the question as far as the estates under the management of the Court of Wards were concerned. Hence, it would appear that the Government Pleader also was not in agreement with Mr. Lister's opinion that the variations in terms of the licence of 1915 were in the interest of the ward, or his property. Ultimately, he left the question for decision by Government as a matter of general policy affecting, as he thought, a large number of estates. This opinion of the Government Pleader is contained in Ex. 130 (AW), and is dated 16th August 1915. Nothing appears to have happened until 20th of March 1916, when Mr. W. A. Ironside addressed a letter to Mr. MacGregor. Though there is no indication in the official correspondence that Mr. MacGregor's note aforesaid was communicated to the Company, it would appear from the letter that the Company were agreeable to the suggestion of Mr. MacGregor regarding minimum royalty. Mr. Ironside, therefore, proposed redrafting the previous letter of the Company (Ex. H (2)) by eliminating the plea for exemption from minimum royalty, and limiting it to a request for the extension of the prospecting period only. Mr. Ironside also added this very significant sentence,

> "Will you please let me know how it appears to you best for me to act in order to save you as much trouble as possible and to prevent misunderstandings." *(vide* Ex. 125 (J) at p. 312 of Vol. III of the paper book).

This information from Mr. MacGregor, Mr. Ironside wanted through Cunningham of his office and his nephew who were expected to see Mr. MacGregor in a few days. This sentence has been utilized by Mr. Das for the appellant Raja as supporting his suggestions that Mr. MacGregor, though functioning as the Manager of Court of Wards, was really in the camp of the Company. This aspect of the controversy will be noticed hereafter. To this letter, Mr. MacGregor sent a reply (Ex. 125 (K), dated the 22nd of March 1916) suggesting to the Company that, in continuation of the original letter, he might write another one withdrawing their application for exemptiou from the minimum royalty, and pressing for the extension clause only. As a result of the correspondence referred to above and a personal interview, apparently between Mr. MacGregor and Mr. Cunnigham, a revised proposal was made by the letter Ex. 125 (L) dated 4th April 1916. In this letter, the Company suggested (1) that the prospecting and developing period be definitely fixed as for twelve years; (2) that the Company should have the option of extending the prospecting period for a further period of twelve years without any obligation to take up any fixed area during the extended period; (3) that, at the end of twenty-four years, if the Company took on lease not less than twenty thousand bighas, they should have a further extension for twelve years with a guarantee to take up a further area of ten-thousand bighas; and (4) that, with regard to minimum royalty, the terms of the present licence should hold good in respect of ten thousand bighas but that minium royalty in respect of any additional areas taken should not be payable until transport facilities for despatch of coal from mines were available. On the receipt of the revised proposals of the Company as aforesaid, Mr. MacGregor put up the matter before the Deputy Commissioner, expressing his own opinion against extension beyond twenty-four years from the date of the original licence as also against the proposal to forego minimum royalty on the second ten-thousand bighas to be taken during the extended period. Mr. Lister, the Deputy Commissioner, by his note dated 21st April, 1916 (Ex P-5), adhered to his view previously expressed that twenty-four years was enough, and that he was opposed to any further extension beyond 1939. He also expressed himself to the effect that, in view of the fact that the Company had withdrawn the proposal for the postponement of the payment of the minimum royalty, the matter might be reconsidered in a light favourable to the Company. By their letter (Ex. H (1)), dated the 3rd May 1916, the Company further elucidated their proposals of 4th of April by indicating that they will be liable to pay *salami* at the original rate of five rupees per bigha for any additional area taken, besides the two-thousand bighas covered by the original licence, but adding that no minimum royalty will be payable on such additional areas as may be taken in the extended period until railway transport facilities were available. The company further informed the authorities of the Court of Wards that the results of the survey of northern portion of Karanpura Coal Fields by their geologists were 'most disappointing," and that the previously published records in respect of the coal area had been proved to be most inaccurate. This statement was made with a view to urging strongly the necessity of the proposed extension at the Company's option for the second and the third period of twelve years. On receipt of this letter, Mr. Lister forwarded to the Commissioner of Chota Nagpur Division a long letter (Ex. H), dated 21st June 1916 on the proposal of the Company for the alterations aforesaid in the original licence. In this letter Mr. Lister observed that in his view, extension for twenty four years, that is, until 1939 would be adequate, and that the extension for thirty six years, asked for, was not necessary. But in para. 6 of the letter, which contains his recommendations, it would appear that he was prepared even to grant a third period of twele years and also agreeable to postpone the payment of minimum royalty on any additional areas besides ten thousand bighas to be taken in the first twelve years, but no such concession to be given to them in the third period of twelve years. It may be added that Mr. Lister proceeded on the assumption that the Company will have to invest a very large amount of capital for developing the collieries and building the necessary railway. He also dealt with the question of payment of minimum royalty under the impression that it was a sanction against procrastination in the development of the collieries on the part of the Company. He also made calculations of the investments so far made by the company on the coal areas prospected by them under the original licence. He ended his letter by observing that he was making those recommendations in "the interests of the estate and of the public". Exhibit 130 (AX) is the letter dated 26th June 1916, from the Commissioner of Chota Nagpur Division to the Secretary, Board of Revenue, recommending the Company's proposals for alteration of the original licence in the same terms as the Deputy Commissioner had done. But there are certain observations in this letter to which serious objection has been taken on behalf of the appellant Raja. The first is that there is a suggestion that the Company might give up the concession already granted to them, if the alterations desired by them were not accepted. Mr. Das has vehemently argued that there is no foundation for such a suggestion, and that, as a matter of fact, there is no evidence that the Company ever even thought of surrendering the licence. The second objection raised relates to the remark that the geological examination of the northern portion of the Karanpura Coal Fields had proved disappointing. It was contended on behalf of the Raja that this statement is not based on facts, and that there is no evidence in support of such a statement except the statement already referred to in the letter Ex. H (1) by the Company to the Manager, Ramgarh Wards Estate, which it is contended, cannot be evidence except of the fact that such a contention was raised. It was also objected that the authorities of the Court of Wards made prominent reference to the interest of the public which it is contended, is not a matter relevant to be taken into account but the interest of the ward and the advantage of the property. On 3rd July 1916, the officiating Secretary to the Board of Revenue wrote back to the Commissioner, Chota Nagpur Division, with reference to the previous correspondence, already adverted to. This is a very important letter in so far as it has been claimed that this was the sanction of the Board of Revenue to the alteration suggested by the Company in the original licence. The relevant portion of this letter is in these terms:

> "I am directed to say that the Board accepts generally the recommendations of the Deputy Commissioner, which have your support, but that the draft deeds embodying the proposed terms should be submitted to it, in order that they may be scrutinized by the Legal Remembrancer." (Ex. 130 (AY)).

It was contended in the Court below, and it has been contended before us also, on behalf of the Company that this letter is the necessary sanction of the Board of Revenue to the proposal for the alterations in the terms of the licence of 1915. The Court below has held that this does not amount to a sanction in asmuch as, it will presently appear, it was not a categorical acceptance by the Board of the terms offered by the Company. Still something remained to be done by the Board in consultation with their legal advisers before they could finally accord their sanction to the proposal. The learned Subordinate Judge has given very good reasons for holding against the contentions of the company and in our view, this finding is entirely correct. In pursuance of the letter of the Board, the Manager, Ward's Estate, wrote to the Company the letter Ex. (P-2), dated 12th July 1916, informing them of the general approval of the Board, and requesting them to have a draft agreement drawn up for the opinion of the Legal Remembrancer.

This letter was acknowledged by the Company by their letter, Ex. 130 (AZ), dated 14th July 1916. With their letter dated 3rd August 1916 (Ex. 130 (AAA)), the Company enclosed the required draft prepared by their solicitors. From the letter (Ex. 131 (C)), dated 20th October 1916, it appears that Mr. Sharda Charan Mitra, the legal adviser of the Ramgarh Estate, examined the draft submitted by the Company to the Manager, Court of Wards, and that he suggested certain alterations. By his letter dated 27th October 1916, the Manager, Court of Wards, forwarded to the Company the draft as revised by Mr. Mitra. The Company appear to have sat over this letter until 19th February 1917, when they sent a letter, Ex. 130 (AAC), objecting to the alterations suggested by Mr. Mitra as aforesaid, as, in the words of the Company, 'these alterations touch two vital important questions". The company, therefore, urged that the draft as made by their Solicitors should be retained in respect of the matters on which there was a difference between the legal adviser of the Estate and the Solicitors of the Company. In other respects, they accepted the alterations suggested by Mr. Mitra. The letter dated 15th March 1917, from the Company to their Solicitors (Ex. 130 (AAD) refers to an interview between Mr. MacGregor and the Company's officers. They handed over to the Solicitors Mr. MacGregor's note along with Mr. Lister's letter to the Commissioner to the effect that, after taking up the first ten thousand bighas of coal lands during the first period of twelve years, the Company will have no liability for payment of minimum royalty for any additional area taken during the second period of twelve years until railway facilities were available, or until the twenty-fifth year. The Company further informed their Solicitors that they were prepared to agree to those terms. It would further appear from the letter that Mr. MacGregor was in Calcutta, and was ready to interview the Solicitors of the Company with their agent, Mr. White, so as to expedite the matters after discussion of such points as may be necessary. Exhibit 133, dated 30th March 1917, is a letter from Mr. MacGregor to the Deputy Commissioner of Hazaribagh submitting the draft of the proposed alterations in the original license which, the letter states, has been approved by Mr. Sharda Charan Mitra, the legal adviser of the Estate, for sanction. The letter further asked that the enclosures submitted with the letter might be returned with the sanction. It contains a query, dated 31st March 1917 apparently by the Deputy Commissioner, whether it required the Board's sanction and the answer to that query is apparently by the Manager, which is in the affirmative, and is dated 2nd April 1917. Apparently, therefore, the general approval of the Board, dated 3rd July 1916 was not taken by the parties to the transaction as the sanction of the Board to the terms of the extension of the original license. The Commissioner of Chota Nagpur Division by his letter, dated 24th April 1917 (Ex. 131 (d)) submitted to the Board of Revenue the draft of the proposed agreement with a request that the same might be scrutinized by the Legal Remembrancer, and then returned for execution. The letter also added that the draft agreement had been approved by Mr. Sharda Charan Mitra, who had advised the Estate at the time of the drawing up of the original prospecting licence. The Commissioner of Chota Nagpur Division sent another letter to the Board of Revenue on 20th June 1917 in continuation of his letter aforesaid of 24th April 1917. This letter only forwarded Mr. MacGregor's letter to the Deputy Commissioner, requesting him to move the higher authorities "to expedite their sanction to the said agreement." In reply to this letter the Secretary to the Board of Revenue wrote back to the Commissioner on 13th July 1917, (Ex. P (4)). This letter makes a pointed reference to the Additional Legal Remembrancer's note of 9th July 1917 (Ex. 147 (B)), in which he had raised four points which required examination and elucidation. The following sentence in that letter is highly significant:

> "The agreement, however, is one of such importance that the Board agrees with the Additional Legal Remembrancer that it should be referred to the Solicitor to the Government of India before final acceptance, and, before it can be so referred, it is necessary to clear up the four points within the extract enclosed from a note recorded by the Additional Legal Remembrancer."

The Board further indicate their observations on three of the points raised in the note aforesaid. This letter is of great importance from the point of view suggested on behalf of the appellant Raja, namely, that there were still important points very material to the terms of the proposed alteration in the original licence outstanding between the parties. It was naturally argued on his behalf that this letter made it clear that the Board of Revenue had not granted the necessary sanction by their letter of 3rd July 1916 which is claimed by the respondent Company to have been such a sanction by the Board. The most important outstanding points were, first, whether the obligation to take up ten thousand bighas in the third period of twelve years should be insisted upon, and secondly, whether the minimum royalty was to be suspended only in case of leases taken in the second period of twelve years (which is wrongly characterized as the second decennial period in that letter). It appears that the questions raised by the Additional Legal Remembrancer, which were forwarded by the Board to the Commissioner, were dealt with by the Manager who wrote some letter to the Company, asking for elucidations of those points. The answer of the Company is contained in the letter Ex. 125 (AC) dated 24th July 1917. The letter makes reference to telegram, copies of which were enclosed. The position which the Company took was that, if an aggregate area of twenty thousand bighas is taken up by the Company within the first twenty-four years, the licence would be further extended for another twelve years; but there was no obligation on the part of the Company to take any further area during the third period of twelve years so extended. On 7th August 1917, MacGregor wrote the letter Ex. 132 (e) to the Deputy Commissioner of Hazaribagh, in answer to the correspondence contained in the Board's letter of 13th July 1917, and the extract from the Additional Legal Remembrancer's note dated 9th July 1917. With reference to the points raised in the Additional Legal Remembrancer's note, Mr. MacGregor enclosed the letter from Mr. Sharda Charan Mitra (flagged 'A') and his notes (flagged 'B' and 'C'), giving his reasons for accepting the Company's demands. He further mentioned that he had an opportunity of discussing the matter with the Additional Legal Remembrancer, and the latter was satisfied with the explanations given. He ended his letter by a request that the matter be "put through as soon as possible." Mr. Das, on behalf of the appellant Raja, contended that Mr. MacGregor was very anxious to see the matter through for certain reasons of his own, which will be discussed later, namely, that he had his own axe to grind. On receipt of this letter, the Deputy Commissioner forwarded the same with the enclosures to the Commissioner. He further mentioned the fact that the Manager had seen the Legal Remembrancer as also the Hon'ble Member of the Board, and that they were satisfied with the explanations. He also requested that the matter be expedited (Ex. 132 (d)). By his letter dated 25th August 1917, (Ex. 131 (f)), the Commissioner completed the chain of correspondence. He reiterated the fact that the Manager had seen the Hon'ble Member and the Legal Remembrancer. Hence, he did not think it necessary to make any observations of his own. The Board, by its letter dated 14th September 1917, (Ex. 131 (g)), sent the draft to the Legal Remembrancer with a request that the same may be referred to the Solicitor to the Government of India for examination from the point of view of the Estate. It is important to note at this stage that the Board indicated in Para. 2 of the letter the changes sought to be introduced in the original prospecting licence, a copy of which was also enclosed. The Board indicated that the changes sought to be introduced were (1) that the original licence for a period of six years was to be extended to twelve years, with a right of renewal for a further period of twleve years on certain conditions therein indicated; (2) that on those conditions being fulfilled, a further period of twelve years would be granted for prospecting, during which period the Company was to undertake the obligation, to take a lease of at least 10,000 bighas; (3) that the dead rent was to be Rs. 8000 for the first six years, and thereafter Rs. 50,000 a year; (4) that the minimum royalty in respect of the additional areas to be taken in excess of 10,000 bighas will not be payable until 26th March 1939, or earlier, if railway facilities were available; and (5) that *salami* will be payable whenever any excess area is taken under lease. On receipt of the papers by the Solicitor to the Government of India, he wrote back to the Legal Remembrancer on 25th September 1917, (Ex. 131 (h)) and pointed out that two matters still required looking into, namely, (1) the clause relating to three years' grace, whether it was to be allowed during each period of twelve years or only once, and (2) the clause as regards payment of Rs. 8000 per year as dead rent whether it was to be for all the six years or only for five years. The Board of Revenue's letter, he pointed out, made it payable for all the six years. He further pointed out certain amendments in the draft which related to the conditions bearing upon the payment of minimum royalty. On receipt of this letter from the Solicitor to the Government of India, the Legal Remembrancer wrote a letter (Ex. 131 (i)), dated 5th October 1917, to the Board of Revenue. In this letter, he made certain observations on the points raised by the Solicitor to the Government of India. He further pointed out that it was difficult to deal with the question of payment of Rs. 8000 as dead rent without further instructions. He made further suggestions with a view to amending the draft of the terms. Apparently, on receipt of the Legal Remembrancer's letter, the Board of Revenue wrote back to the Commissioner on 9th October 1917, (Ex. 133 (a)), enclosing the Legal Remembrancer's letter of 5th October 1917, just referred to, the letter of the Solicitor to the Government of India to the Legal Remembrancer, and the Board's letter to the Legal Remembrancer, which all had raised certain controversies as regards the exact terms of the alterations to be made in the original prospecting licence. These letters were enclosed by the Board to the Commissioner "for information and such action as may be considered necessary." On 13th/16th October 1917, someone on behalf of the Commissioner forwarded the letter with the enclosures from the Board of Revenue to the Deputy Commissioner, again "for information and such action as may be considered necessary." It further appears from the endorsement on that letter, dated 18th October 1917, apparently by the Deputy Commissioner, that he treated the matter as "most urgent," and sent the copy with the enclosures in original to the Manager to be dealt with by him, if possible, before he made over charge. It is clear from this endorsement that Mr. MacGregor was leaving the service of the Ramgarh Estate, and was about to make over charge. As a matter of fact, he made over charge on 2nd November 1917, vide Ex. 125 (AE), the letter from Mr. MacGregor to Mr. Ironside of Bird & Co. On behalf of the Company it was vehemently argued by Sir S. M. Bose that Ex. 133 (a), the memorandum from the Board of Revenue to the Commissioner, was the sanction by the Board to the transaction in question. The learned Subordinate Judge has accepted this contention. On the other hand, on behalf of the appellant Raja, it has been strongly urged that this was a mere routine letter, and not the formal sanction of the Board of Revenue to the terms on which the original licence was to be extended. As this is a very crucial matter determining the validity or otherwise of the transaction, it will have to be discussed in some detail. But, before that is done, it is convenient to complete the narrative of events leading up to the execution of the deed of variation on 23rd November 1917. Mr. MacGregor wrote the letter (Ex. H(3)), dated 18th October 1917, to the Company informing them that the draft with certain suggestions of Government Solicitor and the Legal Remembrancer had been received by him. He also stated that he was anxious that everything connected with the matter, namely, the extension of the prospecting licence, should be settled before he made over charge at the end of the month, or early in the month following. He, therefore, wanted to discuss the matter personally with them. Hence, it appears, there was an interview between Messrs. Orr Dignam & Co., Solicitors to Messrs. Bird & Co., and Mr. MacGregor on 26th October 1917, *vide* the letter Ex. 130 (AAE). The letter by the Company's Solicitors mentions the fact that three additional clauses after cl. 8 and certain other additions had been made to the draft as returned by the Board. They further state that, with the exception of the second point, namely, with regard to the payment of eight thousand rupees as dead rent for the first year, they thought it was not payable by the Company. On 1st November 1917, Mr. MacGregor wrote the letter Ex. 132 (b) to the Deputy Commissioner of Hazaribagh, informing him of his interview with the Company and their Solicitors, and of how he had decided the matters in controversy raised by the Board of Revenue at the instance of the Government Solicitor and the Legal Remembrancer, particularly with reference to the question of payment of eight thousand rupees as dead rent for the first year. The Deputy Commissioner, in his turn, informed the Commissioner by his letter Ex. 147 (c), dated 5th November 1917, that the Manager, Ramgarh Estate, had accepted the revised terms as drafted by the Company's Solicitors after consultation with him and under his instructions. Apparently, the matter of the revised draft of the terms of extension of the prospecting licence was never sent back to the Board for their final approval, and the manner in which the questions raised by the Board had been determined by the Deputy Commissioner in consultation with the Manager. They apparently thought that nothing more had to be done. As a matter of fact, the Manager and the Company treated the letter of 3rd July 1916, as the sanction of the Board, as would appear from the letter Ex. 130 (AAG), dated 9th November 1917, written by the Secretary, Board of Revenue, to Messrs. Bird & Co., enclosing the Board's letter No. 20/308/2, dated 3rd July 1916, for incorporation in the fresh deed to be executed incorporating the terms of the revised licence. Indeed, that very letter is incorporated as the sanction by the Board of Revenue. On 23rd November 1917, as already indicated, the variation deed was executed. It was signed by Mr. A. M. Walter as Manager of the Court of Wards, Mr. MacGregor having already left, for service elsewhere.

[52] On the question of the validity of this transaction, at the forefront of his argument, Mr. Das, on behalf of the appellant Raja, contended that there was really no sanction given by the Court of Wards to the document as finally drawn up and executed on 23rd November 1917. It was contended that the letter of the Board of Revenue, dated 3rd July 1916, could not be the sanction, inasmuch as a number of questions were still outstanding. The learned Subordinate Judge has acceded to that contention, and we have already indicated that we agree with this conclusion of the learned Subordinate Judge. It is not necessary, therefore, to repeat those reasons once again. The learned counsel for the respondent Company, on the other hand, contended that that document was the sanction of the Board of Revenue. But he contended further that, if that was not the sanction of the Board of Revenue, certainly the memorandum of the Board, dated 10th October 1917, was such a sanction. The learned Subordinate Judge

has accepted this contention. But, in our opinion, neither in form nor in substance, could the memorandum aforesaid of the Board of Revenue be treated as the sanction of the Board. This memorandum was, as contended on behalf of the appellant, routine communication from the higher authority to the subordinate authority for consideration of the matter raised in the letter of the Legal Remembrancer and the Solicitor to the Government of India. While reciting those letters, the matters which were still outstanding have been noticed, and it will appear therefrom that, rightly or wrongly, the Board had raised the question that eight thousand rupees had to be paid as dead rent for the first year. Certainly, the Board itself and not the Manager, or the Deputy Commissioner, could have been the final authority to dispose of that matter. The Manager, or the Deputy Commissioner, may have been right in thinking that it was not in the contemplation of the parties that the eight thousand rupees would be payable as a result of the alteration of the terms of the licence. But the final say in the matter lay with the Board itself, and the Manager, or the Deputy Commissioner, could have only indicated their reasons for the conclusions they had arrived at. But it was open to the Board to insist upon the payment of eight thousand rupees for the first of the six years, if it took the view that that should be insisted upon as a consideration for the further concession to be granted to the Company. Furthermore, it cannot be said that the last word in the matter of drafting of the terms of the alteration of the licence lay with solicitors of the Company. The draft as revised by the solicitors of the Company was never submitted to the consideration of the Board. The Board had already indicated in one of the letters, quoted above, that they treated the matter of drafting the terms as of great importance, and, therefore, had insisted upon the terms being examined not only by the Legal Adviser of the Provincial Government (the Legal Remembrancer) but also by the solicitor to the Government of India. Hence, in the ordinary course of business, in order to obtain the final sanction of the Board, the revised draft as finally made by the solicitors of the Company should have been submitted through the proper channel to the Board of Revenue for examination by them, or, on their behalf, by the Legal Remembrancer, or the solicitor to the Government of India, as the Board thought fit and proper. This was never done; nor were the other matters raised in the letters of the Solicitor to the Government of India and of the Legal Remembrancer again submitted to the Board for their consideration and final approval. The Board had not delegated its power to the Deputy Commissioner, or to the Manager, to decide finally the questions in controversy raised by them, and which had not been accepted by the Company or their solicitors in their entirety. On the other hand, the Company's solicitors had made their own draft of the amendments purporting to carry out the intentions of the Board of Revenue. But certainly it was not for them to have the last say in the matter. The proper authority to deal with the question finally was the Board of Revenue itself.

[53] Mr. Das, on behalf of the appellant Raja, pointed out that, whenever the Board accorded its sanction to such a transaction, it did so in unequivocal terms, the instances of which are to be found in (1) Ex. 130 (AS), dated 29th July 1914, the relevant portions of which are as follows:

> "In reply to your letter No. 1121, dated 25th July 1914, I am directed to convey the sanction of the Board to the agreement arrived at as between the Ramgarh Estate, as represented by the Manager, Mr. W. C. MacGregor and by the Deputy Commissioner on behalf of the Court of Wards, of the one part, and Messrs. Bird & Co., Calcutta, of the other part, which has been embodied in two documents.....'.',

then the exact nature of the two documents is recited in two separate paragraphs, and then follows the following:

> "The Board also approves the drafts of the above two documents, forwarded with your letter, which have also, it is understood, been approved by Mr. Sarada Charan Mitter acting on behalf of the Ramgarh Estate."

(2) Exhibit P (9) dated 25th November 1914, the relevant portion of which is in these words:

> 'With reference to your letter No. 1571 W/I (a)-31, dated 8th October 1914, I am directed to convey the sanction of the Board to the postponement, for one year, of the prospecting license granted to Messrs. Bird and Company in respect of the Karanpura Coal fields belonging to the Ramgarh Wards Estate in the district of Hazaribagh."

(3) Exhibit 98, letter from the Board of Revenue to the Commissioner, dated 4th/5th December 1935, the relevant portions of which is in these terms:

> "With reference to your letter No. 1365W/X (a)-11, dated 18th November 1935, I am directed to say that the Board accepts your recommendations and sanctions the extensions for a further period of 12 years, i. e., up to 26th March 1951, of the period of exemption under cl. 4 (V) of the lease from payment of minimum royalty on areas held in excess of 10,000 bighas by the Karanpura Development Company limited......,";

and, lastly, (4) Ex. 104, memorandum of the Board of Revenue to the Commissioner bearing date 19th March 1936, which is in these terms:

> "In modification of the orders issued in Board's letters Nos. 21-104/4, dated 5th December 1935, and 21-44/3, dated 24th February 1936, it now sanctions the extension for a further period of 12 years, i. e., up to 26th March 1951, of the period of exemption under cl. 4 (V) of the lease from payment of minimum royalty on areas held in excess of 10,000 bighas by the Company......"

These instances of sanction by the Board of final transactions were quoted by Mr. Das, on behalf of appellant Raja, to show that it appears to have been the invariable practice of the Board to use the commencing words of S. 18, Court of Wards Act [IX (B. C.) of 1879] namely, "The Court may sanction. . . ." Mr. Das urged that the Court of Wards invariably use those words with a view to leaving no doubt in the mind of anyone dealing with the Court of Wards that a particular transaction had been sanctioned by the Court.

[54] On the other hand, Sir S. M. Bose, on behalf of the respondent company contended, that though, in form the letter of 9th October 1917, is not a sanction, in substance, it would amount to a sanction, because nothing had been left to be done by the Court of Wards towards completing the transaction, namely, the variation of the original licence. He drew our attention to a number of decisions. The first case relied upon by him is the decision of their Lordships of the Judicial Committee in *Gulabsingh* v. *Seth Gokuldas*, 40 I. A. 117: (40 Cal. 784 P. C.). That was a decision under the Central Provinces Government Wards Act (XVII [17] of 1885). In that case, the Chief Commissioner had sanctioned the assumption by the Court of Wards of the management of the estate of a certain zamindar, and also accepted the proposal for the liquidation of the debt owing from the estate, which was the chief purpose of the assumption of the management of the estate by the Court of Wards. It appears that in that case the Deputy Commissioner had asked for the acceptance of the proposal to raise one lac of rupees from the respondent in that case for the purpose of meeting the liabilities of the estate. Their Lordships of the Judicial Committee considered the letter from the Secretriat to the Commissioner sanctioning the proposal for the liquidation of the debt of the estate as a sufficient sanction by the Court of Wards of (for?) effecting a mortgage of the property (under?) the management of the Court of Wards to raise a sufficient sum for the liquidations of the indebtedness of the estate. Their Lordships further observed that it was not necessary that the actual mortgage to be made by the Court of Wards should be submitted to the Chief Commissioner for his sanction or that the Court of Wards should have the Chief Commissioner's sanction to the precise terms of the mortgage. It has to be noted that the decision of their Lordships of the Judicial Committee was based on a consideration of the provisions of the Central Provinces Act which may not be in *pari materia* with the Bengal Court of Wards Act. We have not before us the Central Provinces Act (XVII [17] of 1885); but it would appear from the trend of the decision of their Lordships that the Chief Commissioner in that case had to sanction acts of the Court of Wards itself. In the present case before us, we are concerned with the sanction of the Court of Wards in relation to the acts of its subordinate officers, namely, the Manager and the Deputy Commissioner or the Commissioner. The scheme of the two Acts does not appear to have been the same. Hence, the argument by analogy in the present case does not hold good. The next case relied upon on behalf of the respondent is that of *Ramkanai Singh Deb* v. *Mathewson*, 42 I A. 97: (A. I. R. (2) 1915 P. C. 27). This was a decision under the Chota Nagpur Encumbered Estates Act of 1876. In this case, a patni lease was sanctioned by the Commissioner in favour of Robert Watson & Co. A patni lease is a well-defined transaction, the essential features of which had in that case, been sanctioned by the sanctioning authority, namely, the Commissioner. In those circumstances, it was held by their Lordships of the Judicial Committee that it was not necessary that the document ulimately prepared should also have been submitted for his sanction. In that case, their Lordships further pointed out that what was left to be done by the subordinate of the Commissioner was only entering formal details in the document. In that case, therefore, there were no essential terms outstanding to be settled between the contracting parties, as in the present case. If it were clear that the Board of Revenue as the Court of Wards had sanctioned all the essential particulars of the transaction it may not have been necessary to submit the final draft for the formal sanction of the Board; but, as already indicated, in the present case certain essential terms of the transaction had to be settled, and the draft had to be made accordingly. The correspondence already summarised indicates that the parties were not *ad idem* on all essential terms of the variation of the original licence. Even after the Board of Revenue had sent back the draft along with the suggestions of the Legal Remembrancer and the Solicitor to the Government of India, the Company's solicitors were suggesting changes in substantial terms of the agreement. Therefore, it was necessary that the terms as finally drafted by the Company's solicitors should have been submitted to the Board of Revenue for their examination and ultimate formal sanction, if the Court of Wards found that their intentions had been fully and properly incorporated in the document as finally drafted. It will be seen that it was not the practice of the Board of Revenue as the Court of Wards to accord formal sanction until the terms were embodied in a formal document. The letter, Ex. 180 (j) dated 16th/17th April 1914 from the Deputy Commissioner to the Company states that

> "the terms regarding Karanpura as arrived at the at meeting of the 1st and 2nd instant have been approved by the Board as just and proper. This formal sanction cannot be given until the terms are embodied in a formal document."

So far as the Company were concerned, they may have said their final word, but so far as the other party, the Court of Wards, was concerned, they had not yet done so, though the Manager and the Deputy Commissioner had taken the view that the draft as made by the Company's solicitors truly expressed the intentions of both the parties. Further, it may be mentioned in this connection that Rule 242 framed under S. 70 of the Act requires sanction to be reproduced in the deed to be executed by the Court of Wards. The rule reads thus:

> "All leases appertaining to an estate under the Court of Wards should be executed by the Manager in accordance with opinion of the Legal Remembrancer quoted below:
>
> It is not desirable to make the propietors parties to the lease or to make the proprietors the real lessors.
>
> Words should be added reciting (1) that the manager was appointed on such and such a date, and (2) that the lease was sanctioned by the Court of Wards in exercise of the power conferred by S. 18, Court of Wards Act, 1879, by order dated so and so."

The obvious implication of the rule seems to be that the sanction is to be incorporated in the deed evidencing the transaction, as was done in all other instances. There is nothing to shew that, in the cases cited by Sir S. M. Bose, a similar rule requiring incorporation of the Board's formal sanction in the deed was to be found. Hence, in our opinion, the cases relied upon on behalf of the respondent company do not support their contention that there was a sanction by the Court of Wards to the transaction of the year 1917.

[54a] It was also argued on behalf of the appellant Raja that the agreement of 1917, varying the terms of the agreement of 1915, was not for the benefit of the ward, or the advantage of the property inasmuch as the terms of the transaction of 1907 in favour of Bokaro Ramgarh and Co could not be the basis for a transaction which could entitle the grantees to have leases up to 1951 on the same terms as regards minimum royalty and *salami* and royalty. Mr. Das's contention was that the Court of Wards never applied its mind to this aspect of the case. They never considered whether the terms of 1907 would be fair and equitable from the point of view of the Estate for leases to be granted between 1917 and 1951. In our opinion, there is much to be said in support of this contention. The correspondence already discussed above between the Company on the one hand and the officers of the Court of Wards on the other discloses the fact that all the time they were discussing the advantages of the Company, and facilities to be granted to them for further extension of the term of their licence which meant, in effect, the terms of the lease or leases to be ultimately created in favour of the Company. It was never considered by the officers of the Court of Wards as to whether the giving up of the claim to minimum royalty in respect of areas above the first ten thousand bighas would be beneficial to the ward. The question of the market rate and other allied questions will be dealt with in connection with the second extension which was granted in 1937, as it is more convenient to deal with that aspect of the case at one place.

[54b] Mr. Das contended further that, on the question of minimum royalty, the officers of the Court of Wards completely misdirected themselves by considering only one aspect of the matter whether the absence of a term regarding payment of minimum royalty for all additional areas taken under the extended licence would lead the Company to procrastinate in raising coal or in working the mines. Mr. Das contended, and, in our opinion, rightly, that the provision in a lease for payment of minimum royalty is directed not only to preventing procrastination on the part of the grantee in opening mines and raising coal but is also meant to ensure a regular flow of income to the grantor. In this connection, reference was made to the following observations of Striling L. J. in *In re Aldam's Settlement*, (1902) 2 Ch. 46 at p. 60: (71 L. J. Ch. 552):

> "The object of a fixed or minimum rent is two-fold: first, to provide a specified income on which the tenant for life may rely; and secondly (and this is the more important reason), as a security that the mine will be worked, and worked with reasonable rapidity."

Mr. Das contended, therefore, that the officers of the Court of Wards did not consider the question whether it could possibly be in the interest of the ward to forego his claim to substantial sums of money every year in the shape of minimum royalty for all additional areas to be taken in pursuance of the extended terms. It was pointed out that the extension of the term was mainly, if not entirely, for the benefit of the Company, and no thought was given to any corresponding benefit to the owner of the property It was also contended that, by the revised terms of the licence, the Company were given the right to take further areas under lease up to year 1951 without any liability for payment of minimum royalty until 26th March 1939, or until railway facilities were available; but at the same time the Court of Wards never insisted on the Company giving an undertaking that they would provide for railway facilities within a reasoable time Hence, it was argued that the revised terms really meant all rights for the Company but practically no corresponding obligations. In this connection, Mr. Das referred to Ex. P (16), a letter from Anderson Wright and Co. representing Bokaro and Ramgrh, Ltd. to the Manager, Ramgarh Wards Estate, dated 3rd March 1916, in which they say that the Company had

> "....... entered into an arrangement with the East Indian Railway and the B. N. Railway under which these Railways covenanted to put in a Railway Line to serve the coalfields, in consideration for which the Company agreed to give them a sub-lease of extensive blocks of coal-bearing land, for the granting of which no pecuniary benefit would accrue to the Company, either by way of *salami* or royalty, the whole of the benefit being reserved for the Raj. As you are aware these Railway Companies have already constructed a line into the field at an expenditure of some sixty lacs of rupees which not only facilitates the opening up of the coalfields but must undoubtedly most materially benefit the Raj ...."

Mr. Das contended that the Court of Wards should have insisted upon the Company doing some such thing as Bokaro Ramgarh did with a view to bring railway facilities to the coal area.

[55] Mr. Das further contended that the extension of the terms of the original licence of 1915 was obtained by the Company on false pretences. In their application of 3rd August 1915, Ex. H (2), they purported to say that they would have to raise capital, namely, thirty thousand pounds, for prospecting and development, two-hundred-thousand pounds for development, machinery and colliery completion, and one and a half million pounds sterling for provision of railway facilities, and that these vast sums of money could not be raised within the six years of the original prospecting license. But, Mr. Das contended, that the Company had never either intended to work the colliery themselves nor to construct railway for working the colliery. Reliance has been placed upon the evidence of Mr. Roberts (witness No. 1 for the Company). He joined the Company in 1919. He has admitted in his cross-examination as follows:

> "Since I have been a member of the firm, the Development Company has had no intention of building a Railway at a cost of a million and a half pounds. During 1915, pound was approximately speaking equal to Rs. 15. All records of Bird & Co., relating to the matters relevant in this suit have been filed in Court. Since I became an assistant in the Coal Department of Bird & Co., I have seen no paper which will show that they or the Karanpura Development Company ever intended to build a Railway at a cost of a million and a half pounds."

The same witness has also admitted that

> "the Company has never worked the mine of its own. We never opened any mine. We have developed the property through prospecting and through sub-leases."

The witness has also made the following significant admission:

> "All the areas sub-leased by us except one were taken up by Railways. The Railways are still working Bhurkunda. They themselves obtained a prospecting license from us in 1920, and prospected the area themselves..."

Mr. Michalmore, who was examined on commission, on behalf of the Karanpura Development Company, Ltd., has also corroborated the above admissions of Mr. Roberts by admitting that

> "the Karanpura Development Company Limited is not working coal in any portion of licensed area. As far as I know the company has no intention of working any coal areas."

Mr. Das has, therefore, contended that, when the Company made an application for extension of the term of the prospecting license, they did so on grounds which were entirely unfounded in fact, and that they actually obtained the extension of the terms of the lease on representations which were not true.

[56] Mr. Das also contended that the Company had made a misleading representation to the officers of the Court of Wards when they stated in their letter Ex. H (1) that the results of the survey by their geologists of the coal fields were most disappointing. Mr. Das's grievance on this score was that the officers of the Court of Wards accepted this statement of the Company at its face value without calling for Dr. Jowett's report on those coal fields. Mr. Das has drawn our attention to the fact, as noted in the judgment of the Court below, and mentioned by us earlier, that, far from being disappointing, even the limited surveying done by Dr. Jowett disclosed that there (were) first-class coal seams and a larger number of second-class coal seams in the areas in question. As to how far those alleged misleading statements by the Company influenced the officers of the Court of Wards is not absolutely clear. But the fact remains that those statements of the Company were incorporated in one of the letters, already set out, of the officers of the Court of Wards (*vide* Ex. 139 (AX)). Summing up Mr. Das's contentions on this part of the case, his grounds for urging that the officers of the Court of Wards were guilty of negligence are (1) in assuming without any foundation, or even a suggestion by the Company, that the Company will give up the concession unless the extension asked for were granted; (2) in not insisting upon the Company to give an undertaking that they will introduce railway facilities within a reasonable specified time, failing which they would be liable to pay minimum royalty in respect of the excess areas taken by them as a result of the extended term of the lease; and (3) that the officers of the Court of Wards did not call upon the Company to produce Dr. Jowett's report on the prospects of the coal lands.

[57] Mr. Das further urged, in connection with the grant of the extension of the term of the prospecting licence, that Mr. MacGregor had

himself an interest in the promotion of the Karanpura Development Company for whom, admittedly, Bird & Co. were acting in the matter of securing the concession from the Court of Wards. Mr. Das pointed out in this connection that, as would appear from the sequence of events, Mr. MacGregor was waiting for the deed of alteration of the original licence to be executed, and, as soon as that was hurried through, chiefly by him, he gave up the service of the Court of Wards, and took a double appointment, namely, (1) under the Lachmipur Estate on a salary of one thousand rupees, and (2) a sinecure post of Rs 1,250 to Rs. 1500 per month under Bird & Co. Besides these he got 250 Founder's Shares in the Karanpura Development Company as a reward for the services he had rendered to the Company in obtaining the licence, or in obtaining the extension of the term of the license. In this connection, our attention was drawn to the evidence of Mr. Roberts. He admitted that he met Mr. MacGregor first in 1922-23 at Ranchi, when he was in the service of Bird & Co. as a zamindari Manager. Mr. MacGregor was in charge of the Karanpura Coal Field, and was the Company's Liaison Officer. One of his duties as such officer would be to act between Bird & Co. and Ramgarh Wards Estate; and to be in touch with the Ramgarh Wards Estate and to get things done for the Company's benefit. As regards the date of Mr. Mac Gregor's appointment under the Company, he admitted that the books of the Company will show the date of his appointment. The witness had no knowledge if Mr. Mac Gregor helped Bird & Co. materially in obtaining the license of 1915 and the variation of 1917. The witness naturally resented the suggestion made in his cross-examination that Mr. MacGregor, while he was Manager of the Ramgarh Wards Estate, was rewarded by Bird & Co. for having helped and assisted that Company in obtaining the agreements of 1915 and 1917, as the witness naturally admitted, it would amount to bribing Mr. MacGregor. The witness's attention was drawn to Ex. 4 which contains the following recitals :

> "And whereas certain firms and individuals had rendered considerable services to the parties hereto of the second part in securing the said license and prospecting the property and in consideration of such services it has been agreed that Ten Thousand Founder's Shares in the capital of the company credited as fully paid up should be allotted to such firms and individuals as the firm shall direct."

The witness admitted that Mr. MacGregor was registered as a holder of 250 shares in 1921 or 1922 or thereabouts. He was further pressed as to the manner in which those shares were acquired by Mr. MacGregor. The witness expressed his inability but admitted that, if he purchased the shares, that would be shown in the Share Register, that it was by a deed of transfer but that such a deed he could not find. He further admitted that, if such a deed were in existence, he would have found it. The witness, ultimately, being further pressed in cross-examination, had to admit that

> "if Mr. MacGregor was an original allottee, the shares which were registered in his name must have been a part of 10,000 shares deducted as a reward for services. The Karanpura Development Company was registered on 14th July 1920."

Exhibit A (j) 6, statement filed by the Karanpura Development Company on 20th July 1920, shows that, in consideration of the sale to the Company, the Company will allot to the promotors, or to their nominees, fifty thousand Founders' Shares of ten rupees each credited as fully paid up. It would also appear from that document that the nominal capital of the Company was forty lacs of rupees, out of which thirty five lacs worth of shares were divided into 3,50,000 Ordinary Shares of ten rupees each, and fity thousand Founders' Shares of ten rupees each. From Ex. Q, list of share-holders in Karanpura Development Company, it would appear that Mr. W. MacGregor c/o Bird & Co. held 250 shares out of the fifty thousand Founders' Shares, referred to above. Mr. Das contended that, it being an admitted fact that Bird & Co., were acting as Agents on behalf of the Karanpura Development Company, the allotment of 250 Founders' Shares in favour of Mr. MacGregor must have been in consideration of the services rendered by him to the Company in obtaining the concession from the Court of Wards. Hence, Mr. Das laid great stress on the following admission of Mr. Roberts:

> "It is impossible for me to say why Mr. MacGregor was given 250 Founders' Shares unless he assisted in securing the license and its modification or in prospecting the property for the benefit of Bird & Co."

It would appear that Mr. MacGregor submitted his resignation of the post of Manager, Court of Wards, on 15th September 1917, his reason being that the then Raja would come of age in about a year and a half, as a result of which the Estate would probably be released from the Court of Wards. He, therefore, had accepted an appointment in the Bhagalpur Division for nine years. Mr. MacGregor made over charge on 2nd November 1917. Mr. Das contended that Mr. MacGregor was only waiting to see the deed of alteration of the original agreement executed, and that the haste with which the variation deed of 23rd November 1917, was finalized without the proper sanction of the Court of Wards is thus accounted for. Though, as a matter of fact, it was Mr. Walter, Mr. MacGregor's successor-in-office who signed the variation deed on 23rd November 1917, he merely put his signature to it, and everything had been done by his predecessor in office. Immediately thereafter, Mr. MacGregor accepted the service of the Company on Rs. 1,250 to Rs. 1,500 a month, besides his salary of Rs. 1000 a month from the Lachmipur Estate. But it appears that Mr. MacGregor was, more or less, permanently residing near the coal-fields, and only occasionally went to Bhagalpur side in connection with his employment as Manager of the Lachmipur Estate. In our opinion, these facts point to the inference that Mr. MacGregor was certainly interested in the Company and in their determined efforts to obtain prospecting license in respect of the entire Karanpura Coal Fields belonging to the Ramgarh Wards Estate. It would thus appear that Mr. MacGregor's duties were in conflict with his self interest. It is not surprising, therefore, that Mr. MacGregor evinced an unusual anxiety, during the course of the negotiations for the grant of the licence and the subsequent alteration of the same, that the Company should get the monopoly for searching for coal in the valuable coal fields belonging to Court of Wards, which were still then quite in a virgin state. The learned Subordinate Judge has observed that the evidence was not conclusive. But in a matter like this, no conclusive evidence could be available, as the parties to such a nefarious arrangement would not deliberately or willingly give any clue to the real state of affairs. The appellant Raja could not be expected to adduce any better evidence of the collusion between Mr. MacGregor, the Manager of the Wards Estate, and the Company. The learned Subordinate Judge has also commented on the fact that Mr. MacGregor was a mere subordinate officer of the Court of Wards. But he has not attached sufficient importance to the fact that it was the Manager, Court of Wards, who initiated proposals, and practically gave a lead to the higher officials. There is no doubt that, if the higher officials of the Court of Wards like the Deputy Commissioner and the Commissioner and the Hon'ble Member, Board of Revenue, had any the least suspicion that Mr. MacGregor was in the pay of, or was under a promise by the Company to be awarded for his services, they would have been more circumspect and alert in safe-guarding the interest of the ward of the Court than they appear to have been. It also appears from the official correspondence discussed above that it was Mr. MacGregor who had been moving between the Company, the Deputy Commissioner, the Commissioner and the Board of Revenue in the matter of the settlement of the terms of the agreement, and naturally much depended on what he orally represented to the officers concerned during the long course of negotiation.

[58] In pursuance of the concession as altered by the terms of the deed of variation of 23rd November 1917, six leases were executed between the years 1922 and 1937. The first lease was executed on 17th July 1922, in respect of 3,035 bighas, vide Ex. 9. *Salami* at the rate of Rs. 40 per bigha, amounting to Rs. 1,21,400 was paid. Royalty was to be paid at four annas per ton for steam coal, three annas for rubble, two annas for dust, eight annas for hard coke, and six annas for soft coke. In respect of this area, a sub-lease (Ex.-A) was executed on 20th April 1923, in favour of Andrew Yule & Co., with effect from the date of the head lease, that is to say, 17th July 1922, in respect of 2,011 bighas, and another sub-lease (Ex. B) was executed on the same date in favour of Villiers, Ltd., in respect of 1,024 bighas with retrospective effect from 31st December 1921, the total *salami* for these two areas being Rs. 5,31,125.

[59] The second lease was in respect of 1,150 bighas at a *salami* of Rs. 46,000 (vide Ex. 8). It was executed on 26th January 1924, but with retrospective effect from 17th October 1922 (as stated in the sub-lease). The sub-lease (Ex. D) in respect of this area was given to South Karanpura Company on 25th April 1927, with retrospective effect from 3rd November 1922, at a *salami* of five lacs of rupees.

[60] The third lease was executed on 19th March 1924, in respect of 2,309 bighas at a *salami* of Rs. 92,360 (Ex. 6) with effect from 24th March 1923. The sub-lease (Ex E) in respect of this area was granted in favour of the Bengal Nagpur Railway Company on 28th February 1927, with effect from the date of the commencement of the head lease, that is to say, 24th March 1923, at a *salami* of Rs 7,64,685.

[61] The fourth lease was executed on 26th November 1923, in respect of 6,800 bighas at a *salami* of Rs. 2,72,000 (Ex. 7). The sub-lease (Ex. C) in respect of this area was given to the Railway Board on 27th March 1923, at a *salami* of Rs. 11,90,000 with effect from 17th October 1922, that is to say, even earlier than the execution of the head lease.

[62] The fifth lease is dated 12th April 1927, with effect from 1st April 1924, in respect of village Religara of 4,045 bighas at a *salami* of Rs. 1,61,800 (Ex. 10). The sub-lease (Ex. F) in respect of this area was given to B. B. C. I. and M. S. M. Railways on 26th November 1931, with effect from 1st April 1924, at a *salami* of Rs. 14,15 750.

[63] The last and the sixth lease was given on 17th July 1933, in respect of 200 bighas at a *salami* of Rs. 8,000 (Ex. 13) The sub-lease (Ex. C) in respect of this area was given on 6th March 1935, to South Karanpura Company with

effect from 3rd November 1922, at a *salami* of Rs. 11,343.

[64] Putting side by side the two series of transactions, namely, one the leases between the Court of Wards and the Company, and the other, the sub-leases, between the Company and the sub-lessees aforesaid, it would appear that the Wards Estate got Rs. 7,01,560 by way of *salami*; whereas the Company made Rs. 44,12,903 by way of *salami* from their sub-lessees. It will be noticed further that the sub-leases, in most of the cases, came into existence before the leases themselves, that is to say, the Company merely played the part of middlemen. They settled to lease out to sub-lessees certain specified areas on their own terms, and then obtained leases from the Raj for the corresponding areas. As regards the rate of royalty, it will appear that the rates to be paid by the Company to the Wards Estate were at a uniform rate stated above, and the rate of royalty payable by the sub-lessees to the Company were double or more than double the rates for the different kinds of coal or coke, though the two series of transactions are, more or less, contemporaneous. Mr. Das argued, on the basis of those figures, that the Court of Wards did not act like prudent men of business in agreeing to extend the period of the licence from 1921 to 1951 on the same terms as regards royalty and *salami* which obtained in the year 1907, that is to say, the terms on which the lease was granted in favour of Bokaro Ramgarh, Ltd., Mr. Das contended that the Court of Wards should have taken into account the rising prices of commodities, particularly during and after the first World War, and that, in so far as they did not take this aspect of the case into their consideration, they were guilty of gross negligence in the discharge of their duties to the Ward of the Court.

[65] In view of these considerations, it must be held that the agreement of 1917, the first deed of variation of the original licence, is vitiated on account of the fact that there is no valid sanction of the Court of Wards to that transaction. It is also void for another equally good reason, namely, that the Court of Wards acted beyond their powers in foregoing the claim of the ward to minimum royalty in respect of additional areas to be taken in pursuance of the extended term of the licence without any thought being taken as to the benefit of the property and the advantage of the ward. The transaction is not binding on the appellant Raja also because the Court of Wards were misled by false representations made by the Company as to the reasons for granting the extension of the licence. As Mr. MacGregor, the then Manager of the Court of Wards, was acting not entirely in the interest of the Court of Wards but of the Company, which fact was not known to the Court of Wards, the latter were misled into granting extension of the term of the licence beyond the real necessity of the situation and on terms which are not beneficial to the interest of the proprietor. For all these reasons, it must be held that the first variation of the prospecting licence is not binding upon the appellant Raja. That being so, all the six leases, set out above, granted in pursuance of the variation deed of 1917, must be held to be void.

[66] The second deed of variation of the original licence came to be executed on 1st January 1937, the negotiations leading up to this deed may now be summarised. In Ex. V, dated 11th May 1934, recording the minutes of a discussion between the Manager, Court of Wards, and the Company, the suggestion was made that the condition regarding the payment of minimum royalty by March 1939, might be waived, and the period extended for another term of twelve years. Exhibit 95 (c) is the letter, dated 24th April 1934, from the Company to the Manager, Court of Wards, mentioning that they had already taken leases of 17,539 bighas, and that they had to take a further area of 2,461 bighas in order to be entitled to a further extension of twelve years, and that the area of 4,045 bighas in *mauzas* Religara and others still remained to be developed owing to the absence of railway facilities. They also referred to the financial stringency of recent years which led to, they said, complete suspension by the railways of all capital development schemes. The Company, therefore, suggested that the clause regarding remission of minimum royalty on areas not accessible by rail be extended until the end of the licence, namely, 1951. Upon this letter, the Manager, Mr. Walter, addressed a letter to the Deputy Commissioner (Ex. 95 (a)), dated 19th/23rd May 1934. In this letter, after reciting the facts of the previous transactions between the parties, the Manager strongly supported the Company's request for remission of minimum royalty on all areas in excess of ten thousand bighas upto 1951. The Deputy Commissioner, by his letter Ex. 121, dated 2nd June 1934, addressed certain queries to the Manager who supplied the information required by the Deputy Commissioner, vide Ex. 122, dated 11th June 1934. By his letter Ex. 118, dated 10th June 1934, the Deputy Commissioner, Mr. Russel, wrote to the Commissioner, recommending that the further concession asked for the Company be granted. In this letter, the Deputy Commissioner pointed out that, if the concession asked for by the Company were to be refused, the Company will have to pay minimum royalty at five rupees a bigha on 4,045 bighas *plus* the additional area of

2,461 bighas, which they had to take in order to be entitled to the third period of twelve years. The value of that royalty at the rate of Rs. 32,550 per year was stated to be Rs. 3,90,360 in course of the next twelve years after 26th March 1939. Mr. Russell also pointed out that one day the coal deposits of this Estate will be the most important coal fields in India, and should be properly developed. There is a suggestion in this letter, to which serious objection has been taken by Mr. Das on behalf of the appellant Raja, that there was a danger of the Company giving up the concession and that it was important that a concern like Bird & Co., should be retained. Mr. Das has rightly pointed out that, in the whole of the record of this case there is not the faintest suggestion that the Company had up to that time expressed their intention to give up the licence, or that there was any apprehension that they may not be able to continue to hold the licence. On the other hand, the materials on the record, as rightly pointed out by Mr. Das show that the Company were very anxious not only to retain the licence but to take further areas in order to be qualified for availing the third period of twelve years, ending with March 1951. The Deputy Commissioner took the view that, in the long run, it may be more paying to the Estate to sacrifice immediate return from minimum royalty. But Mr. Das has rightly pointed out that this was not an admissible consideration; because the Company never intended, as shown above, to work any coal mines, or to provide for railway facilities at their cost. It has also been rightly pointed out that the concession asked for by the Company could not, on the face of it, be judged to be a transaction for the benefit of the wards of the Estate. On 13th August 1934, Mr. Russel wrote back to the Manager, Ramgarh Ward Estate (Ex. 123). In this note, the Deputy Commissioner pointed out that the revision of the prospecting licence in 1917 was granted to the Company on the ground that it had an enormous programme of development of the coal lands, and that the exemption from minimum royalty now asked for for a further period of twelve years is based on the ground that there is no possibility of development in sight then, that is to say,

> 'the exemption is to be give not as an inducement to expedite development but simply to enable the company to hold on to the prospecting license without adding to its present loss (if any)."

He, therefore, asked the Manager to collect information from the Company as to the losses which the Company had to bear as a result of the previous transactions, and the losses which they may have to bear in future. The Company, by their letter to the Manager, "Wards Estate (Ex. 25), dated 10th December 1934, purported to give the answers to the queries raised by the Deputy Commissioner. This letter Mr. Das characterized as full of untruths and half truths. The very first item in the letter, saying that they were faced with a loss on royalty as from 1939 of Rs. 22, 660 per annum, was found by the Company themselves to the wrong, and was withdrawn by a subsequent letter, vide Ex. 133 (B). They mention the further fact that their average expenditure on prospecting was Rs. 26,000 per year, and that their capital expenditure on that head was over twenty-five lacs. They further state that interest on that sum at six per cent per annum amounted to an annual charge of one and a half lacs. Mr. Das commented on these statements by saying that the Company had not informed the Deputy Commissioner through the Manager that they had made forty-four lacs twelve thousand and odd only by way of *salami*, apart from the fact that they had been realising royalty at a rate of twice or more than twice the rate which they were required to pay under their leases to the proprietor of the Estate. Mr. Walter wrote the letter Ex. 119 on 14th/15th December 1934, to the Deputy Commissioner recommending that the exemption asked for by the Company should be granted in full. In this letter, the Manager makes use of the wrong statement made and subsequently withdrawn by the Company themselves that they stood to lose on royalty alone the sum of Rs. 22,660 per annum from 1939. Moreover, Mr. Walter repeates a false suggestion, it is so argued by Mr. Das, that, if the concession were not granted, the Company might relinquish their holdings. On 14th/15th March 1935, the Deputy Commissioner addressed a letter (Ex. 95) to the Commissioner, giving the history of the transactions between the parties up to date. In this letter also, the Deputy Commissioner emphasises the suggestion, which has been characterised as false that it was important to retain firms like Bird & Co. as if they had given any indication that they would have to relinquish their holding, if the concessions asked for were not granted. In doing so, Mr. Marwood was only repeating the suggestions made by his predecessor, Mr. Russell. By his letter Ex. 26 (a), dated 18th May 1935, the Commissioner pointed out that the Company had yet to take under lease an additional area of 2,461 bighas in order to secure the extension of their prospecting licence. On 6th July 1935, there was a conference between Mr. Philip, then Member of the Board of Revenue, Mr. Marwood, the Deputy Commissioner, Mr. Walter, the Manager and Mr. Roberts, a representative of the Company, and this question of exemption from payment of minimum royalty was discussed. These notes by Mr. Roberts (Ex. 130 (AAAK) are very significant. He remarks:

> "Mr. Phillips stated that we were asking the estate to forego minimum royalty at Rs. 5 a bigha on 4045 bighas, plus the additional area of 2461 bighas which represented a loss to the estate of Rs. 32,530 a year or a minimum of Rs. 3, 90,360 in the course of 12 years if no further development takes place."

He adds further:

> "The subject was argued for some time and I formed the opinion that Mr. Phillips was unwilling to comit himself in agreeing that the Estate would forego the minimum royalty, but that if he could, on further examination of the subject, find a precedent for such action he would probably concur.
>
> "He closed the case by stating that he was not finally convinced our application was sound.
>
> "Discussing the matter later with Mr. Walter, he advises me that the precedent exists as Bokaro Ramgarh, Ltd., were granted several extensions free of minimum royalties in the area they hold."

Mr. Das, on behalf of the appellant Raja, contended, and, in our opinion, rightly, that, if matters stood like that, it showed a proper appreciation by the Member, Board of Revenue, of the situation. But he contended further that it was Mr. Walter, the Manager, who misled the higher officials and the Member, Board of Revenue, by citing the false precedent which, in fact, never existed. As will presently appear, it is a fact that Bokaro Ramgarh Ltd. were granted several extensions; but it is not a fact that they were granted exemption from payment of minimum royalty.

[67] Thereafter, the Company wrote the letter Ex. 96 (b) on 24th July 1935, to the Manager, referring pointedly to the conference aforesaid and Mr. Phillip's reactions to the Company's representations. The Company, apparently taking the cue from the Manager himself, in Para. 5 of the letter recited seven reasons why they should be exempted from payment of minimum royalties, one of those reasons being that the Estate had granted extension more than once to Messrs. Bokaro Ramgarh, Ltd., free of payment of royalty. They added the request that the same concession might be shown to the Company also. Mr. Das, on behalf of the appellant informed us that it was not a fact that Messrs. Bokaro Ramgarh, Ltd., had been exempted from payment of minimum royalty, and the learned counsel for the respondent Company did not controvert that statement of fact. On 14th August 1935, the Company applied for a coal mining lease or leases over an area of 2,461 bighas in Karanpura, vide Ex. 96 (c). Though the Company, in their letter, did not say so, Mr. Walter, in his letter (Ex. 120) to the Deputy Commissioner, observed on the Company's application as follows:

> "Although the application now made is stated to be under the terms of the prospecting license, i. e. unconditional, in view of the previous correspondence on the subject and the conversation we had with the Hon'ble Member, it must be assumed that the application is conditional on the exemption of the payment of minimum royalties on areas held on mining lease in excess of 10,000 bighas. By his letter Ex 96, dated 14th October 1935, the Deputy Commissioner reitereted the observations quoted above of the Manager, and recommended that the question of exemption might be submitted to the Board for orders.

Exhibit 98 is the Board's sanction of the extension subject to certain conditions, namely,

> "that the mining lease over the additional area of 2461 bighas required to complete 20,000 standared bighas is executed by the Company by the end of February 1936."

This sanction of the Board came after the letter Ex. 155 (c) written by Mr. Philip to Mr. Marwood on 3rd December 1935, which shows that Mr. Walter saw Mr. Philip, and that he had sanctioned the proposal of exemption from payment of minimum royalty by Karanpura on areas in excess of ten thousand bighas. In pursuance of the sanction of the Board, the Manager wrote the letter Ex. 29 on 19th December 1935, to the Company enclosing the Board's order dated 5th December 1935. He further asked them to execute the lease by the end of February 1936. By their letter Ex. 99 (a), dated 13th January 1936, the Company requested the Manager to allow them time till the end of December 1936, by which time they may be able to choose the best area of 2,461 bighas to be taken on lease. On 22nd January 1936, the Manager wrote the letter Ex. 32 to the Deputy Commissioner, recommending the Company's application for extension of time, as asked for by them. Then follow a series of letters regarding payment of surface rent, which, as ultimately realised, was a mistaken demand. On 20th February 1936, the Company advised the Manager, by their letter Ex. 35, that they had deposited in the Imperial Bank, Calcutta, the sum of Rs. 98,440, being the *salami* for 2,461 bighas of coal land. The Board then finally sanctioned the extension for a further period of twelve years of the exemption from payment of minimum royalty subject to the condition that the mining lease in respect of the additional area of 2,461 bighas is executed by 31st December 1936, *vide* Ex. 104, dated 19th March 1936. By their letter dated 30th October 1936 (Ex. 44 (a)), the Board duly approved the draft of the deed of extension. On 9th December 1936, by their letter Ex. 46, the Company intimated to the Manager their choice of the area of 2,461 bighas. Then there was a series of letters passing between the Manager, Court of Wards, and the Company regarding the draft of the lease of the additional 2,461 bighas. It appears that Mr. McLeod Smith took the place of Mr. Walter as the Manager of the Ramgarh Wards Estate. By his letter dated 24th February 1937 (Ex. 55), Mr. McLeod Smith pointed out that, out of the area selected by the Company, 1,260 bighas in village Sirka was liable to payment of minimum royalty from 9th December 1936, as railway facilities already existed in respect of those areas. On 10th March 1937, the Company, by their letter Ex. 58, acknowledged liability for payment of minimum royalty in respect of only 561 bighas in Sirka, and further pointed out that 751 bighas in west Sirka was about a mile away from the existing railway line, and, therefore, not liable for payment of minimum royalty. On 1st April 1937, the Manager wrote back to the Company, intimating them that the registration of the engrossed deeds would be held up until the question of the payment of minimum royalty demanded by the Estate in respect of 751 bighas in west Sirka and 1,108 bighas in Saunda was finally settled. Then there was an exchange of letters between the Manager and the Company as regards the question whether the areas in question could be said to be served by railway line. By their letter Ex. 68, dated 21st May 1937, the Company informed the Manager that they were agreeable to paying minimum royalty in respect of the areas pointed out by the Manager as being served by railway. Ultimately, on 1st June 1937, the deed of variation was executed and registered.

[68] From the statement of the negotiations and the correspondence between the Company and the officers of the Court of Wards, set forth above, it is clear (1) that the Member, Board of Revenue, agreed to sanction the exemption from payment of minimum royalty up to 25th March 1951, apparently on the ground that there was a precedent afforded by the extension of the term of Bokaro Ramgarh, Ltd. without payment of minimum royalty; and (2) that the sanction given by the Court of Wards was conditional on the fulfilment of the condition laid down in the Board's letter of sanction, set out above, namely, the execution of the lease by the end of December 1936. But the three lease were executed on 2nd August 1937, that is to say, about a week before the appellant Raja attained majority. Hence, the condition precedent as laid down by the Board was not fulfilled by the Company. But it may be said on their behalf that the question of the selection of coal lands had not been settled until May 1937. The obvious thing for the Company to do was to obtain a fresh sanction by the Board as was done previously when the sanction of the Board of 4th/5th December 1935; not having been carried out by the Company another sanction was given on 19th March 1936, giving them a further period of grace until the end of December 1936. The Court below has rightly taken the view that the condition precedent laid down by the Board in their final sanction was not carried out by the Company. Hence, the three leases executed on 2nd August 1937, were bad, as they must be deemed to have been executed without the sanction of the Board.

[69] But, in our opinion, the more serious objection to the legality of the sanction of the Board rests on the consideration that the Board was misled by the Manager of the Wards Estate into granting the sanction on the supposition that there were precedents for such a course, namely, that Bokaro Ramgarh Ltd., had been granted several extensions without the liability for payment of minimum royalty, which, as a matter of fact, has been found, as already indicated, not to be based on truth. The sanction of the Board, therefore, is entirely vitiated.

[70] Even assuming that the sanction granted by the Board of Revenue is free from the vitiating influences pointed out above, the sanction, on the face of it, is beyond the powers of the Board of Revenue, inasmuch as it amounts to making a gift of large sums of money which would be payable by the Company to the ward of the Court, if they were anxious to avail of the further extension of twelve years. The Court of Wards may have been generous to the Company, but should have been just to the ward of the Court. Certainly, the transaction of the year 1937, extending the period of the licence without the corresponding obligation of payment of minimum royalty, is, on the face of it, not for the benefit of the ward, and there is no trace in the record of any thought being given to this aspect of the question. As a matter of fact, the entire correspondence, set out above, betrays an anxiety on the part of the officers of the Court of Wards beginning from the Manager, Mr. Walter, to secure the maximum benefit to the Company without insisting upon their fulfilling their corresponding obligations. It has been admitted on behalf of the Company that there is no other case in which the term of a licence had been extended without the liability for the payment of minimum royalty. That being so, the action of the Court of Wards in extending the period of the licence without the liability for payment of minimum royalty was beyond their legitimate powers. It must, therefore, be held that the transaction of 1937 was also void.

[71] Another aspect of the question that was raised in connection with the validity of the extension of 1937 is whether the Court of Wards was justified in granting the extension by going to the length of agreeing to write off the minimum royalty payable after 25th March 1939, without considering the question of whether this transaction would be for the benefit of the ward. Connected with this question is the other question whether the Court of Wards at all considered the desirability of extending the licence beyond 1939

on terms as regards *salami* and rates of royalty which had been settled in 1907. It has been argued that, after the first extension of the year 1917, the Company did nothing but make the middleman's profit by granting sub-leases to different parties, as already set forth above, even before taking the leases from the Court of Wards. In making those sub-leases, it has already been noticed, the Company obtained much more favourable terms as regards *salami* and royalty during the years 1922 to 1927. It was naturally emphasized that the Court of Wards themselves could have found parties to take leases on much better terms than those settled on the basis of the lease in favour of Bokaro Ramgarh. Ltd., in 1907. On the very face of it, there is no doubt that the market rates of *salami* and royalty in 1937 could not be the same as those in 1907. But nowhere in the lengthy correspondence between the parties is there any trace of the consideration by the officers of the Court of Wards whether it would be beneficial to the ward to grant the extension of the licence, and thus open the door to further leases on the original terms. Not only that the Court of Wards agreed even to release the Company from their obligation to pay minimum royalty after 25th March 1939. It is manifest, therefore, that the Court of Wards practically agreed to make a gift of a large sum of money, which should have come into the coffers of the ward, to the Company. Such a transaction cannot, on the face of it, be justified, apart from any other considerations of the validity of the sanction.

[72] It has not been contended on behalf of the Company that, if the first and the second variation deeds of the years 1917 and 1937, respectively, are void either for want of the necessary sanction of the Board of Revenue or for non-consideration of the benefit of the ward, the several leases executed in pursuance of those extensions would not be equally void.

[73] It has been, as noted earlier, agrued on behalf of the respondent company that, there being no allegation of fraud against the Company in the matter of obtaining the leases, no action will lie against them, though the plaintiff-appellant may have had a cause of action, if any, against the Court of Wards itself. In this connection, it has been pointed out that the allegations in the plaint, even after the amendments of the same, amount to averments of negligence or even gross negligence on the part of the Court of Wards; but that those allegations could not sustain an action against the Company either for rescission of the contracts or a declaration that the contracts were void. It is true that the action is not based on fraud either of the Court of Wards or of the Company; nor is it an action based on negligence. The plaintiff-appellant has alleged negligence on the part of the officers of the Court of Wards, or the Court of Wards itself, only as ancillary to his claim for a declaration that action of the Court of Wards, was not within its competence, inasmuch as it did not consider the benefit of the ward: in other words, negligence is not the cause of action but it has been alleged against the Court of Wards to show that the Court of Wards did not act as it was bound to do, as a prudent man of business would manage his own property. Hence, it must be held that this contention raised on behalf of the respondent Company is not well-founded in law.

[74] It was next contended on behalf of the respondent Company that the suit for possession is barred by limitation, inasmuch as it is contended, the Company came in possession of the coal fields by virtue of the prospecting licence of 1915, that is to say, in the life-time of the appellant Raja's father who died on 10th April 1919. If it can be shown that the Company has been in possession of the coal fields since 1915, they may have acquired title by adverse possession. But there is no evidence of such possession. The Company had only a licence to dig and search for coal. No interest was created by those licences in the land itself. Casual and spasmodic acts of digging or boring holes on different spots within the coal area cannot be said to be such possession as to attract the rule of adverse possession. All the leases came into existence after the death of the present Raja's father; hence, certainly the claim for possession in respect of those leases cannot be said to be barred by limitation or adverse possession.

[75] Sir S. M. Bose further contended that the persons in actual possession of different areas within the coal fields were not parties to this suit, and that, therefore, the suit for possession was not maintainable. This suit for possession must be taken to be for possession in the same sense in which the defendant Company is in possession, and the plantiff's suit, if it is to be decreed, must be for possession as against the defendant Company. The rights of third parties, if any, cannot be affected by the decree to be passed in this litigation.

[76] Sir S. M. Bose, on behalf of the Company further contended that some of the letters passing between the Court of Wards and the Company were not admissible in evidence. But it is admitted that both Mr. MacGregor and Mr. Walter are dead and their statements made in the course of the correspondence between the Company and the Court of Wards would be admissible under S. 32, Evidence Act, as they were made in the ordinary course of business. Furthermore, they will be admissible under S. 6, Evidence Act as *res gestae*. It cannot be denied that those letters passed in the course of the negotiations between

the parties for the settlement of the terms of the licence, or the extensions of the original licence. It also appears that many of those letters were adduced by the Company themselves, and adduced in evidence on their own behalf. Naturally, therefore, no objection appears to have been taken as to their admissibility in the Court below. But, if they are not relevant under the Evidence Act, mere want of objection on their part will not make them admissible. But, as already pointed out, those letters are admissible under the provisions of the Evidence Act.

[77] It was also suggested that the appellant Raja must be deemed to have waived any objections that he may have had to the validity of the leases executed between the parties, as he received royalties in the years 1938 and 1939 before the suit was instituted by him. The Court below has decided this issue against the defendant Company, and no arguments have been addressed to us to show that the decision of the Court below on this part of the case is erroneous in law or in fact.

[78] As all the pleas raised on behalf of the defendant Company in bar of the suit fail, it must be held that the plaintiff Raja is entitled to a decree for a declaration that the prospecting licence dated 6th March 1915, and its variations in 1917 and 1937 were all void and inoperative, and not binding on the plaintiff, and, consequently, the leases granted by the Court of Wards in pursuance of those transactions, as mentioned in Sch. B. are equally void and inoperative. The plaintiff is also entitled to possession and mesne profits. It must also be held that the plaintiff in Suit No. 28 of 1940 is not entitled to any relief, and the suit must be dismissed with costs throughout. The plaintiff in Suit No. 82 of 1940 is entitled to his costs both here and in the Court below. It follows that both the appeals are allowed, and the cross-objection by the respondent Company is dismissed. Mesne profits shall be determined not on the basis claimed by the plaintiff Raja, but on the basis of the profits made by the respondent Company from the coal fields in question.

R.G.D. *Appeals allowed.*

A. I. R. (37) 1950 Patna 166 *[C. N. 33.]*

MEREDITH AND RAMASWAMI JJ.

Radha Kant Jha — Appellant v. *Ramanup Singh and others — Respondents.*

A. F. A. D. No. 1752 of 1946, Decided on 9th September 1949, from decision of Sub-Judge, Muzaffarpur, D/- 24th May 1946.

Civil P. C. (1908), O. 38, R. 10 — Attachment before judgment — Sale of attached property before attachment but deed registered after — Sale is valid and prevails over subsequent execution sale in favour of person attaching it.

An attachment before judgment cannot prevail over a sale-deed executed in respect of the attached property before the order of attachment is made even though the sale-deed is registered after the attachment. If in such a case the person attaching the property purchases it subsequently in execution of his decree, he cannot get a valid title to the property as against the prior private purchaser: A. I. R. (14) 1927 P. C. 42; A. I. R. (20) 1933 Cal. 212; A. I. R. (25) 1938 Pat. 134; A. I. R. (28) 1941 Pat. 247 and A. I. R. (35) 1948 Pat. 60, *Ref.*; A. I. R. (27) 1940 Pat. 565 and A.I.R. (34) 1947 Pat. 293, *Doubted and Distinguished.*
[Paras 6 & 13]

Annotation: ('44-Com.) C. P. C., O. 38, R. 10, N. 1.

S. C. Mukharji — for Appellant.

A. C. Roy and K. D. De — for Respondents.

Ramaswami J. — This is an appeal by the plaintiff from a decision of the Subordinate Judge of Muzaffarpur dismissing his suit.

[2] The plaintiff alleged that in 1941 he had instituted a money suit against the defendant 2nd party for recovery of Rs. 612 and odd due under a handnote. He obtained a decree, in execution of which he purchased 4 bighas 1 katha 12 dhurs of land. The purchase was on 11th May 1943 and shortly after the plaintiff obtained *dakhaldehani*. It is stated that on 3rd May 1941, defendant 2nd party executed a *kebala* with respect to the land in suit in favour of the defendants 1st party, but the *kebala* was registered only on 5th May 1942, after certain contested proceedings before the Registration Officer. It is the admitted case that on 7th June 1941, the plaintiff had prayed in the money suit for attachment of the disputed land. The Court accepted the petition and on 30th June 1941, passed an order of attachment. After *dakhaldehani* had taken place, the defendants 1st party filed an objection under O. 21, R. 100, Civil P. C., which was allowed by the executing Court. The plaintiff thereafter instituted the present suit under the provisions of O. 21, R. 103, Civil P. C.

[3] The main question debated before the lower Court, was whether the *kebala* executed by defendant 2nd party in favour of the defendants 1st party was a *farzi* and fraudulent document.

[4] Upon this issue of fact the lower Courts have after examining the evidence, reached the definite conclusion that the *kebala* was genuine and for consideration and was not ante-dated.

[5] In support of the appeal Mr. S. C. Mukharji, nevertheless pressed the argument that the *kebala* executed in favour of the respondents could not prevail over the order of attachment since it was registered long after the order of attachment was made by the Court. Learned counsel referred to the provisions of S. 64, Civil P. C., which is to the following effect:

"Where an attachment has been made, any private transfer or delivery of the property attached . . . shall be void as against all claims enforceable under the attachment."

But it is necessary to read O. 38, R. 10 which enacts that

> "attachment before judgment shall not effect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree".

[6] Upon the facts of the present case, it is manifest that the plaintiff cannot succeed for the attachment cannot prevail against a sale deed which was executed before the order of attachment was made.

[7] In *Kalyanasundaram Pillai* v. *Karuppa Mooppanar*, 8 P. L. T. 327 : (A. I. R. (14) 1927 P. C. 42) a Hindu male had executed a deed of gift in respect of part of immovable property and delivered it to the donee; a day after he adopted a son, and five days later the deed of gift was registered. The question arose as to whether the deed of gift took effect from the date of execution or from the date of registration. The Judicial Committee affirmatively laid down that the deed became effective from the date when it was executed and the gift accepted by the donee. Lord Salvesen remarked in the course of his judgment:

> "Their Lordships are unable to see how the provision of S. 123, T. P. Act, can be reconciled with S. 47, Registration Act, except upon the view that, while registration is a necessary solemnity in order to the enforcement of a gift of immoveable property, it does not suspend the gift until registration actually takes place. When the instrument of gift has been handed by the donor to the donee and accepted by him, the former has done every thing in his power to complete the donation and to make it effective. Registration does not depend upon his consent, but is the act of an officer appointed by law for the purpose, who, if the deed is executed by or on behalf of the donor and is attested by at least two witnesses, must register it if it is presented by a person having the necessary interest within the prescribed period."

[8] In a Calcutta case *Nabadweepchandra Das* v. *Lokenath Ray*, 59 Cal. 1176 : (A. I. R. (20) 1933 Cal. 212) a question arose as to whether an attachment would prevail over a mortgage deed which had been executed before it. The learned Judge answered the question as follows:

> "To consider the effect of S. 64, Civil P. C., the true nature of an order of attachment has to be realised. Form No. 24 of Appendix E to the Code is the form of a prohibitory order for attachment of immoveable property. It shows that, by such an order, the judgment-debtor is prohibited and restrained from transferring or charging the property by sale, gift or otherwise, and all persons are prohibited from receiving the same by purchase, gift or otherwise. At the stage at which the attachment in the present case was effected, the transferor had done all that lay in his power to complete the transfer and to make it effective and the transferee had already taken the charge, which had been so created in his favour, and all that remained was the solemnity to be gone through which was necessary to make it enforceable, we are, accordingly, of opinion that the attachment, such as it was in the present case, did not affect the mortgage."

[9] These cases were followed with approval by a Division Bench of our Court in *Faiyazuddin Khan* v. *Mt. Zahur Bibi*, 19 P. L. T. 383 : (A. I. R. (25) 1938 Pat. 134). In this case the learned Judges held that a deed of *baimokasa* executed by the plaintiff's husband in her favour on 19th July 1928, would prevail against an attachment of the same property effected on 27th August, 1928. Though the *baimokasa* deed was registered after the attachment, the learned Judges held that it must under S. 47, Registration Act operate from the date of its execution.

[10] It is necessary to state that in two later cases, *Jeo Narayan* v. *Budhan Mahto*, A. I. R. (28) 1941 Pat. 247 : (192 I. C. 812) and *Sadei Sahu* v. *Chandramani Dei*, A. I. R. (35) 1948 Pat. 60 ; (13 Cut. L. T. 21) the learned Judges referred with approval to and followed *Faiyazuddin Khan* v. *Mt. Zahar Bibi*, 19 P. L. T. 383, : (A. I. R. (25) 1938 Pat. 134).

[11] On behalf of the appellant reliance was placed on *Gopal Bux* v. *Shyambehari Singh*, A. I. R (27) 1940 Pat. 565 : (188 I. C. 269) in which the learned Judges observed that:

> "the words of S. 69, Civil P. C. make it clear that the property does not actually vest in the purchaser at the time of the sale; but once the sale is confirmed, it is deemed to have vested in him as and from that date. Confirmation of a sale is an integral part of the transaction of sale and without confirmation the purchser acquires no title. Consequently an order prohibiting sale also prohibits confirmation of sale which had already taken place but which had not been confirmed before the prohibitory order was passed."

Learned counsel also made reference to *Deopati* v. *Mahabir*, 25 Pat. 529 at P. 538 : (A. I. R. (34) 1947 Pat. 293) in which Manohar Lall J. refers with approval to the case in *Gopal Bux* v. *Shyambehari Singh*, A. I. R. (27) 1940 Pat. 565, : (188 I. C. 269) and observes as follows:

> "To adopt this language, here also the registration of a sale deed is an integral part of the transaction of the sale and without its registration, the purchaser acquires no title. It follows that on the date when the application was made under R. 89, the appellant had no title to maintain it."

[12] The facts of the present case are clearly distinguishable for the *kebala* in dispute is a registered document. On the contrary, it is apparent from the recital of facts in *Deopati* v. *Mahabir*, 25 Pat. 529 : (A. I. R. (34) 1947 Pat. 293) that the unregistered *bai beyana* deed was not registered at all. Moreover, the decision in *Gopal Bux* v. *Shyambehari Singh*, A. I. R. (27) 1940 Pat. 565 : (188 I. C. 269) and also the obiter of Manohar Lall J. in *Deopati* v. *Mahabir*, 25 Pat. 529 : (A. I. R. (34) 1947 Pat. 293) are of doubtful authority in view of the decision of the Judicial Committee in *Bhawani Kumar* v. *Mathura Prasad Singh*, 40 Cal. 89 : (16 I. C. 210). In that

case a mortgage had been granted on 9th August, 1886, in favour of the respondent over a certain share in four out of 71 villages. On 31st May he obtained a decree on his mortgage which was made absolute on 19th December, 1899. He executed his decree and a sale took place on 19th March 1900, at which the respondent himself became the purchaser. On 28th March, an instalment of Government revenue on the 71 villages fell into arrear and the whole residuary share of 71 villages, including the 4 villages purchased by the respondent, was notified for sale. The respondent did not pay the revenue due, but on 23rd April he obtained a certificate confirming the sale of 19th March in execution of his decree. On 6th June 1900, the whole of the villages was sold for arrears of revenue and was purchased by the predecessor in title of the appellant, and the appellant instituted a suit against the respondent for the share purchased at the execution sale. Upon these facts the Judicial Committee reversed the decision of the High Court and held that the sale in execution of the mortgage decree took effect from the actual date of the sale, and not from its confirmation, and, therefore, from 19th March 1900 the respondent by his purchase became the proprietor of the estate sold, and not merely the purchaser of such right, title and interest in it as the mortgagor might have had.

[13] Upon this review of the authorities it is manifest that the defendants first party obtained a valid title to the lands in dispute by their purchase which would prevail over the purchase by the plaintiff in the execution case.

[14] In my opinion the decision of the lower appellate Court is correct, and this appeal must be dismissed with costs to the contesting defendants.

Meredith J. — I agree.

K.S. *Appeal dismissed.*

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*A. I. R. (37) 1950 Patna 168 *[C. N. 34.]*

REUBEN AND NARAYAN JJ.

Brajdeo Narain Singh—Petitioner v. *Dominion of India and others—Opposite Party.*

Civil Revn. No. 874 of 1948, Decided on 12th September 1949, against order of Addl. Sub-Judge, Palamau, D/- 4th November 1948.

*(a) Indian Independence Act (1947), S. 15 (2)— "Law of the new Dominion"—Continuance of Legal Proceedings Act (1948) is law of new Dominion within sub-section—Continuance of Legal Proceedings Act (1948).

The Continuance of Legal Proceedings Act is a statute enacted by a Legislature lawfully authorised to legislate for the Dominion, and the reference to the law of the Legislature of the Dominion in the proviso to S. 15 (2) is to a law by the Legislature of the new Dominion or of the Constituent Assembly acting under sub-s. (1) of S. 8 of the Independence Act. Sub-s. (2) of S. 15 contemplated that the power to designate the person to continue legal proceedings will be exercised either by the Governor-General or by an authority empowered to legislate for the Dominion, and that once the designation had been made right conferred thereby can only be withdrawn by a law of the Constitution. It follows that the Continuance of Legal Proceedings Act is a law of the new Dominion within the meaning of S. 15 (2). [Para 8]

(b) Indian Independence Act (1947), S. 15 (1) and (2)—Abatement of suit under S. 15 (1) — No provision for setting it aside — Provisions of O. 22, Civil P. C., do not apply — Request to Court by person designated to be allowed to continue proceedings is of formal nature—Even if application to Court is necessary, Art. 181 and not Art. 171 of Limitation Act would apply — Limitation Act (1908), Arts. 171 and 181.

Ordinarily, when a suit abates against a party, the Court has to consider what is the effect of the abatement and, if the abatement has occurred against a single plaintiff the suit abates as a whole. However, the abatement of a suit under S. 15 (1) is an abatement by statute and there is no provision for setting it aside. The procedure under O. 22, Civil P. C., is entirely foreign to such a case. As soon as the designation is duly made, it is open to the person designated to appear before the Court and to ask to be permitted to continue the proceedings. As he is by statute entitled to continue the proceedings, the request to Court to be allowed to do so would be of a formal nature. Even if an application to the Court is necessary, the Article of the Limitation Act applicable would be the residuary Art. 181 and not Art. 171. [Para 9]

Annotation : ('42-Com.) Lim. Act, Art. 171 N 2; Art. 181, N. 13.

(c) Civil P. C. (1908), S. 115 (c) — Suit abating under S. 15 (1), Indian Independence Act — Both Dominion of India and Province of Bihar allowed to continue suit — Irregularity held did not affect jurisdiction of Court.

Where the Dominion of India and the Province of Bihar were both allowed by the trial Court to continue the suit abated under S. 15 (1), Indian Independence Act:

Held, that at the most this was an irregularity not affecting the jurisdiction of the Court. [Para 10]

Annotation : ('44-Com.) Civil P. C., S. 115, N. 12.

(d) Continuance of Legal Proceedings Ordinance (1948)—Ordinance if *ultra vires* of Governor-General *(Quære.)*—Government of India Act (1935), S. 42. [Para 3]

A. B. Saran and Thakur A. D. Sinha — for Petitioner.

Ranjit Sinha and R. S. Chatterji — for Opposite Party.

Reuben J. — This petition is directed against an order of the Additional Subordinate Judge, Palamau, on what he describes as an application for substitution. It arises out of a title suit pending in the Court of the Subordinate Judge, the petitioner being one of the defendants in the suit. The suit was filed by the Government in 1933 with regard to certain underground rights. As provided by S. 79, Civil P. C., as it then stood, the plaintiff was described as the Secretary of State for India in Council. Under the provisions of the Government of India Act, 1935, S. 179, the Secretary of State for India must be deemed to have been substituted since 1937 for the Secretary of State for India in Council. A further change in the description of the plaintiff was necessitated by the Indian Independence Act, 1947, the relevant provisions of S. 15 of which are as follows:

> "(1) Notwithstanding anything in this Act, and in particular, notwithstanding any of the provisions of the last preceding section, any provision of any enactment which, but for the passing of this Act, would authorize legal proceedings to be taken, in India or elsewhere by or against the Secretary of State in respect of any right or liability of India or any part of India shall cease to have effect on the appointed day, and any legal proceedings pending by virtue of any such provision on the appointed day shall, by virtue of this Act, abate on the appointed day, so far as the Secretary of State is concerned.
>
> (2) Subject to the provisions of this sub-section, any legal proceedings which, but for the passing of this Act, could have been brought by or against the Secretary of State in respect of any right or liability of India, or any part of India, shall instead be brought.
>
> (a) in the case of proceedings in United Kingdom, by or against the High Commissioner,
>
> (b) in the case of other proceedings, by or against such person as may be designated by order of the Governor-General under the preceding provisions of this Act or otherwise by the law of the new Dominion concerned;
>
> (c) and any legal proceedings by or against the Secretary of State in respect of any such right or liability as aforesaid which are pending immediately before the appointed day shall be continued by or against the High Commissioner, or, as the case may be, the person designated as aforesaid:
>
> Provided that, at any time after the appointed day, the right conferred by this sub section to bring or continue proceedings may, whether the proceedings are by or against, the High Commissioner or person designated as aforesaid, be withdrawn by a law of the Legislature of either of the new Dominions so far as that Dominion is concerned, and any such law may operate as respects proceedings pending at the date of the passing of the law."

[2] "The preceding provisions" referred to are contained in S. 9, which empowered the Governor-General to pass orders necessary or expedient for giving effect to the Indian Independence Act. Under sub-ss. (3) and (5) of that section the period within which such an order could be passed was from 3rd June 1947, to 31st March 1948. The order necessary for giving effect to sub-s. (2) of S. 15 with respect to pending proceedings was incorporated in sub-cl. 3 of cl. 12, Indian Independence (Rights, Property and Liabilities) Orders 1947, [G. G. O. 18 dated 14th August 1947]. For some obscure reason the provision was confined to proceedings "in respect of any liability of the Governor-General in Council or a Province." Therefore it did not cover the present suit, which is in respect of a right and not a liability. The omission was brought to the notice of the Governor-General by the Bihar Government (*vide* the Statement of Objects and Reasons of Bill No. 44 of 1948 published at p. 464 of the Gazette of India dated 3rd July 1948, Part V) and an Ordinance, entitled the Continuance of Legal Proceedings Ordinance 1948, (Ordinance No. XII [12] of 1948), was promulgated in exercise of the Governor-General's powers under S. 42, Government of India Act, 1935, by a notification dated 28th May 1948. The relevant provision of this Ordinance is:

> "3. *Continuance of proceedings*: — Any legal proceedings which, immediately before the appointed day,
>
> (a) were pending by or against he Secretary of State in any Court within the territories which as from the appointed day became the territories of India by virtue of sub-s. (1) of S. 2, Independence Act, 1947 (10 and 11 Geo. VI c. 30), and
>
> (b) were in respect of any right of India or any part of India, shall
>
> (i) if the right in question was that of the Governor-General in Council, be continued by or against the Dominion of India;
>
> * * * * *
>
> (iii) if the right in question was that of any Governor's Province other than Bengal, the Punjab, the North-West Frontier Province or Sind, be continued by or against that Province."

The District of Palamau lies in a partially excluded area. The Ordinance was applied to this area by a notification of the Governor of Bihar under S. 92, Government of India Act, published in the Bihar Gazette of 30th June 1948, Part II at p. 1339. This was followed by the filing on 14th August 1948, of the application out of which the present petition has arisen. It is an application on behalf of the Dominion of India and the Province of Bihar. It asserts that under S. 3 of the Ordinance the applicants have the right to continue the suit, and that,

> "although it is not necessary to apply for setting aside the abatement or for substitution of the names of the petitioners in place of the Secretary of State for India or for permission to continue the suit by the petitioners, this petition is filed to avoid technical objection."

Apparently, at the time when the application was made the applicants were not certain whether the right in question was of the Governor-General in Council or of the Province of Bihar. Hence, the application was filed on behalf of both of them. The application was allowed by the Additional Subordinate Judge on 4th November 1948. In the meantime, the Ordinance had been replaced by an Act of the Central Legislature entitled the Continuance of Legal Proceedings Act 1948, (Act No. XXXVIII [38] of 1948), which received the Governor-General's assent on 3rd September 1948. Section 3 of this Act is substantially in the same terms as S. 3 of the Ordinance, and sub-s. (2) of S. 5 provides that anything done or any action taken in exercise of powers conferred by or under the Ordinance shall be deemed to have been done or taken in exercise of powers conferred by or under this Act "as if this Act had commenced on 28th day of May 1948." The Act was applied to the partially excluded areas by a notification under S. 92, Government of India Act dated 29th October 1948, appearing at p. 2515 of Part II of the Bihar Gazette dated 10th November 1948. Taking the

Act to be a valid enactment effective under S. 15, Indian Independence Act (this has been questioned by Mr. Saran who appears for the petitioner), application of the Dominion of India and the Province of Bihar must be taken to be one under the Act.

[3] Mr. Saran's first contention is that Ordinance No. XII [12] of 1948 is *ultra vires* of the Governor-General under S. 42, Government of India Act. This section, as it stands subsequent to adaptations made in pursuance of the Governor-General's powers under S. 9, Indian Independence Act, 1947, is as follows:

> "The Governor-General may, in cases of emergency, make and promulgate Ordinances for the peace and good government of the Dominion or any part thereof, and any Ordinance so made shall, for the space of not more than six months from its promulgation have the like force of law as an Act passed by the Dominion Legislature; but the power of making Ordinances under this section is subject to the like restrictions as the power of the Dominion Legislature under this Act to make laws: and any Ordinance made this under section may be controlled or superseded by any such Act."

Mr. Saran challenges the validity of this Ordinance on two grounds, first of all, that it is not "for the peace and good government of the Dominion or any part thereof," and, secondly, that it is in contravention of Ss. 15 and 9, Indian Independence Act, which contemplate that, if the Governor-General designates the person who is to carry on the proceedings, he will do so by an order passed not later than 31st March 1948. I am not impressed with the second ground, but was at first inclined to accept the first contention. It is difficult to see how the making of a provision for the continuance of legal proceedings affecting rights of the nature of private property is connected with the preservation of peace and good government. It is clear from the section that the existence of an emergency is a matter for the Governor-General to decide, and that the Court cannot go behind his statement that there is an emergency. This is not so clear as regards the requirement that the Ordinance should be for peace and good government, and some support for Mr. Saran's contention that Ordinance No. XII [12] is not for peace and good government is to be found in the preamble to the Ordinance, which omits to say so and merely states :

> "Whereas an emergency has arisen which makes it necessary to provide that the continuance of certain legal proceedings, etc."

The matter is, however, not so simple as it appears, for their Lordships of the Judicial Committee in *Bhagat Singh* v. *Emperor*, 58 I. A. 169 : (A. I. R. (18) 1931 P. C. 111 : 32 Cr. L. J. 727) considered a provision of the Government of India Act, 1915, which is almost identical in terms, and came to the conclusion that it was for the Governor-General and the Governor-General alone to decide whether an emergency existed and whether the proposed Ordinance conduced to peace and good Government or not. As a decision on this point is not necessary in view of Act No. XXXVIII [38] of 1948 which has replaced the Ordinance, I do not think it would be right on my part to enter on the long investigation which would be necessary before I could accept or reject the contention of Mr. Saran.

[4] On the other side, Mr. Ranajit Sinha goes even further than is indicated by this decision. He points out that under S. 42 the Ordinance of the Governor-General is given the force of an Act passed by the Dominion Legislature, that under S. 18, Government of India Act, 1935, the Constituent Assembly which enacted Act No. XXXVIII [38] is the Dominion Legislature, and that under S. 6, Indian Independence Act, 1947, "the Legislature of the Dominion" has plenary powers to make laws for the Dominion, which shall not be void or inoperative on the ground that they are repugnant to the law of England or to the provisions of any existing or future Act of the Parliament of the United Kingdom, etc. It is necessary to deal with this argument, as the meaning of the expression "Legislature of the Dominion" has to be considered in connection with another point raised by Mr. Saran. This point arises in connection with Act No. XXXVIII [38] of 1948. Mr. Saran's argument is as follows : Sub-s. (2) of S. 15, Indian Independence Act provides for the designation in one of two ways of the person who is to continue the legal proceedings; he may be designated either by an order of the Governor-General under the preceding provisions of the Act, or "by the law of the new Dominion concerned." Then there is a proviso that after the appointed day, that is, 15th August 1947, the right conferred by sub-s. (2) to bring or continue proceedings may be withdrawn by "a law of the Legislature of either of the new Dominions" so far as that Dominion is concerned. There is evidently a distinction drawn between "the law of the new Dominion" and "the law of the Legislature of the new Dominion." Mr. Saran contends that Act XXXVIII [38] is a law of the Legislature of the new Dominion and not "a law of the new Dominion" by which alone the designation could be made.

[5] I have referred to S. 6, Independence Act, which provides that the Legislature of the new Dominion shall have plenary powers of Legislation uncurbed by any existing legislation or by any future Act of the Parliament of the United Kingdom. Its powers are not even limited by the Indian Independence Act, that is, the

Act designed to bring the Legislature of the Dominion into existence. This Legislature, however, is the Legislature to be set up after the new Constitution comes into operation. The arrangements for what is to happen in the meantime are contained in S. 8, Indian Independence Act. I reproduce below the relevant portions of this section ;

"(1) In the case of each of the new Dominions, the powers of the Legislature of the Dominion shall, for the purpose of making provision as to the constitution of the Dominion, be exercisable in the first instance by the Constituent Assembly of that Dominion, and references in this Act to the Legislature of the Dominion shall be construed accordingly.

(2) Except in so far as other provision is made by or in accordance with a law made by the Constituent Assembly of the Dominion under sub-s. (1) of this section, each of the new Dominions and all Provinces and other parts thereof shall be governed as nearly as may be in accordance with the Government of India Act, 1935; and the provisions of that Act, and of the Orders in Council, rules and other instruments made thereunder, shall, so far as applicable, and subject to any express provisions of this Act, and with such omissions, additions, adaptations and modifications as may be specified in orders of the Governor-General under the next succeeding section, have effect accordingly :

Provided that—

* * * * *

(e) the powers of the Federal Legislature or Indian Legislature under that Act, as in force in relation to each Dominion, shall, in the first instance, be exercisable by the Constituent Assembly of the Dominion, in addition to the powers exercisable by that Assembly under sub-s. (1) of this section.

(3) Any provision of the Government of India Act, 1935, which as applied to either of the new Dominions by sub-s. (2) of this section and the orders therein referred to, operates to limit the power of the Legislature of that Dominion shall, unless and until other provision is made by or in accordance with a law made by the Constituent Assembly of the Dominion in accordance with the provisions of sub-s. (1) of this section, have the like effect as a law of the Legislature of the Dominion limiting for the future the powers of that Legislature."

[6] Under sub-s. (1), the Constituent Assembly which has been in existence since December 1946 (*vide* sub-s (3) of S. 19 of the Act) will, for the purpose of making provisions regarding the constitution of the Dominion, exercise "the powers of the Legislature of the Dominion" it is not the Legislature of the Dominion and references in the Act to the "Legislature of the Dominion" are to be construed accordingly. As regards ordinary legislation, the Constituent Assembly is to exercise "the powers of the Federal Legislature or the Indian Legislature" under the Government of India Act, 1935 (*vide* proviso (e) to sub-s. (2)) and is to remain subject to the limitations on the powers of the Legislature imposed by the Government of India Act of 1935, subject to any modification therein made by the Constituent Assembly in exercise of its constitution-making power under sub-s. (1) (*vide* sub-s. (3).) Under S. 8, therefore, the Government of India Act as modified by adaptations is to remain in force and the Constituent Assembly functioning for the purpose of ordinary legislation is to remain subject to the limits imposed on the powers of the Legislature by that Act. The use of the expression 'Dominion Legislature' in S. 18, Government of India Act makes no difference. It was substituted by an adaptation made by the Governor-General under S. 9, Indian Independence Act and takes the place of "the Federal Legislature or Indian Legislature" whose powers the Constituent Assembly is to exercise under proviso (e) to sub-s. (2) of S. 8, Indian Independence Act. Under the Indian Independence Act the Constituent Assembly in this capacity is to be subject to the limits prescribed by the Government of India Act. Similarly, under the Government of India Act, the Dominion Legislature spoken of in S. 18 is to function within the provisions of the Act. It follows that, when the Government of India Act speaks of the Dominion Legislature, the expression connotes something quite different from the expression "Legislature of the new Dominion" occurring in S. 6, Indian Independence Act.

[7] The meaning of the expression "the law of the new Dominion" is to be found in sub-s. (3) of S. 18, Indian Independence Act, the terms of which are as follows:

"Save as otherwise expressly provided in this act, the law of British India and of the several parts thereof existing immediately before the appointed day shall, so far as applicable and with the necessary adaptations, continue as the law of each of the new Dominions and the several parts thereof until other provision is made by laws of the Legislature of the Dominion in question or by any other Legislature or other authority having power in that behalf."

Under this provision, the existing law of British India became the law of the new Dominion subject to modifications by laws of "the Legislature of the Dominion" or by "any other Legislature or other authority having power in that behalf." The conception is that of a body of law, liable to modification from time to time by several lawfully authorised agencies. The modifications might be of several kinds. Existing legislation may be repealed or it may be altered in some particular or it may be added to. The resultant body of law will still be the law of the Dominion, and it would contain laws of the Legislature of the Dominion as well as those of other legally empowered authorities. That the expression is to include new laws is clear from sub-s. (2) of S. 15, Indian Independence Act which provides that the law of the new Dominion may designate the person who is to continue legal proceedings. Evidently this must refer to legislation made subsequent to the coming into operation of the Indian Independence Act. That the expression includes laws affecting the constitution as well as ordinary laws appears from sub-s. (2) of S. 6 which says:

> "No law and no provision of any law made by the Legislature of either of the new Dominions shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of this or any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Legislature of each Dominion include the power to repeal or amend any such Act, order, rule or regulation in so far as it is part of the law of the Dominion."

The term "the law of the Dominion" occurring at the end of this sub-section evidently includes the Indian Independence Act, which is of the nature of the law of constitution.

[8] Coming now to the terms of sub.s. (2) of S. 15, according to my interpretation, the law of the new Dominion would include Act XXXVIII [38] of 1948, which is a statute enacted by a Legislature lawfully authorised to legislate for the Dominion, and the reference to the law of the Legislature of the Dominion in the proviso is to a law by the Legislature of the new Dominion or of the Constituent Assembly acting under sub-s. (1) of S. 8. It appears that sub-s. (2) contemplated that the power to designate the person to continue legal proceedings will be exercised either by the Governor-General or by an authority empowered to legislate for the Dominion, and that once the designation had been made the right conferred thereby can only be withdrawn by a law of the constitution. It follows that Act No. XXXVIII [38] is a law of the new Dominion within the meaning of this section, and there is no substance in the contention of Mr. Saran.

[9] Mr. Saran's next contention is that, even if Act No. XXXVIII [38] be a law of the new Dominion within the meaning of sub-s. (2) of S. 15, the application of the opposite party must be held to be barred by limitation. He urges that the abatement which has occurred under sub-s. (1) of S. 15 has the effect of a decree *Naimuddin Biswas* v. *Maniraddin Laskar*, 32 C. W. N. 299: (A. I. R. (15) 1928 Cal. 184), *Ramphal Sahu* v. *Satdeo Jha*, 21 P. L. T. 597 : (A. I. R. (27) 1940 Pat. 346 F. B.), that the opposite party cannot be allowed to continue the suit until the abatement is set aside: *Mt. Bibi Khozaima* v. *Official Liquidator of the Kayestha Trading and Banking Corporation, Ltd.*, 2 Pat. 168 : (A. I. R. (10) 1923 Pat. 417), and that the period within which an application for setting aside the abatement could be filed had expired before the filing of the present application. In this connection Mr. Saran has drawn our attention to the provision of S. 4 of the Ordinance, repeated in S. 4 of Act No. XXXVIII [38] providing that, in computing the period of limitation prescribed for an appeal or application to Court in respect of the proceedings in question, the period from 15th day of August 1947 to 28th day of May 1948 shall be excluded. The answer to Mr. Saran's contention is that the question of setting aside an abatement does not arise at all. Under sub-s. (1) of S. 15, Indian Independence Act, there was an abatement, but it was not an abatement of the suit as a whole; the suit abated only against the Secretary of State. Ordinarily, when a suit abates against a party, the Court has to consider what is the effect of the abatement and, if the abatement has occurred against a single plaintiff, the suit abates as a whole. Here, however, the suit was kept alive by sub-section (2) which provided that, in spite of the abatement, the suit "shall be continued" by a person designated in the manner provided by that sub section. The abatement is an abatement by statute and there is no provision for setting it aside. The procedure under O. 22, Civil P. C., by which an abatement is set aside and the legal representatives of the deceased party are substituted in his place, is entirely foreign to the case before us. Neither the Dominion of India nor the Province of Bihar is a legal representative of the Secretary of State. All of them are the representatives of the Crown who is the real plaintiff in the suit, vide *United Provinces* v. *Atiqa Begum*, (1940) F. C. R. 110 at p. 171 : (A. I. R. (28) 1941 F. C. 16). As soon as the designation was duly made, it was open to the person designated to appear before the Court and to ask to be permitted to continue the proceedings. As he was by statute entitled to continue the proceedings, the request to Court to be allowed to to do so would be of a formal nature. Section 15 is in marked contrast to O. 22, R. 10, Civil P. C., which allows an assignee to continue a suit "by leave of the Court". The provisions in S. 4 of the Ordinance and of Act XXXVIII [38] do not help the petitioner. They relate to applications and appeals which it may be necessary to file in respect of the "pending legal proceedings", for instance, if such a suit has been disposed of and an appeal has to be filed. Further, even if an application to the Court was necessary, the Atricle of the Limitation Act applicable would be the residuary Article 181 and not Article 171. As the period given by Article 181 is three years, the application was well within time.

[10] Finally, it is contended that both the Dominion of India and the Province of Bihar cannot be allowed to continue the suit. This is not a matter which we need go into in a petition in civil revision. At the most, that is an

irregularity not affecting the jurisdiction of the Court. Further, we are informed by Mr. Sinha that he has instructions not to press the suit on behalf of the Dominion of India and will take the necessary steps in the Court of the Subordinate Judge.

[11] On the above grounds, I would dismiss this petition with costs. The hearing-fee will be assessed at three gold *mohars*.

[12] The suit has been pending for a very long time. We are told that it is now ready for hearing. The Judicial Commissioner of Chota Nagpur should see that it is taken up without further delay.

[13] **Narayan J.**—I agree and have nothing to add to the exhaustive judgment of my learned brother. The suit did not abate as a whole and was kept alive by sub-s. (2) of S. 15, and the question, therefore, whether the application for setting aside the abatement was made within time or not did not really arise. The procedure will be governed by the carefully drafted provision of S. 15.

V.R.B. *Petition dismissed.*

A. I. R. (37) 1950 Patna 173 *[C. N. 35.]*

AGARWALA J.

Hasar Ali and others — Appellants v. *Ajodhaya Sah and others—Respondents.*

A. F. A. D. No. 771 of 1948, Decided on 2nd September 1949, from decision of Sub-Judge, 1st Court, Monghyr, D/- 23rd March 1948.

T. P. Act (1882), S. 60 — Clog on redemption — Long term by itself is not clog.

In India a long term is not by itself a clog on the equity of redemption, entitling the mortgagor to redeem before the expiry of the period agreed upon : *Case law referred.* [Para 2]

Annotation : ('45-Com.) T. P. Act, S. 60 N. 31.

Rajkishore Prasad—for Appellants.

G. P. Das and Rameshwar Prasad Sinha and Bindeshwari Prasad Sinha—for Respondents.

Judgment.—This is an appeal by the plaintiffs against concurrent decisions of the Courts below. The appeal arises out of a suit for redemption of a mortgage dated 8th September 1928. The term of the mortgage stated in the bond is 98 years. There is a provision that if the mortgage be not redeemed at the end of the term, it should not be redeemable for another term of 98 years. The suit was instituted on 1946, long before the expiry of the term, it being contended by the plaintiffs that the reference to 98 years in the bond had been fraudulently inserted in it by the defendant in place of the eleven years which had been agreed upon between the parties. Both the Courts negatived the plea of fraud and held that 98 years was the term agreed upon.

[2] In the appellate Court it was conceded on behalf of the plaintiffs that a long term of 98 years cannot by itself be a clog on the equity of redemption, nevertheless, it is now contended that such a long term is a clog on the equity of redemption, and reference is made to a decision in *Bhullan* v. *Bachcha Kunbi*, 53 ALL. 580 : (A. I. R. (18) 1931 ALL. 380). The term of the bond in that case was for sixty years, and there was a provision that, if it were not redeemed on the day following the sixteeth year, it would not be redeemable for a further period of sixty years. Young J. who delivered the leading judgment, held that it is open to the Courts in India to take the view that an unreasonably long term in a mortgage bond is a clog in the equity of redemption. Sulaiman J. agreed that in the particular case there was a clog on the equity of redemption, but was doubtful whether a long term by itself constituted a clog. In *Rajai Singh* v. *Randhir Singh*, A. I. R. (12) 1925 ALL. 643 : (87 I. C. 30) the term of the mortgage was for 95 years, and there was a provision that the interest for the entire period should be paid along with the principal sum at the end of the term. It was held that it would be inequitable to uphold the transaction in its literal terms, and that the mortgagor should be allowed to redeem the property before the expiry of the term stipulated on payment of the principal money with interest due up to the date of redemption. In *Durga Charan Maji* v. *Poresh Bewa*, A. I. R. (12) 1925 Cal. 105 : (76 I. C. 336) a redemption was allowed in the case of a bond, the term of which was fixed at 50 years. In that case, however, the mortgagee did not plead that he was entitled to remain in possession for the full term of 50 years. On the other hand, he set up a false plea that the transaction was a sale. Cases which have taken a view adverse to the appellants also exist. In *Sabratan* v. *Dhanpat Gadaria*, 54 ALL. 1041 : (A. I. R. (20) 1933 ALL. 70) a Division Bench held that in India where there is a codified law of mortgage, it would be improper for the Courts to ignore that law and to look to English cases as their guide in determining what amounts to a clog on the equity of redemption. A term of 60 years was not held *per se* to be a clog on the equity of redemption. Similarly, in *Muhamed Ibrahim* v. *Muhomed Abiz*, 8 I. C. 1068 : (9 M. L. T. 462) where the term of the mortgage was 90 years, it was held that the mortgagor was not entitled to redeem the mortgage before the expiry of that period. In *Jagannadham* v. *Narasimham*, A. I. R. (31) 1944 Mad. 501 : (1944-2 M. L. J. 144) Pantanjali Sastri J. held that the mortgagor's right to redeem ceases only on the expiry of the period agreed upon, and, therefore, where the period agreed upon is

sixty years, it could not be regarded as a clog on the equity of redemption. There is a case of the North West Frontier Province in which the term was 150 years, *Abdulla* v. *Sadulla Khan*, 15 I.C. 917 (Lah.). The preponderance of authority is clearly in favour of the view that in India a long term is not by itself a clog on the equity of redemption, entitling the mortgagor to redeem before the expiry of the period agreed upon. The appeal, therefore, fails and is dismissed with costs.

V.B.B. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 174 *[C. N. 36.]*

MANOHAR LALL AND RAMASWAMI JJ.

Rameswar Pd. Missir—Appellant v. *Ramnath Khemka and others — Respondents.*

A. F. A. D. No. 2411 of 1946, Decided on 19th September 1949, from decision of Sub-Judge, Muzaffarpur, D/- 31st July 1946.

(a) T. P. Act (1882), Ss. 82 and 92 — Claims for contribution and subrogation distinguished—Remedies are independent and not mutually exclusive—Limitation for claim for contribution—Limitation is to be computed from date of payment — Limitation Act (1908), Art. 132.

A co-mortgagor who paid the full amount of the mortgage debt may under S. 82 not only sue for contribution but under S. 92 he may be subrogated to the rights of the mortgagee whose mortgage he redeemed. The remedies granted by these sections are independent and not mutually exclusive; and a co-mortgagor who pays the mortgage money has right of contribution and acquires a charge under Ss. 82 and 100 in addition to his right of subrogation under Ss. 92 and 95. [Para 6]

In other words, a person who is bound to pay only a part of the mortgage debt acquires on redemption two distinct rights. He may simply sue for reimbursement under S. 82 of the Act. He may also sue under S. 92 to enforce the rights of the mortgagee to follow the mortgaged properties. [Para 6]

The right to reimbursement arises on a contract, express or implied, to reimburse; and the party who claims the right enforces it in his own right and not in the right of another. Consequently, the right does not arise until he has discharged the debt of another. But the right to enforce a security by virtue of subrogation is a right which equity concedes to a person, who not being primarily liable to discharge an obligation, does discharge it, and it is a right to demand the performance of the original obligation and the application thereto of all securities held by the creditor. It is a claim which is enforced in the right of the original creditor, and only because the person discharging the obligation becomes clothed with the rights and powers of the original creditor. Subrogation is rather an additional remedy than an additional right, and may exist concurrently with, and as a further security to, the right to a simple action for reimbursement: A. I. R. (9) 1922 Pat. 499, *Rel on; Case law referred.* [Para 6]

Section 82 has not been abrogated by S. 92. [Para 19]

The period of limitation for a suit for contribution under S. 82 is 12 years from the date of payment and not from the date when the original mortgage money becomes payable: A. I. R. (16) 1929 Pat 94, *Discussed.* [Para 13]

Annotation: ('45-Com.) T. P. Act, S. 82, N. 13.

(b) T. P. Act (1882), S. 82 — Liability to contribute is not personal.

The obligation under S. 82 is not personal but the obligation is attached to the properties which are liable to contribute rateably to the debt secured by the mortgage. The owner of the properties has an option either to pay his rateable share or to allow it to be realised out of the properties.

(Nature of decree to be passed in a suit for contribution indicated). [Para 14]

Annotation: ('45-Com.) T. P. Act, S. 82, N. 14.

G. P. Sahi and Shreenath Singh — for Appellant.

Nandlal Untwalia, Anwar Ahmad and Thakur Pd. —for Respondents.

Ramaswami J.— This appeal is by defendant 1 against the decree of the Subordinate Judge of Muzaffarpur in the suit for contribution under S. 82, T. P. Act. The plaintiff alleged that defendant 10 Ramaji Prasad as Karta had on 28th May 1928 executed a simple mortgage bond in favour of Bharat Singh with respect to his share in 5 touzis including 17 gandas 3 kauris and odd share in touzi No. 3926/2. On 2nd January 1930 Ramji Pd. executed a sale deed with respect to 4 gandas and odd share of touzi No. 3926/2 in favour of defendant 2. On the same date he executed sale-deeds as regards 17 gandas and odd share of touzi No. 3928/1 and touzi No. 3926/2 in favour of defendant 1. On 26th September 1932 he executed a sale-deed in favour of the plaintiff with respect to 17 gandas and odd share of touzi No. 3889/2. Defendants 4 to 9 acquired 13 gandas and odd share of touzi No. 3905/2 by auction sale in execution of a money decree. Later, defendants 13 and 14 who were the sons of Bharat Singh instituted a mortgage suit (No. 217 of 1940) against defendant 10, the plaintiff and defendants 1, 2 and 4. They obtained a decree and in execution thereof the mortgaged properties were sold on 21st September 1941. The plaintiff, however, deposited a sum of Rs. 4055/9 being the sale proceeds with damages in order to set aside the sale. The plaintiff, therefore, claimed contribution from the defendants alleging that they were all liable for payment of the decretal amount. Defendant 1 contested the suit on the ground that touzi No. 3926/2 was not liable to contribute. He asserted that defendant 10 had on 4th September 1928 executed a mortgage bond in favour of Khakan Singh, that the latter was not impleaded in the mortgage suit brought on behalf of Bharat Singh Khakhan Singh brought a mortgage suit (No. 80 of 1941), obtained a decree, in execution of which 17 gandas and odd share of touzi No. 3926/2 was sold and purchased by Nawal Kishore. But the learned munsif held that touzi No 392/2 was liable to contribute and the plaintiff was entitled to a decree against all the defendants. This decree has been affirmed in substance by the Subordinate Judge.

[2] The main question posed in this appeal is whether defendant 1 who had purchased touzi No. 3926/2 is liable to contribute the proportionate amount paid by the plaintiff for setting aside the sale.

[3] On behalf of the appellant learned counsel stressed the argument that by paying the decretal amount the plaintiff did not benefit the interest of Khakan Singh, the puisne mortgagee, and that the appellant was not, therefore, liable to contribute. In my opinion, this argument is untenable. Learned counsel referred to *Sadhuprasad Bidyadhar* v. *Harikrishna*, A. I. R. (16) 1929 Pat. 94: (115 I. C. 552) and argued that the claim upon the prior mortgage was barred by limitation on the date of payment, that the subsequent mortgagee was not liable to contribute. In this case the plaintiffs satisfied the decree on the basis of the mortgage of 1899 on 15th July 1925. The due date fixed in the bond of 1899 was one year. The period of limitation to enforce that bond therefore began to run from 18th March 1900, and the claim to enforce the mortgage of 1899 became barred on the expiry of 12 years from 18th March 1900. In July 1924 when the payment was made by the plaintiffs there was no claim subsisting upon the mortgage of 1899. Defendant 1 therefore was under no liability to pay the mortgage of 1899. The liability had been extinguished by lapse of time and the plaintiffs by making payment of the decree on the fact of the first mortgage were in no way benefitting defendant 1. Upon these facts Kulwant Sahay J. held that the plaintiffs could not enforce a charge upon the four annas purchased by Kalicharan Panda in execution of a decree upon a subsequent mortgage. Nor could they claim reimbursement as against Kalicharan Panda because there was no liability upon Kalicharan Panda to pay the decree and the payment made by the plaintiffs was not for the benefit of Kalicharan Panda or his heirs.'

[4] But the authority of this case is doubtful in view of the decision of the Judicial Committee in *Ganeshi Lal* v. *Charan Singh*, 57 I. A. 189: (A. I. R. (17) 1930 P. C. 183), in which two properties mortgaged together to secure one debt afterwards became vested in different owners, who purchased subject to the mortgage. One of the purchasers sued for contribution on the ground that he had paid off a mortgage which covered both properties. The Judicial Committee held that he was entitled under S. 82, Transfer of Property Act, 1882, to rateable contribution from the other purchaser, although under an earlier contract of purchase made with the mortgagor (the other purchaser not being a party) he retained part of the then agreed price for the express purpose of discharging the mortgage. The Judicial Committee criticised the view of the Subordinate Judge that there was an equitable principle which precluded the respondents from insisting on the right of contribution. Lord Tomlin emphasised that S. 82 was the section that governed the case and that as the Act prescribed the conditions in which contribution was payable it was not proper to introduce into the matter any extrinsic principle to modify the statutory provisions.

[5] The ratio of *Sadhuprasad Bidyadhar* v. *Harikrishna*, (A. I. R. (16) 1929 Pat. 94: 115 I. C. 552), is also inconsistent with an earlier Privy Council case *Gopi Narain Khanna* v. *Bansidhar*, 32 I. A. 123: (27 ALL. 325 P. C.). In that case a foreclosure decree on a prior mortgage was paid off by a subsequent mortgagee who was a party to the decree, and by virtue of his right of subrogation thereby acquired, he wanted to be substituted in the place of the decree-holder and to continue the proceeding, but he was not permitted to do so on the ground that the decree was satisfied and the proceeding came to an end. He then brought a suit to enforce his right of subrogation and this suit was decreed by the Judicial Committee. The Judicial Committee passed a decree so as to work out the rights of the parties on the basis of the previous mortgage decree. Of course, the question of limitation did not arise in that case, but it is quite clear from the Judicial Committee's decision that the subsequent suit brought to enforce the right of subrogation was not treated as one based on the original mortgage. Lord Davey said (at page 133):

> "And their Lordships think that on payment by Gaya Prasad (the puisne mortgagee) of the sum into Court before the expiry of the enlarged time, and acceptance of that sum by the plaintiffs, the decree was spent and became discharged and satisfied. There was, therefore, nothing left to be done in the execution department. It is true that Gaya Prasad, having made that payment (as he had the right to do), acquired under S. 74, Transfer of Property Act all the rights and powers of the mortgagees as such. But this would not have the effect of reviving or giving vitality to a decree which by the terms of it had become discharged. Even if that were not so, the Judicial Committee fails to see how the respective right of Gaya Prasad, as owner of the first mortgage, and half owner of second mortgage and the respondent as owner of the other moiety of the second mortgage, could have been worked out without additions to the decree which the Court in executing the decree had no power to make. They are, therefore, of opinion that a new decree was required for the purpose, and S. 244, Civil P. C., was not a bar to the present suit."

[6] In this context it is important to remember that a co-mortgagor who paid the full amount of the mortgage debt may under S. 82 not only sue for contribution but under S. 92 of the Act he may be subrogated to the rights of the mortgagee whose mortgage he redeemed. It is

plain that the remedies granted by these sections are independent and not mutually exclusive; and a co-mortgagor who pays the mortgage money has right of contribution and acquires a charge under Ss. 82 and 100 in addition to his right of subrogation under Ss. 92 and 95 of the Act. In *Rajkumari Debi* v. *Makundlal Upadhaya*, 25 C. W. N. 283: (A. I. R (8) 1921 Cal. 166), a co-mortgagor who had paid off the entire mortgage money had sued the other mortgagor for contribution and the suit had not been brought until the expiration of more than 12 years after the due date fixed in the mortgage bond for the payment of the mortgage money. The Division Bench held that the position of a co-mortgagor redeeming a mortgage was that of an assignee of the original security and he could not get a fresh charge and the period of limitation for enforcing the charge was the same as that within which the original mortgagee could have brought his suit on his mortgage had he not been redeemed. The case was overruled by a Full Bench in *Umar Ali* v. *Asmat Ali*, A. I. R. (18) 1931 Cal. 251 : (58 Cal. 1167 F.B.), but Rankin C. J. remarked that the decision in *Rajkumari's case* (25 C. W. N. 283 : A. I. R. (8) 1921 Cal. 166) was the statute law after the amendment. Before making that remark he stated :

> "It may here be observed that S. 95, T. P. Act, has by Act XX [20] of 1929 been amended in such a way that Ss. 92 and 95 as they now stand make it clear that the right of the co-mortgagor redeeming is the same right as the mortgagee whose mortgage he redeems may have against the mortgagor."

If this dictum means that the co-mortgagor has no other right but that being subrogated to the rights of the original mortgagee, I must respectfully express my dissent. For it is manifest that a person who is bound to pay only a part of the mortgage debt acquires on redemption two distinct rights. He may simply sue for reimbursement under S. 82 of the Act. He may also sue to enforce the rights of the mortgagee to follow the mortgaged properties. In *Sibanand Misra* v. *Jagmohan Lal*, 1 Pat. 780 : (A. I. R. (9) 1922 Pat. 499), Das J. emphasised the distinction :

> "In my opinion the right of reimbursement stands on one footing, the right to enforce a security by virtue of subrogation stands on another footing. The right to reimbursement arises on a contract, express or implied to reimburse; and the party who claims the right enforces it in his own right and not in the right of another. Consequently, the right does not arise until he has discharged the debt of another. But the right to enforce a security by virtue of subrogation is a right which equity concedes to a person, who not being primarily liable to discharge an obligation, does discharge it, and it is a right to demand the performance of the original obligation and the application thereto of all securities held by the creditor. It is a claim which is enforced in the right of the original creditor, and only because the person discharging the obligation becomes clothed with the rights and powers of the original creditor."

It is manifest that subrogation is rather an additional remedy than an additional right, and may exist concurrently with, and as a further security to, the right to a simple action for reimbursement. The fact that a party entitled to reimbursement and also to subrogation is entitled to two distinct remedies, seems to have been overlooked, to the confusion of both doctrines : *see* Pomeroy — Equity Jurisprudence—Note to S. 920.

[7] This opinion is supported by a *catena* of authorities.

[8] In *Alam Ali* v. *Beni Charan*, 58 ALL. 602 : (A I.R (23) 1936 ALL. 33 F.B.), the question formulated was :

> "Where a property has been the subject of two simple mortgages and a suit has been brought for sale on the first mortgage and decreed against the second mortgagee also; and subsequently a third mortgage is taken and this mortgagee has paid the decretal amount, but has not obtained possession of the property, when the second mortgagee brings a suit for sale and makes the third mortgagee a party, is the third mortgagee entitled to claim a right of subrogation for the amount which he paid in discharge of the decree in the earlier mortgage suit, even though the period of limitation for a fresh suit on the first mortgage would now be barred ?"

The Full Bench held that under the provisions of the new S. 92 the payment of the mortgage decree conferred upon the person who paid it off a statutory right under that section, which right was not identical with the rights of an assignee of the mortgage but was an acquisition of fresh charge, enforceable within the period of limitation applicable to such a suit. Article 132, Limitation Act, would apply when the charge was sought to be enforced and the limitation of 12 years would run from the date when the decretal amount was paid off and the statutory right acquired.

[9] In *Aziz Ahmad Khan* v. *Chhote Lall*, 50 ALL. 569 : (A. I. R. (15) 1928 ALL. 241), being the owner of a large amount of immovable property, executed a number of mortgages on different dates and in favour of different mortgagees and in several instances the same items of property were mortgaged more than once. One of these mortgages, dated 23rd September 1899, was put in suit and a decree obtained thereon, when one CL, who was a party to the decree and was interested as a puisne mortgagee of one of the items included in the mortgage and also as a purchaser of the same, paid the whole of the decretal amount on 19th July 1916. Thereafter CL sold all the rights which he had acquired by this payment to AA and others, who on 25th April 1922, brought the present suit, asking for contribution as against several properties held by the defendants. The learned

Judges held that the suit was not barred by limitation. The right to contribution arose on the payment made on 19th July 1916, and under Art. 132 of Sch. 1, Limitation Act, 1908, the plaintiffs had 12 years within which to sue.

[10] In *Brij Bhukhan* v. *Bhagwan Datt*, 19 Luck. 70: (A I.R. (29) 1942 Oudh 449 F.B.), the Full Bench held that the period of limitation for a suit by one of several heirs of a mortgagor or by one of the several subsequent transferees of the mortgaged property who had paid the entire mortgage decree for contribution against the other heirs or transferees in which the sale of the defendant's share in the mortgaged property was sought, was 12 years from the date of payment and not from the date when the original mortgage money became payable.

[11] In *Sheosaran Singh* v. *Amla Co-operative Credit Society*, 23 Pat. 953: (A.I.R. (32) 1945 Pat. 192), the plaintiff had purchased at an execution sale 2 annas 8 pies interest in a revenue paying estate. Subsequently there was a partition and the property in suit was allotted to the contesting defendants. The sale in execution took place in 1931. The property sold had been mortgaged, the due date for the payment of the mortgage money being 18th June 1915. A suit was instituted on the basis of this mortgage and a preliminary decree obtained on 24th September 1927. This decree was made final on 15th December 1928. The mortgaged property was sold on 27th January 1936 and before a month elapsed the plaintiff paid into Court the decretal amount together with the statutory compensation, and had the sale set aside. On 25th February 1939, that is, within a period of three years, the plaintiff instituted the present suit and claimed to recover from the defendants one-half of the amount he had paid into Court together with interest from the date of payment. The plaintiff further claimed that, by reason of the provisions of the Transfer of Property Act, the amount due to him was liable to be charged on the moiety of the property originally mortgaged, of which the contesting defendants were now the sole owners. Upon these facts, the Division Bench held that the plaintiff was entitled to the decree he had prayed for. Shearer J. stated that the plaintiff did not primarily sue as a subrogee and the point of limitation did not really arise. He observed that when the mortgagee obtained a decree on the foot of his mortgage and the mortgaged property was sold, and a co-mortgagor paid off the amount requisite to set aside the sale and the sale was set aside the co mortgagor became an assignee in equity of the mortgage bond and if he sued as a subrogee, the suit would be barred. But he also obtained a charge by virtue of Ss. 82 and 100 on the share of the other co-mortgagor and the limitation in such suit should be computed from the date when payment was made.

[12] In this context reference may be made to *Batey Krishna* v. *Parsotam Das*, 71 I. A. 153 (A. I. R. (31) 1944 P. C. 85) in which the respondents, as subsequent mortgagees of the suit property, had obtained in a previous suit a decree, dated 27th May 1927, for foreclosure, subject to a declaration that the appellant had a charge on certain specified suit property in respect of sums paid by him in 1917 in redemption of mortgages prior to that of the respondents. A suit was instituted by the appellant on 31st July 1931, to recover the sums so paid by enforcement of the charge by sale of the mortgaged property. The Judicial Committee held that the appellant had been subrogated to the rights of the prior mortgagees, but the rights thus obtained became merged in the decree passed in the foreclosure suit, that a charge was created in favour of the appellant by the final decree in that suit, and that for the purposes of limitation time ran from the date of the charge thus created, and accordingly the appellant's suit having been brought in 1931, was within the relevant 12 years period of limitation prescribed by Art. 132, Limitation Act, 1908.

[13] From this review of the authorities, it is manifest that in the present case the claim of the plaintiff for contribution against defendant 1 is not barred by limitation.

[14] It is necessary to emphasise that the obligation under S. 82 is not personal but the obligation is attached to the properties which are liable to contribute rateably to the debt secured by the mortgage. The owner of the properties has an option either to pay his rateable share or to allow it to be realised out of the properties. The plaintiff ought, therefore, to be granted a decree that he is entitled to claim contribution of the amounts from the respective defendants as calculated in the decree of the lower appellate Court, that in the event of the amounts with interest at 6 per cent. per annum till date of payment not being paid within six months from the date of the decree, the plaintiff will be entitled to recover the amounts by sale of the respective properties or so much thereof as may be necessary to satisfy the respective debts.

[15] Subject to this modification I should dismiss this appeal with costs.

[16] **Manohar Lall J.** — I have very little to add to the exhaustive judgment prepared by my learned brother. If it was not for the case of *Sadhu Prasad* v. *Harikrishna*, A. I. R. (16) 1929 Pat. 94 : (115 I. C. 552) I could not imagine

that it could be seriously argued that the period of limitation for a contribution suit could arise earlier than the date when the payment is made by the plaintiff entitling him to a decree for contribution. *Sadhu Prasad Mahapatra's case,* (A. I. R. (16) 1929 Pat. 94 : 115 I. C. 552) may be distinguished on the ground that in that case the plaintiff was not a party to the decree which he had paid off, and therefore, he was not bound to pay off that decree. Kulwant Sahay J. relied upon this fact very strongly, as he points out, that there was no liability upon defendant 1 or upon his heirs to satisfy the decree on the basis of the first mortgage of 15th July 1925, and therefore, when the plaintiff made the payment in satisfaction of that decree on that date, he was not entitled to claim contribution or to enforce any charge so far as the four annas share of defendant 1 was concerned.

[17] In my opinion, the whole confusion arises in thinking that a claim for contribution is merely another name for the claim for subrogation. The two are entirely independent remedies and should not be confused. The matter has been put with his usual clarity by Das J., in *Sitanand Misra's case,* 1 Pat. 780 : (A.I.R. (9) 1922 Pat. 499). See the quotation given by my learned brother from that case in his judgment. It is true that Das J. gave a personal decree for the amount, but I do not take this to mean a decision that the amount contributed cannot be charged on the property to the extent that it was rateably liable to pay the mortgage debt which has been paid off. I would draw attention to the observations of Lord Tomlin in *Ganeshi Lall* v. *Charan Singh,* 57 I. A. 189 : (A. I. R. (17) 1930 P. C. 183):

> "It seems to their Lordships that S. 82 is the section that governs the case, and that as the Act prescribes the conditions in which contribution is payable it is not proper to introduce into the matter any extrinsic principle to modify the statutory provisions"

and distinguished the case of *Muhammed Abbas* v. *Muhammed Hamid,* 9 A. L. J. 499 : (14 I. C. 179) on the ground that in that case there passed to the party from whom the contribution was sought the benefit of the contract by which the money was to be applied, but in the case before their Lordships the defendants were no party to the contract of 1914, nor has the benefit of the contract passed to them in law or in equity.

[18] Reliance was placed on behalf of the appellants on the concluding paragraph of S. 82, T. P. Act which provides that nothing in this section applies to a property liable under S. 81 the claim of the subsequent mortgagee, but as has been pointed out by Mulla in his commentary on the Transfer of Property Act, 1936 Edn. at page 498:

> "The last paragraph of the section is somewhat cryptic, but it apparently means that the right of contribution is subject 'to' the right of marshalling."

The concluding prargraph of S. 82, therefore, is of no help to the appellants.

[19] The only other serious argument that could be advanced is that under the amended Transfer of Property Act, S. 92 only confers a right of subrogation on any of the persons referred to in S. 91 other than mortgagor and on any co-mortgagor who redeems the property subject to the mortgage. But in my opinion, this argument is not sound as S. 82 has not been abrogated by S. 92, and it is open to the person who redeems the property to claim either subrogation or to enforce a charge on the property to the extent that the payment has redeemed the property from the charge rateable due upon it. To such a situation the period of limitation cannot begin to run till after the payment has been made giving rise to the right of contribution. For these reasons, I agree that no question of limitation arises in this case. I would dismiss this appeal with costs subject to the modifications proposed by my learned brother.

V.B.B. *Decree modified.*

A. I. R. (37) 1950 Patna 178 *[C. N. 37.]*

MANOHAR LALL J.

Dominion of India, representing the East Indian Railway Administration at New Delhi — Appellant v. *Jamunadas Agarwalla and another — Respondents.*

A. F. A. D. No. 810 of 1948, Decided on 14th September 1949, from decision of Sub-Judge, Dhanbad, D/- 31st March 1948.

Civil P. C. (1908). S. 100 — Concurrent finding of fact — Ground that there is no evidence to support finding not taken in grounds of appeal — Certificate of advocate as required by Rule 9 of Chap. VII of High Court Rules also not filed — Finding cannot be interfered with — Patna High Court Rules, Chap. VII, R. 9. [Para 1]

Annotation: ('44-Com.) Civil P. C. Ss. 100 and 101 N 55.

N. C. Ghose and P. K. Bose — for Appellant.
S. C. Mazumdar and A. N. Chatterji — for Respondents.

Judgment. — This appeal has been strenuously argued by Mr. Ghose on behalf of the defendant. But having heard his argument I am satisfied that it is not possible for me to interfere in second appeal with the finding that "the holes in the 20 tins could have been made only with the connivance or active participation of the Railway servants". It is argued that there is no evidence whatsoever in support of this finding. I then turned to the grounds of appeal and found that there was no ground taken to that effect, and there is no certificate as required by R. 9, Ch. VII, page 33 of the High

Court Rule, that the advocate who prepared the grounds had examined the record, and, in his opinion, there is, in fact, no evidence whatsoever to support the finding. For these reasons I decline to consider as to whether there is not evidence in the case in support of that finding. It must be assumed that there was evidence and although it might be circumstantial evidence the Courts below have concurrently come to that conclusion. Indeed, the rule of *res ipsa loquitur* fully applies to the facts found, namely, that 20 tins were found with holes bored into them. It cannot be assumed that the consignor would hand over the tins in this condition, otherwise all the oil would flow out through the holes. It is, therefore, obvious that the holes in the tins were made after the goods came in the railway custody e. g., in the godown itself. Unless I go through the whole record it is not possible to find out on what evidence the finding is based. (The rest of the judgment is not material for the purposes of reporting.)

K.S. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 179 *[C. N. 38.]*

SHEARER J.

Dr. Sir Kameshwara Singh — Petitioner v. *Province of Bihar — Opposite Party.*

Misc. Judicial Case No. 236 of 1949, Decided on 25th November 1949.

(a) Letters Patent (Patna), Cl. 9—'For purposes of justice' — Meaning — Questions held of public importance—Relief illusory—Suit can be tried.

Clause 9, Letters Patent, (Patna) states that the jurisdiction of the High Court under it is to be exercised "for purposes of justice", and the purposes of justice are served when the questions which arise in the suit are questions of public importance and unusual difficulty and when the interests of neither party will be seriously prejudiced if the suit is tried in High Court instead of being tried locally. Thus the questions, namely, whether a person, whose interests are likely to be prejudicially affected by a law which has been passed by the Provincial Legislature and has received the assent of the Governor-General is entitled to ask for a declaration that the law is unconstitutional and for an injunction restraining the Provincial Government from bringing the law into operation and whether, what a proprietor or tenure-holder is to receive as compensation under the Abolition of Zamindari Act, 1948, for his estate or tenure is, in fact, compensation within the meaning of that expression as it is used in sub-s. (2) of S. 299, Government of India Act are questions in the determination of which a very large number of persons are vitally interested and are of some considerable difficulty and hence the suit in which they arise may be transferred to the High Court under this clause. [Paras 1 & 2]

It is the duty of the High Court to see that to no suitor who comes before it justice is either delayed or denied. The plaintiff may or may not be entitled to relief, and any relief to which he may be entitled may, in the event, be illusory and of no avail to him. But that is no reason why his suit should not be tried : 24 Cal. 183, *Rel. on.* [Para 2]

Annotation : (44-Com.) Civil P. C. Letters Patents (Cal.), Cl. 13, N. 1, Pts. 1, 2.

(b) Interpretation of Statutes—Constitution Act —Principles of construction to be applied are not precisely the same as would apply in construing ordinary documents. [Para 2]

P. R. Das, S. P. Srivastava and Balbhadra Prasad Singh — for Petitioner.

Sir Alladi Krishnaswami Aiyar and Advocate-General — for Opposite Party.

Order.—This is an application under Cl. 9, Letters Patent, asking that a suit now pending in the Court of the Subordinate Judge at Darbhanga be removed to and tried by this Court in exercise of its extraordinary original civil jurisdiction. Clause 9, Letters Patent states that this jurisdiction is to be exercised "for purposes of justice", and the purposes of justice are served when the questions which arise in the suit are questions of public importance and unusual difficulty and when the interests of neither party will be seriously prejudiced if the suit is tried in this Court instead of being tried locally *Harendra Lall Roy* v. *Sarvamangala Dabee*, (24 Cal. 183). Two questions of constitutional law arise in this suit. One is whether a person, whose interests are likely to be prejudicially affected by a law which has been passed by the Provincial Legislature and has received the assent of the Governor General is entitled to ask for a declaration that the law is unconstitutional and for an injunction restraining the Provincial Government from bringing the law into operation. That is obviously a question of great public importance and of some little difficulty. The other is whether, what a proprietor or tenure-holder is to receive as compensation under the Abolition of Zamindari Act, 1948, for his estate or tenure is, in fact, compensation within the meaning of that expression as it is used in sub-s. (2) of S. 299, Government of India Act. That, again, is a question in the determination of which a very large number of persons are vitally interested and it is a question of some considerable difficulty. Mr. P. R. Das, for the plaintiff, states that his client does not propose to adduce oral evidence, except possibly oral evidence of a purely formal character, and contends that the questions which arise in the suit are purely and simply questions of law. Sir Alladi Krishnaswami Aiyar, while disputing this, has not said or suggested that, if oral evidence is to be adduced by the defendant, that oral evidence will not be given by persons who can as conveniently attend this Court as they could the Court of the learned Subordinate Judge.

[2] An affidavit has been put in on behalf of the defendant by Mr. Singeshwar Prasad Sinha,

who is the Secretary to the Provincial Government in the Revenue Department. The grounds set out in this affidavit are not, and do not purport to be grounds for declining to remove the suit to this Court but rather grounds for postponing the trial of the suit *sine die* or for not trying it at all. In Para. 8 of the affidavit it is stated that "the suit is premature". I take this to mean that the plaintiff has not, as yet, any cause of action. If that is so, the suit will be dismissed. Again, Paras. 10 and 11 of the affidavit contain the following :

> "10. That the new constitution will be in force from January 1950 and under the provisions thereof, questions such as are raised in the present suit are nonjustiable.
>
> 11. . . . . As there is no intention on the part of the Provincial Government to bring into force the impugned Act before the new constitution comes into force, it will be a waste of public time and money to go into the investigation of matters involved in the present suit, and any decision in the suit, it is respectfully submitted, will be infructuous and of no effect when the new constitution comes into operation and the certificate is granted by the President."

Cases have occurred in England in which an injunction has been granted *ex debito justitiae* to restrain a nuisance and the Court has, at the same time, suspended the operation of the injunction in order to enable legislation to be introduced in Parliament which would legalise the nuisance: *Roberts* v. *Gwyrfai District Council*, (1899) 2 Ch. 608 at p. 615 : (68 L. J. Ch. 757). If this suit is maintainable, and the plaintiff is entitled to an injunction, then, if it is also clear that, on the President giving the certificate referred to in sub s. (6) of S. 24, Constitution Act, the existence of an injunction would lead to an impasse in the administration, this Court might well, in order to prevent that impasse, take the course of suspending the operation of the injunction for a specified period. I am not pre-judging this matter, and I am well aware from what was said by Mr. P. R. Das, for the plaintiff, that if such a course were proposed to be taken, Mr. Das would oppose it on the ground that what, in his view, is a wrong today will not cease to be a wrong in consequence of the President's certificate, and would contend that sub-s. (1) of S. 24, Draft Constitution is not to be read in conjunction with sub-s. (2) and confers on every citizen a right to property which sub-s. (2) does not take away or curtail. That argument will presumably, have to be considered sooner or later, and I can see no good reason myself why, if the necessity and occasion arises, it should not be considered in this suit and should instead be left to be considered in a suit instituted after the constitution comes into operation. Ordinarily, I would not, in dealing with such an application as this, have made these observations, and I have hesitated to make them, but I feel constrained to do so in consequence of a statement which was made by Sir Alladi Krishnaswamy Aiyar in the course of his argument. My recollection as to what was said is confirmed by a very full and accurate account of the proceedings which has appeared in the "statesman" newspaper. Sir Alladi is there reported as having said :

> "It is not the province of a Court to sit as a third branch of a Legislature and invalidate legislation passed by it with plenary powers in any particular subject. It is or will be the duty and privilege of this and any other Court, when the occasion arises, to interpret and give effect to the will of the sovereign people as embodied and expressed in the Constitution Act."

This Court is not unmindful that the principles to be applied in construing the Constitution Act are not precisely the same as it would apply in construing an ordinary document, nor is it insensible to the responsibility which it undertakes if and when it pronounces any law to be an unconstitutional law. At the same time, it is also the duty of this Court to see that to no suitor who comes before it justice is either delayed or denied. The plaintiff may or may not be entitled to relief, and any relief to which he may be entitled may, in the event, be illusory and of no avail to him. But that is no reason why his suit should not be tried. The suit will be removed from the Court below and will be tried by this Court in exercise of its extraordinary original civil jurisdiction. The costs of this application will be costs in the suit. The hearing fee is assessed at six gold mohurs.

D.R.R. *Application allowed.*

A. I. R. (37) 1950 Patna 180 *[C. N. 39.]*

SHEARER J.

Bhubneshwari Chand Lal Chaudhury — Petitioner v. *Sukal — Opposite Party.*

Civil Revn. No. 390 of 1949, Decided on 16th November 1949, from order of Addl. Sub-Judge, Purnea D/- 7th March 1939.

Civil P. C. (1908), S. 115 — Defendant requiring plaintiff to appear in Court to state whether he was prepared to take oath — Court dismissing suit on plaintiff declining to do so — Revision allowed — Oaths Act (1873), Ss. 8, 9, 12.

Where the defendant desires that the plaintiff should be required to appear in Court to state whether or not he is prepared to make a certain statement on solemn affirmation and if he is prepared, to make the statement, the order of the Court dismissing the suit on the ground that the plaintiff has disobeyed its order requiring him to attend in person is without jurisdiction or, at all events, the Court acts with material irregularity : A. I. R. (6) 1919 Pat. 36, *Disting.* [Para 1]

Annotation : ('44-Com.) C. P. C., S. 115, N. 10, 12; ('46-Man.) Oaths Act, S. 8, N. 1; S. 9, N. 1; S. 12 N. 1.

S. C. Mazumdar — for Petitioner.

S. Anwar Ahmad — for Opposite Party.

Order.—This application in revision is directed against an order dismissing a suit to recover a sum of Rs. 500 due under a promissory note. The plaintiff in the suit is a well known zamindar in the Purnea district, and soon after the defendant entered appearance he put in a petition stating that, if the plaintiff would come into Court and state on solemn affirmation that he had borrowed the money, the suit might forthwith be decreed with costs against him. The learned Munsif directed the plaintiff to appear. The plaintiff offered to give evidence on commission but declined to appear in Court on the ground that neither he nor his ancestors for several generations had done so, and that it would be damaging to his prestige. The learned Munsif eventually made an order dismissing the suit on the ground that the plaintiff had disobeyed his order requiring him to attend in person. It is quite clear that, in substance, if not on the face of it the application which the defendant made was an application under S. 8, Oaths Act (X [10] of 1873). Now, the proviso to S. 9 of the Act prohibits a Court from compelling a party to attend personally in order to state whether or not he is prepared to take the oath which the other party to the suit calls on him to take; in other words, the action taken by the learned Munsif initially was without jurisdiction and, it, therefore, I think necessarily follows that his order dismissing the suit was also an order without jurisdiction, or at all events, that in making it he acted with material irregularity. Section 12, Oaths Act makes it clear that, while a Court may take into consideration the refusal of a party to make an oath or take a solemn affirmation it must after recording the reasons given by the party, proceed with the trial of the suit. Mr. Anwar Ahmad referred to *Sri Prabhu* v. *Dwarka Prasad*, 4 P. L. J. 152 : (A. I. R. (6) 1919 Pat. 36) a decision on which the Courts below also relied. It appears, however, that in that case, the defendant wished to examine one of the three plaintiffs as a witness, and presumably having been examined-in-chief, this plaintiff would have been cross-examined by the pleader appearing on behalf of the other two plaintiffs. In the present case the defendant did not wish to examine the plaintiff as a witness. What he wished was that the plaintiff should be required to appear in Court to state whether or not he was prepared to make a certain statement on solemn affirmation and if he was prepared, to make the statement. The application must, in my opinion, be allowed with costs. The order of the trial Court is set aside, and it is directed to proceed with the trial of the suit and dispose of it according to law. Hearing fee is assessed at two gold mohurs.

D.H. *Revision allowed.*

A. I. R. (37) 1950 Patna 181 *[C. N. 40.]*

IMAM AND JAMUAR JJ.

Province of Bihar—Appellant v. *Thakkan Manjhi — Respondent.*

Government Appeal No. 13 of 1949, Decided on 5th September 1949, against decision of 1st Addl. Sessions Judge, Monghyr, D/- 17th January 1949.

Bihar Foodgrains Control Order (1947), S. 3 (b)—"Premises" does not include country-boat—Words and Phrases.

The word 'premises' found in cl. (b) of S. 3, Bihar Foodgrains Control Order, 1947, cannot be read to include a country-boat : (1862) 1 Moore P. C. (N. S.) 73 and (1852) 1 E. & B. 120, *Considered.* [Para 4]

Government Advocate — for Appellant.

Chatterpati K. Singh and Narsingh Prasad — for Respondent.

Imam J.— This is an appeal by the Provincial Government against the acquittal of the respondent, who had been tried for an offence punishable under S. 7, Essential Supplies (Temporary Powers) Act, 1946, for contravention of the provisions in cl. (b) of S. 3, Bihar Foodgrains Control Order, 1947. The respondent had been convicted by a Magistrate of the first class who had sentenced him to one year's rigorous imprisonment and had further directed that the entire 190 bags of rice seized from the two country boats shall be forfeited to His Majesty under S. 14, Bihar Foodgrains Control Order, 1947. The Additional Sessions Judge of Monghyr, however, set aside the conviction and acquitted the respondent.

[2] According to the prosecution, on 24th April 1947, two country-boats, each containing 95 bags of rice, were seized at Sakarpura Ghat by the Sub-Inspector of police station Bakhri. The respondent was in possession of one of the two boats. According to the statement of the Sub-Inspector in the first information report, he had come to learn from a spy that two boats fully loaded with rice bags had just arrived at Sakarpura Ghat from Nepal side and that the same would be carried to Bakhri Bazar to be stored in some golas that night. Accordingly, the Sub-Inspector proceeded to Sakarpura Ghat to verify the information and to take necessary action. He actually found two boats loaded with 190 bags of rice at the Ghat. The respondent, who was one of the boatmen, reported that these boats were loaded with 190 bags of rice belonging to Bana Chand Marwari of Hanuman Nagar district Saptari Nepal, and that the bags of rice were to be carried to the gola of Bahoran Potedar of Bakhri. The Sub-Inspector posted constables to guard the boats and the bags of

rice were weighed. As the respondent failed to produce a permit or a licence for carrying these bags of rice, the Sub-Inspector charged him for having contravened the provisions of Ordinance XVIII [18] of 1946.

[3] The Additional Sessions Judge in appeal does not appear to have given any findings as to whether the facts alleged by the prosecution had been proved, nor is there anything in the judgment of the Additional Sessions Judge to indicate that he differed with the trial Court on the facts which the prosecution purported to prove by the evidence adduced on their behalf. He acquitted the respondent on a point of law, namely, that in keeping more than 20 maunds of grain on a boat, the provisions of cl. (b) of S. 3, Bihar Foodgrains Control Order, 1947, had not been contravened, as a boat could not be said to be included in the expression "premises". He referred to the meaning of the word (premises as to be found in Chambers' Dictionary and held that it could not by any stretch of imagination be thought that the word 'premises' meant a country-boat. The Assistant Public Prosecutor had frankly conceded before him that a country-boat being not a premises, the appellant could not be thought to have contravened the provisions of S. 3, cl. (b), Bihar Foodgrains Control Order, 1947. As to the order of forfeiture passed by the trial Court, the Additional Sessions Judge found that the 190 bags of rice were in two boats, 95 in each boat, and according to the admission made by the prosecution witnesses 1 and 2 in cross-examination one of these boats was in charge of one Muni Mallah, who was not proceeded against. In such circumstances, the Magistrate could not pass orders of forfeiture of 95 bags of rice found in possession of Muni Mallah on a separate boat. In setting aside the conviction, he also set aside the order of forfeiture passed by the Court below against the respondent.

[4] The principal question for decision is as to whether the word 'premises' found in cl. (b) of S. 3, Bihar Foodgrains Control Order, 1947, can be read to include a country-boat. The word 'premises' has not been defined in the Bihar Foodgrains Control Order, 1947, but the word 'vessel' has been defined to include boats of every kind including mechanically propelled boats. In the Code of Criminal Procedure, the word 'place' has been defined in S. 4, sub-cl. (q) to include "also a house building, tent and vessel". There is no definition of the word premises' in the Code of Criminal Procedure, as far as I can see. In the Penal Code also, there is no definition of the word 'premises', but the word 'vessel' has been stated in S. 48 of the Code, to denote anything made for the conveyance by water of human beings or of property. It will thus be seen that we can get no assistance from these statutory provisions as to the meaning of the word 'premises'. In the Indian General Clauses Act, there is no definition of the word 'premises' but the word 'vessel' has been stated to include "any ship or boat or any other description of vessel used in navigation", and the word 'ship' has been stated to include "every description of vessel used in navigation not exclusively propelled by oars. In the Bihar and Orissa General Clauses Act, the words 'vessel' and 'ship' are described in the same way as in the Indian General Clauses Act. There is, however, no definition of the word 'premises'. It will, therefore, be noticed that in these various statutory provisions, including the Bihar Foodgrains Control Order, 1947, the word 'vessel' has been stated to mean boats of all kinds. The word 'ship' has been a meaning in the aforesaid two General Clauses Acts to include "every description of vessel used in navigation not exclusively propelled by oars." The word "premises", however, has not been mentioned in these various statutory provisions. Webster's New International Dictionary, 2nd Edition unabridged, states that with reference to law 'premises' means "the property conveyed in a deed, hence, in general, a piece of land or real estate; sometimes, especially in fire-insurance papers, a building or buildings on land; as, to lease premises; the premises insured. Sometimes loosely applied to personal property, as a vessel." According to Stroud's Judicial Dictionary 'premises' in popular language frequently means buildings. It also includes a pleasure garden occupied with a dwelling-house, *qua rating* for water supply. Stroud's Dictionary, however, refers to the case of the *Beacon Life, and Fire Assurance Co.* v. *James Gibb*, (1862) 15 E. R. 630 : (1 Moore P. C. N. S. 73) show that the word 'premises' in that case referred to a ship. An examination of that case shows that a fire insurance policy had been effected on a ship. It is unnecessary for me to go into the facts of that case, but it is clear that nothing else but a ship was insured by an instrument which was generally used in connection with life insurance. Lord Chelmsford in delivering the decision of the Judicial Committee observed :

> "Now, the word 'premises', although in popular language it is applied to buildings, in legal language means, the subject or thing previously expressed; and the question here is, in what sense this word is used, which must be gathered from the contract itself, and not from any external evidence."

It will be seen from this observation of his Lordship that the popular meaning given to the word 'premises' is with reference to buildings, but in legal language it means the subject or thing previously expressed and may in certain circumstances come to be construed to include a ship, depending in what sense the word was used in the contract itself. Strouds refers to another case *The Queen* v. *Leith*, (1852) 118 E. R. 382 : (1 E. & B. 120) for a wide use of the word 'premises'. An examination of the case, however, does not disclose that there was a definite decision by the Court that a pier or landing place consisting of floating barges, boarded over, and kept in their places by iron chain cables, fastened to iron anchors sunk or imbeded in the bed of the river and connected by wooden bridges with each other and with a platform resting upon an abutment attached and made fast to the wall of the said premises, was premises. The main decision, however, was that it could undoubtedly be regarded as accessory to the land for rateable purposes. One of the learned Judges, Coleridge, J. observed,

> "The rate is substantially on a tenement made more valuable by the floating pier, which therefore is mentioned in addition to the tenement."

Wightman J. observed,

> "Had the rate been laid on the barges only, as distinct from the land, I should have paused before I affirmed it."

In my opinion, this case in no sense decides that the word 'premises' includes a boat as distinct from a building or land. Such being the situation, I think the ordinary meaning as understood in the English language must be given to the word 'premises'. Normally, it would be a loose expression to use the word 'premises' in connection with a boat. There may, however, be circumstances such as in the case of *the Beacon Life and Fire Assurance Company*, ((1862) 15 E. R. 630 : 1 Moore P. C. N. S. 73) which may establish that a boat or a ship comes within the word 'premises'. I can even imagine that houseboats, which are so well known in Kashmir, and barges in England used by many as residence, may in certain circumstances come to be included in the word 'premises'. In the present case, however, the boat carried bags of rice from some place to Sakarpura Ghat to be unloaded there and then to be stored in the gola of some person. The boat was not used as a dwelling place, nor was it fixed to any land permanently. The Bihar Foodgrains Control Order, 1947, is a penal law and must be construed strictly. The enactment of the said law has restricted the ordinary rights of a citizen to possess foodgrains. It is to be further noticed that in S. 9, Bihar Foodgrains Control Order, 1947, certain powers of inspection search and seizure are given to certain officers, and one of them is :

> "to enter, inspect or search any places or premises, vehicles or vessels in which he has reason to believe that any violation of the provisions of this Order or of the licences issued under this Order is taking place."

As I read this legislation, obviously, in S. 9 a clear distinction is made between the words 'premises' and 'vessel'. Since the Order itself designates the word 'vessel' to include all kinds of boats, the use of the expressions 'places', 'premises', 'vehicles' or 'vessels' in S. 9 would suggest that a clear distinction was being made between the words 'premisee' and 'vessels'. It seems to me that there is nothing in the terms of the Bihar Foodgrains Control Order to justify giving the word 'premises' a special meaning other than the ordinary meaning given to it in the English language.

[5] In the result, I am of opinion that the decision of the lower appellate Court was correct, and the acquittal of the respondent was justified. The appeal is accordingly dismissed.

Jamuar J.—I agree.

R.G.D. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 183 *[C. N. 41.]*

NARAYAN J.

Khudu Mahto — Petitioner v. *Bhim Mahto and others — Opposite Party.*

Civil Revn. No. 380 of 1949, Decided on 27th October 1949, against order of Sub-Judge, Purulia, D/- 14th May 1949.

Civil P. C. (1908), Ss. 151, 152 — Final decree in partition suit on basis of commissioner's report —Commissioner committing mistake in totalling areas of lands — Under S. 151, Court to correct mistake in decree — If mistake is not detected by Court it ought to correct it under S. 152 on application of plaintiff — Fact that decree has been executed is of no importance.

Where the pleader-commissioner whose report has been accepted by the Court and on the basis of whose report the final decree in a suit for partition has been passed, has committed a mistake in totalling the areas of the lands, it is the duty of the Court to check the arithmetical calculation made by the Commissioner before passing the final decree on the basis of the commissioner's report, and if the Court passes a decree without noticing the mistake that has been committed by the commissioner, then the Court would ultimately be deemed to be responsible for the mistake which has cropped up in the decree, and under S. 151 it must correct the mistake committed by it for the ends of justice or to prevent the abuse of the process of the Court. If the Court is not able to detect the mistake itself it should correct the mistake when the plaintiff points it out and applies for its correction. The fact that the decree has been executed is of no importance so far as the question as to whether the amendment prayed for should be allowed or not is concerned. The amendment ought to be allowed if it is fit to be allowed in view of the provisions of Ss. 151 and 152, it being another matter as to how the plaintiff will proceed so far as the execution is concerned after the amendment prayed for is made. [Para 2]

Annotation : ('44-Com.) Civil P. C., S. 151 N. 4, 6; S. 152, N. 2, N. 8 Pts. 3, 4.

S. C. Majumdar — for Petitioner.

Order. — This application is directed against an order of the Subordinate Judge of Purulia, dismissing an application for the amendment of a decree. The decree in question had been passed in a suit for partition on the basis of the commissioner's report, and after the decree had been passed, possession was delivered to the parties on the basis of the commissioner's report which had been embodied in the decree. The plaintiff thereafter, filed an application under Ss. 151 and 152, Civil P. C., for the amendment of the decree, and it was pointed out that the pleader-commissioner whose report had been accepted by the Court and on the basis of whose report the final decree had been passed, had committed a mistake in totalling the areas of the lands. The learned Subordinate Judge rejected the prayer for amendment mainly on the ground that the decree had already been executed.

[2] I am inclined to agree with Mr. Majumdar that merely because the decree stood executed the Court below should not have rejected the prayer for amendment. Under Ss. 151 and 152, Civil P. C., very wide powers have been given to the Court. Section 151 lays down that nothing in this Code shall be deemed to limit or otherwise effect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. It was the duty of the Court to check the arithmetical calculation made by the commissioner before passing the final decree on the basis of the commissioner's report, and if the Court passed a decree without noticing the mistake that had been committed by the Commissioner, then the Court would ultimately be deemed to be responsible for the mistake which has cropped up in the decree, and under S. 151, Civil P. C., it must correct the mistake committed by it for the ends of justice or to prevent the abuse of the process of the Court. Section 152 lays down that clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion on an application of any of the parties. If the learned Subordinate Judge was not able to detect the mistake himself, he should have corrected the mistake when the plaintiff pointed it out and applied for its correction. The fact that the decree has been executed is of no importance so far as the question as to whether the amendment prayed for should be allowed or not is concerned. The amendment ought to be allowed if it is fit to be allowed in view of the provisions of Ss. 151 and 152, Civil P. C., it being another matter as to how the plaintiff will proceed so far as the execution is concerned after the amendment prayed for is made. This application, therefore, succeeds.

[3] The application is allowed and the Court below will correct the mistake which has been committed in totalling the areas. There is no appearance on behalf of the opposite party and there will be no order for the costs of this application.

D.H. *Revision allowed.*

A. I. R. (37) 1950 Patna 184 *[C. N. 42.]*

SINHA AND MAHABIR PRASAD JJ.

Ramsarup Das and others — Defendants—Appellants v. *Rameshwar Das, Plaintiff and others, Defendants—Respondents.*

A. F. O. D. Nos. 171 and 332 of 1946, Decided on 26th September 1949, from decision of Addl. Sub-Judge, Monghyr, D/- 21st June 1946.

(a) Civil P. C. (1908), O. 1, R. 10 — Necessary parties — Deity not necessary party to litigation in respect of debuttar property.

Ordinarily, the deity is not a necessary party to a litigation in respect of *debuttar* property, as the *shebait*, for the time being, represents the interest of the deity: A. I. R. (4) 1917 Cal. 441 and 32 Cal. 129, *Rel. on.* [Para 7]

Annotation: ('44-Com.) Civil P. C., O. 1, R. 10, N. 37.

(b) Civil P. C. (1908), O. 22, Rr. 1 and 11—Plaintiff suing to establish his personal right to office entitling him to possession of property — Death of plaintiff either during pendency of suit or during pendency of appeal — Suit will abate—Substituted party can only prosecute cause of action as originally framed in suit.

If a plaintiff is suing to establish his right to a certain property in his own rights and not by virtue of his office, certainly the cause of action for the suit will survive, and his legal representative can continue the suit on the death of the original plaintiff, either during the pendency of the suit or of the appeal. But, where the plaintiff's suit is primarily to establish his personal right to an office which would entitle him to possession of the property, on his death, either during the pendency of the suit or during the pendency of the appeal, the right to sue would not survive, and the suit will, therefore, abate. The principle is well established that the substituted party can only prosecute the cause of action as originally framed in the suit, and, if it becomes necessary materially to alter the pleadings it becomes manifest that the original cause of action is being substituted for another cause of action which could very well form the subject-matter of a separate suit. In such a case, therefore, it is a new suit which has to be tried. [Paras 11 & 12]

A dispute amongst three chelas as regards succession to the *shebaitship* was settled by an *ekrarnama* according to which the three chelas were to succeed one after another as shebait and after them worthy bairagi of Brahmin descent was to be selected by the locality and the Sadhus of neighbourhood. It was also agreed that those three persons would not nominate their successors. When the last of the aforesaid three chelas became *shebait* and applied for mutation his application was opposed by the defendant. The land registration case ended in favour of the defendant who then dispossessed the former from the office of the *shebaitship*. Plaintiff therefore brought a suit for declaration that according to the terms of the *ekrarnama* he was a shebait, the defendant was a trespasser and for possession of property and mesne profits. The trial Court decreed the suit holding the plaintiff as *shebait* and defendant in wrongful possession. During the pendency of appeal by the defendant the plaintiff died and his chela applied for substitution in his place :

Held that the plaintiff's right related to his personal rights as a *shebait*. The original plaintiff had based his cause of action on the *ekrarnama* which had enjoined upon the plaintiff not to nominate his successor. The person sought to be substituted in his place could succeed only by virtue of the appointment by election or selection according to the custom of the locality. If the Chela were to be substituted in place of the deceased a number of questions would arise for decision and plaint would have to be amended substantially giving rise to the defendant's right of amendment of his pleadings. Thus new issues would be raised necessitating a fresh trial which was not contemplated by the provisions of O. 22. Thus on the death of the plaintiff the suit became infructuous and the chela could not be substituted in place of the deceased plaintiff : *Case law discussed.* [Paras 13 and 17]

Annotation : ('46-Com.) Civil P. C., O. 22, R. 1, N 6 Pt. 1; R. 3 N. 16, R. 11, N. 2, Pt. 1.

(c) Civil P. C. (1908), O. 40, R. 1 — Court has no power to appoint receiver to hold charge of property after litigation is over.

The power conferred on the Court by O. 40, R. 1 (a) to appoint a receiver refers only to the appointment of a receiver in respect of property in regard to which litigation is pending, that is to say, as long as the suit remains pending. The Court has no power to direct the appointment of a receiver, or the continuance of the receiver already appointed, to hold charge of the property after the litigation is determined : A. I. R. (7) 1920 Pat. 501, *Rel. on*; A. I. R. (32) 1945 All. 261 (F. B), *Not foll.* [Para 15]

Annotation : ('44-Com.) Civil P. C, O. 40, R. 1, N. 20, Pt. 4.

P. R. Das, L. K. Jha, B. C. De, R. K. Verma, Prem Lall and Balbhadra Prasad Singh (in No. 171) and J. C. Sanyal (in No. 332) —for Appellants.

Lalnarayan Sinha, J. C. Sanyal, Girish Nandan Sahay Sinha, J. P. Chaudhury, G. C. Banerji, Rai Prasasnath, A. N. Lal and Girja Nandan Prasad (in No. 171) and G. C. Banerji (in No. 332) — for Respondents.

Sinha J. — These two appeals by the defendants arise out of a single judgment and decree passed by the learned Additional Subordinate Judge of Monghyr, dated 21st June 1946, in a suit for declaration of title and recovery of possession of the properties as *shebait* of the deity, Shree Lakshmi Narayan Jee. First Appeal No. 171 is on behalf of defendant 1 Ramsarup Das, and First Appeal No. 332 is on behalf of defendants 2 and 3.

[2] The plaintiff alleged that there is an ancient Asthal in village Salauna in the Begusarai sub-division of Monghyr District endowed with considerable properties. The institution was founded by Mahanth Masta Ram Bairagi Brahmachari Grihatyagi Vaishnava Sadhu of Shree Sampradaya Sect, with the help and support of the Hindus of the locality. He also alleged that the Asthal was a public charitable and religious institution for the behoof of the Hindu community; that the Asthal has large income from gifts and offerings made by the public for religious and charitable purposes; that out of the income and offerings, the *mahanths* successively acquired properties, and thus made accretions to the endowment; that the Asthal had thus acquired considerable properties detailed in Sch. A to the plaint; and that Mahanth Lakshmi Das, the plaintiff's *guru*, made considerable acquisitions for the public trust aforesaid, and erected a stonebuilt temple on the site of the old dilapidated temple at a large cost, and, in Phagoon 1323 Fasli, formally endowed all the properties of the Asthal by *mantra sankalpa* to the deity, Shree Lakshmi Narayan Jee. The properties thus became debottar properties after the endowment aforesaid. Mahanth Lakshmi Das aforesaid died in Magh 1326 Fasli, leaving him surviving three *chelas*, namely, Bishun Das, Bhagwat Das and Rameshwar Das. During the *bhandara*, that is to say, *sradh* ceremony, of Mananth Lakshmi Das, there arose a dispute amongst his chelas as regards succession to the *shebaitship*. That dispute was settled, and the deed of settlement is the *ekrarnama*, dated 5th February 1919, the terms of which were that the three *chelas* aforesaid were to succeed one another as *shebait*, that is to say, Bishun Das was to come first, next to him was to be Bhagwat Das, and the plaintiff was to come after him, and that, after the lapse of the life estate of those three persons a worthy *bairagi* of brahman descent would be selected by the gentlemen of the locality and the *sadhus* of the neighbourhood. It was also agreed as a result of the settlement that those three persons would not nominate their successors. Accordingly, Bishun Das became the first *mahanth* and *shebait*, and he was recorded in the Collector's records as *shebait* of the deity. Bishun Das died on 3rd March 1931, and, on his death, Bhagwat Das succeeded him as the *mahanth* and *shebait* according to the terms of the *ekrarnama*, and he also was recorded as *shebait* of the deity in the Collector's registers. Bhagwat Das died on 25th February 1935, and the plaintiff succeeded him as the *shebait* of the deity. The plaintiff thus became the *shebait* and *mahanth* not only as a result of the *ekrarnama* but also according to the custom and usage of the Asthal and the agreement of the people of the locality and the *mahanths* of the neighbourhood. The plaintiff also alleged that, according to the custom prevalent in the Asthal, the ablest *chela* is appointed shebait by the people of the locality and the *sadhus* and *mahanths* of the neighbouring *mathas*, irrespective of whether he was a senior or junior *chela*, in case the last reigning *mahanth* died leaving more than one *chela*. The plaintiff made an application for mutation of his name

in the Collector's records in substitution of the name of last *mahanth*, Bhagwat Das; but he was opposed by defendant 1 who was set up by designing persons as the *chela* of the last *mahanth*, Bhagwat Das. The land registration case ended in favour of defendant 1, and, on the strength of the order of the Land Registration Courts, defendant 1 dispossessed the plaintiff from the office of the *shebait* on 15th December 1935. Defendants 2 and 3 were also impleaded, as some of the Asthal properties set out in Sch. B of the plaint stood recorded in their names. The plaintiff also sets out a number of litigations between the parties, which are not very material for the purposes of these appeals. The plaintiff prayed for the declaration that, according to the terms of the *ekrarnama*, dated 5th February 1919, the plaintiff is the *mahanth* and *shebait* of the Salauna Asthal after the death of Mahanth Bhagwat Das; that defendant 1 had no title to the office of *shebait*; and that he was never appointed *mahanth* and *shebait* of the aforesaid Asthal. It was also claimed that the possession of defendant 1 as *shebait* of the properties appertaining to the Asthal was that of a trespasser, and that the plaintiff be put in possession of the shebaitship by dispossessing the defendant, or any other persons found to be in possession of the Asthal properties. A decree for mesne profits from the date of the institution of the suit until the date of delivery of possession was also prayed for.

[3] The suit was contested by all the defendants. Defendant 1 filed a separate written statement, and defendants 2 and 3 their own. Except for the formal pleas in bar of the suit, the substantial contentions raised in the written statements were that the Asthal and its properties were not of the nature of a public and charitable trust; that the properties of the Asthal were the personal properties of the *mahanths*; and though it was admitted that Mahanth Lakshmi Das established a temple, and installed the deity Lakshmi Narayan Jee, it was denied that he dedicated all the movable and immovable properties appertaining to the *matha* or the Asthal to the deity, or that the properties thus became *debottar*. Defendant 1 did not admit the genuineness or the validity of the *ekrarnama* dated 5th February 1919, and asserted that, even if the ekrarnama was duly executed, it could not bind the defendant. He denied that the plaintiff became entitled to the *shebaitship*, or that he became the mahanth and *shebait* by virtue of the *ekrarnama*, or as a result of the agreement of the people of the locality and the *sadhus* and *Mahanths* of the neighbouring institutions. It was also asserted that Mahanth Lakshmi Das had no legal right to declare any of the properties appertaining to the *math*, to be *debottar*; nor did he make any such declaration. This defendant claimed to be the legal successor to the mahanthship, and, in accordance with the customs and traditions of the Asthal, became the successor to Mahanth Bhagwat Das as his *chela*, and the *mahanths* and gentry of the locality, on the death of Bhagwat Das, gave *kanthi* and *chadar* and *tilak* and *pagri* to him. He also denied the plaintiff's statement that he was not a *bairagi chela* of Bhagwat Das. Defendants 2 and 3 denied that the properties in Sch. B were Asthal properties, and claimed those properties as their personal properties. They also denied that they were *farzidars* of the *math* in the matter of the purchase of the property at a revenue sale.

[4] The parties adduced voluminous oral and documentary evidence in support of their respective cases. The learned Subordinate Judge, who heard this case in the first instance, has written a very careful and exhaustive judgment. He has decreed the suit, with costs against defendant 1 only, holding that the plaintiff is the *mahanth* and *shebait* of the deity after the death of Bhagwat Das in accordance with the terms of the *ekrarnama*, dated 5th February 1919, and also in accordance with the custom of Salauna Asthal, and that the possession of defendant 1 over the Asthal and the properties was wrongful. He, therefore, decreed the suit for possession and for mesne profits to be determined subsequently. In the course of his very pains-taking judgment, the learned Subordinate Judge came to the conclusion that the properties had been dedicated by Mahanth Lakshmi Das to the deity in the year 1323 Fasli since when they ceased to be the personal properties of the *mahanths*, and became private trust or *debottar* properties that the *ekrarnama* was a valid and genuine transaction; that defendant 1 was not the *chela* of Mahant Bhagwat Das at the time when the *ekrarnama* was executed; that defendant 1 was a *bairagi chela* of Mahanth Bhagwat Das, and the plaintiff's case that he was a *grihasthi chela* was not true; that the defendant had failed to prove the custom alleged by him that the Salauna Asthal is governed by the special custom of primogeniture; that the Salauna Math was a *maurusi* Math; that the properties in question were not the personal properties of the Mahanth as was conceded at the time of argument on behalf of the defendant; and that the plaintiff, in spite of his best efforts to take possession of the Asthal properties, could not succeed in actually taking possession of those properties, and in ousting the defendant. He also found that only Item No. 1 of Sch. B to the plaint was the property

of the deity. Hence, both sets of defendants have filed their respective appeals from the decision in so far as it affects their interests.

[5] During the pendency of the appeals, the successful plaintiff took out execution of the decree for possession. The appellants objected to the delivery of possession being given, and this Court, by its order dated 2nd August 1946, directed that neither party should be allowed to remain in possession of the properties of the Asthal during the pendency of the appeals, and that a third-party receiver should be appointed to take charge of the properties and to look after the worship of the deity. Defendant 1 was appointed interim receiver, and was allowed to remain in the Asthal building but not as a *shebait*. In the meantime, the plaintiff, Rameshwar Das, died, and an application was filed on behalf of another person, calling himself Mahanth Parmeshwar Das as a *chela* of the deceased Rameshwar Das, for substitution in his place. The counsel for the appellants contended that the suit had abated as a result of the death of the sole plaintiff who had sued in his personal rights. That controversy was not determined by the Bench which, by its order dated 9th May 1949, directed, with the consent of the parties, that, for the purposes of the hearing of the appeals, Parmeshwar Das might be substituted in place of the sole plaintiff-respondent without prejudice to the rights of either party to the litigation.

[6] When these appeals were placed before us for hearing, Mr. Lakshmi Kant Jha on behalf of the appellant raised the contention that, on the death of the sole plaintiff-respondent, the suit itself abated, and that, therefore, the appeals need not be heard on merits, and should be decreed, with the result that the suit should stand dismissed. This Court, as already indicated has placed the Asthal properties in charge of a receiver, pending the decision of the appeals in this Court. If the appeals were to be allowed, and the suit dismissed *in limine*, the result naturally would be that the defendant, who was adjudged to be a trespasser, would be restored to the possession of the property. It was argued on behalf of the substituted respondent, Parmeshwar Das, that defendant 1 had claimed personal title in the property which had been found to belong to the Asthal as *debottar* property. Hence, it was argued the defendant should not be placed in such a position, as a result of the decision of this Court, that he should continue the trespass on the property to the great detriment of the deity on whose behalf the *shebait* holds the property. It was, therefore, pointed out that the deity should be added as a party to these appeals, and the appeals heard and disposed of in his presence. Without concluding the arguments, we directed that the deity should be represented by an independent person who should not be either a party to this litigation, or of the camp of either party. The Deputy Registrar of this Court was appointed next friend of the deity, Shree Lakshmi Narayan Jee, installed in the Asthal at Salauna. The Deputy Registrar has appeared through an advocate of this Court, and we have heard the arguments as regards the maintainability of the suit and the result of the appeals in presence of the Deputy Registrar representing the deity. It was urged on behalf of the deity that defendant 1 was not a desirable person to represent the deity, inasmuch he was claiming title to the properties adverse to the deity. Hence, on the analogy of a trustee laying a claim adverse to the trust, it was argued that defendant 1 should be removed from a position in which his interests are apparently in conflict with those of the deity.

[7] Ordinarily, the deity is not a necessary party to a litigation in respect of *debottar* property, as the *shebait*, for the time being, represents the interest of the deity — see in this connection the case of *Dinbandhu* v. *Chamiraddi*, A. I. R. (4) 1917 Cal. 441 : (34 I. C. 548), relying upon the decision of their Lordships of the Judicial Committee in the case of *Jagadindra Nath Roy* v. *Hemanta Kumari Debi*, 32 Cal. 129 : (31 I. A. 203 (P. C.)). Another difficulty in this case is that this is not a suit to remove a *shebait* on the ground that he has been acting in a way prejudicial to the interest of the *debottar* estate. This was a suit by the plaintiff claiming to be the rightful *shebait* of the *debottar* estate as against defendant 1 who was claiming to be the rightful owner of the property as *shebait* and *mahanth*. It may be mentioned in this connection that, though defendant 1 claimed the properties in dispute as the personal properties of the *mahanth*, and got an issue added namely, Issue No. 10 and a large volume of oral and documentary evidence was adduced on this question, the lawyer on behalf of defendant 1 in the Court below withdrew that plea, and unequivocally stated that he was not claiming the property as the absolute personal property of the mahanth but as property belonging to the Asthal which was of a *debottar* character. In this Court also, Mr. P. R. Das and Mr. Lakshmi Kanta Jha, who followed him, have unequivocally taken the same position. Hence, it cannot be said now that defendant 1 was asserting an interest in the property adverse to the *debottar* estate. The case must, therefore, be determined on grounds other than that urged on behalf of the deity that defendant 1 should be removed from his position, because he was claiming a title

adverse to that of the deity. Hence, it would appear that the deity is not a necessary party to this litigation.

[8] The appellant insisted upon the preliminary question raised on his behalf, namely, that the suit had abated in the events which have happened. The argument is that the plaintiff sued on the basis of the *ekrarnama* of the year 1919, whereby each of the three *chelas* of Mahanth Lakshmi Das had agreed to take the place of the last *mahanth* one after the other, and that, accepting the plaintiff's reading of the *ekrarnama*, neither of those three *mahanths* could appoint any successors. If that is so, the argument proceeds, on the death of the plaintiff, the estate would go to the person selected or elected by the gentry of the locality and the *sadhus* and *mahanths* of the neighbouring institutions. But such a person, if so elected or selected, would not come in as the legal representative of his predecessor-in-office. In other words, the contention is that the plaintiff had sued in his personal right as the *shebait* of the *debottar* estate. He is now dead, and, on his death, the suit, though it has resulted in a decree, cannot proceed. In this connection, reliance was placed on a decision of a single Judge of the Calcutta High Court, sitting on the Original Side, in the case of *Sham Chand Giri* v. *Bhayaram Pandey*, 22 Cal. 92. In that case the plaintiff had sued for a declaration that he had been selected to succeed as *mahanth* of the Tarkeshwar Shrine and for possession of the properties attached to the institution as also for an injunction to restrain the defendant from interferring or dealing with the properties of the Shrine. During the pendency of the suit, the plaintiff died, and an application was made for substitution in his place by one who claimed to be the successor-in-office to the deceased plaintiff. He also applied to amend the plaint to make the consequential changes in the pleadings. Sale, J. held that the right to sue did not survive to the applicant, and that, therefore, he could not be substituted in place of the deceased plaintiff. In the course of his judgment, his Lordship made the following pertinent observations :

> "No doubt if this had been a suit to protect the property of the idol as against a trespasser, then it would be difficult to meet the arguments addressed to me on the part of the present applicant; but that is not the character of the suit, and the real object of the applicant is to establish a rival claim to the office of *mohant*, which can only be done by a separate suit. I take it that whoever, is declared to be the *mohant*, the property which appertains to the shrine would follow that declaration. The suit is of a personal character inasmuch as its object is to establish a right to a personal office, and for that reason it appears to me that the right to sue does not survive. The result is that this suit abates."

[9] This decision can be distinguished on the ground that that case had not proceeded to judgment, and there was no decree in existence in favour of the plaintiff, as in the present case. But the question is would that make a material difference to the result ? Reliance was also placed on the decision of a Division Bench of the Lahore High Court in the case of *Gulzar Shah* v. *Sardar Ali Shah*, 12 Lab. 1 : (A. I. R. (17) 1930 Lah. 703). Their Lordships of the Lahore High Court held that, where succession to the office of a *gaddinashin* and *mutwalli* of a religious institution is not hereditary, but dependent on election, a person who claims to be the only disciple of the deceased appellant cannot be regarded as his legal representative for the purpose of carrying on the appeal, inasmuch as the right to such an office is a personal one, and comes to an end, on the death of the person claiming it. This case can be distinguished on the ground that it was the unsuccessful plaintiff who figured as the appellant in the High Court and who was dead. There was no decree in his favour, unlike the present case. Their Lordships followed the decision of the Calcutta High Court just referred to *Sham Chand* v. *Bhayaram Pandey*, 22 Cal. 92.

[10] Reliance was also placed on behalf of the appellant on the decision of the Court of Appeal in the case of *Phillips* v. *Homfray*, (1883) 24 Ch. D. 439 :(52 L. J. Ch. 833). In that case their Lordships pointed out generally the cases in which the right to sue survives. In the course of their long judgment, their Lordships have made the following observations :

> "The only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to us to be those in which property, or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or moneys. In such cases, whatever the original form of action, it is in substance brought to recover property, or its proceeds or value, and by amendment could be made such in form as well as in substance. In such cases the action, though arising out of a wrongful act, does not die with the person. The property or the proceeds or value which, in the lifetime of the wrongdoer, could have been recovered from him, can be traced after his death to his assets, and recaptured by the rightful owner there. But it is not every wrongful act by which a wrongdoer indirectly benefits that falls under this head, if the benefit does not consist in the acquisition of property, or its proceeds or value."

The facts of that case were entirely different and have no resemblance to those of the present. But their Lordships have considered the application of the common law rule of *actio personalis moritur cum persona*. That was also a case in which a decree had been passed; but that decree had not become final, as the enquiries directed by the Court in the first instance had yet to be made, and one of the defendants died after the passing of the decree but before the enquiry had been completed. This case was cited on behalf of the appellant to meet the respondent's argument that the rule would not apply to a case where the suit had resulted in a decree. This ruling has been followed in the later case of *Chapman* v. *Day*, (1884) 49 L. T. 436.

[11] In answer to these rulings relied upon on behalf of the appellant, Mr. Lalnarayan Sinha made reference to the decision of a Full Bench of the Allahabad High Court in the case of *Muhammad Husain* v. *Khushalo*, 9 ALL. 131. In this case a suit had been instituted by a member of a joint Hindu family for recovery of what he called his share of ancestral family property which had been sold in execution of a money decree for a debt contracted by the plaintiff's grandfather. The trial Court dismissed the suit, but, on appeal, the lower appellate Court decreed it in respect of the plaintiff's interest in the property. The defendants appealed to the High Court. During the pendency of the appeal in the High Court, the plaintiff died. The appellants got his widow substituted on the record in place of the deceased plaintiff-respondent. When the matter came before a Division Bench the appellants relied upon a previous decision of the Allahabad High Court in the case of *Padarath Singh* v. *Raja Ram*, 4 ALL. 235: (1882 A. W. N. 29). As the Division Bench was doubtful of the correctness of the ruling relied upon on behalf of the appellant, they referred the case for decision to a larger bench. The Full Bench, consisting of the Chief Justice and four other puisne Judges, agreed with the following observations of the learned Chief Justice:

> "I have always understood the law to be that in those cases in which an action would abate upon the death of the plaintiff before judgment, the action would not abate if final judgment had been obtained before the death of the plaintiff, in which case the benefit of the judgment would go to his legal representative. Whether the deceased plaintiff's representative can enforce the whole of the judgment in this case is a different matter: see *Phillips* v. *Homfray*, (1883) 24 Ch. D. 439: (52 L. J. Ch. 833)."

In my opinion, the answer to the question raised on behalf of the appellant depends upon the nature of the suit. If the plaintiff is suing to establish his right to a certain property in his own rights and not by virtue of his office, certainly the cause of action for the suit will survive, and his legal representative can continue the suit on the death of the original plaintiff, either during the pendency of the suit or of the appeal. But, where the plaintiff's suit is primarily to establish his personal right to an office which would entitle him to possession of the property in question, on his death, either during the pendency of the suit or during the pendency of the appeal, the right to sue would not survive, and the suit will, therefore, abate. The case decided by the Full Bench of the Allahabad High Court, referred to above, related to a right of property not depending upon personal office, though in the earlier decision of the Division Bench of the same Court in *Padarath Singh* v. *Raja Ram*, 4 ALL 235: (1882 A.W.N. 29), their Lordships of that Court went to the length of holding that the suit by a member of a joint family for establishing his right to a property of the joint family would abate on his death. This decision is hardly consistent with the Full Bench decision of the same Court in *Muhammad Hussain* v. *Khushalo*, 9 ALL. 131, and its correctness may well be open to doubt. But it is not necessary to consider that question, as it does not directly arise in this case.

[12] The principle is well established that the substituted party can only prosecute the cause of action as originally framed in the suit, and, if it becomes necessary materially to alter the pleadings it becomes manifest that the original cause of action is being substituted for another cause of action which could very well form the subject-matter of a separate suit. In such a case, therefore, it is a new suit which has to be tried. The following observations of their Lordships of the Madras High Court in the case of *Subbaraya Mudali* v. *Manika Mudali*, 19 Mad. 345, are relevant to the question before us:

> "The general rule is that, as the representative of a deceased plaintiff can only prosecute the cause of action as originally framed, so the defendant can raise no other defence against him than he could have raised against the deceased."

[13] Applying these principles to the case before us, it is to be noted that the original plaintiff had based his cause of action on the *ekrarnama* of 1919, which, as already observed, had enjoined upon the plaintiff not to nominate his successor. The person sought to be substituted in his place can succeed if at all, not by virtue of the fact that he is the *chela* of the deceased plaintiff but by virtue of the appointment by election or selection according to the custom of the Asthal. Whether the plaintiff has been so elected or selected is not a question which has been raised and decided in the suit as originally framed. The original plaintiff succeeded substantially on the ground that he was one of the three contracting parties to the document called the *ekrarnama*. All the three parties to the document now being dead, a number of questions now arise for decision; for example, whether the three contracting parties could validly have bound their successors against the established custom of the Asthal; whether Parmeshwar Das (who seeks to be substituted in place of the original plaintiff) or defendant 1

would be the preferential successor-in-office to the last *mahanth*, or whether neither of them but some third party would be the rightful *shebait* in respect of the *debottar* property. All these are questions which have not been, and could not have been, determined in the suit as originally framed. If Parmeshwar Das were to be substituted in place of the deceased plaintiff respondent, the plaint would have to be amended substantially, giving rise to the defendant's right of amendment of his pleadings. Thus, new issues would be raised necessitating a fresh trial, which, in my opinion, is not contemplated by the provisions of O. 22, Civil P. C.

[14] But it was contended by Mr. Lalnarayan Sinha on behalf of Parmeshwar Das that, if the substitution is not made, the result would be that the property will have to go back from the hands of the receiver, who is at present managing the same, to defendant 1 who has been adjudged to be a mere trespasser. It is not correct to describe defendant 1 as a mere trespasser. He has been adjudged by the Court below to be a trespasser, as his title by virtue of his being the chela of Bhagwat Das was found to be inferior to the plaintiff's title on the basis of the *ekrarnama* of 1919. But if the plaintiff's title is dead with him, defendant 1, having been the person in possession, from whom the receiver had taken over, will naturally get the property back, and hold it so long as he is not ejected by a person with a better title. Mr. Lalnarayan Sinha referred to the observations of their Lordships of the Judicial Committee of the Privy Council in the case of *Subbaiya Pandaram* v. *Mahamed Mustapha Maracayar*, 50 I. A. 295 : (A.I R. (10) 1923 P.C. 175) in support of his contention that the decision of the Court below that the possession of defendant 1 was that of a trespasser will not be *res judicata* in any suit to be instituted hereafter by another person claiming the *debottar* properties as the shebait; but certainly it would merely emphasize the fact that that possession was adverse to the *debottar* estate. As indicated above, there is no danger of that in the present case, inasmuch as the defendant both in the Court below and in this Court has unequivocally abjured all claim to hold the property adversely to the *debottar* estate.

[15] It was further contended by Mr. Lalnarayan Sinha that, the receiver having already taken possession of the estate, he is holding it for the rightful owner of the property; and, as defendant 1 is not the rightful owner, if the suit were to be dismissed, it would naturally mean that the receiver would make over the property to defendant 1. Hence, he suggested that the receiver should be directed to continue in possession of the property until Parmeshwar Das, or somebody else, had established his right to the *shebaitship* in preference to defendant 1. But I am not aware of any procedure known to law in accordance with which this Court can ask the receiver to continue in possession indefinitely, or even for a specified period, in the expectation that a decision might be given in favour of Parmeshwar, or in favour of another person, as preferential successor-in-office to the *shebaitship*. The suit giving rise to these appeals will have to be determined one way or the other, and the receiver will naturally have to make over possession of the property in accordance with that decision. But Mr. Lalnarayan Sinha relied upon the Full Bench ruling of the Allahabad High Court in the case of *Muhammad Ali Khan* v. *Ahmad Ali Khan*, I.L.R. (1945) ALL 818: (A. I. R. (32) 1945 ALL 261). In that case, Braund and Wali-ullah JJ. (Allsop J. dissenting) directed that the respondent should be appointed receiver and manager without security of the property of the *waqf* the receiver to be discharged if, within three months from the date of the order of the High Court, fresh proceedings for the removal of the *mutwalli* were not taken. In that case, their Lordships had agreed to allow the revisional application against the order of the District Judge removing a certain person from the position of a *mutwalli* and appointing another one in his place. Such a direction was proposed to be made by Braund, J. under the provisions of O. 40, R. 1, Civil P.C. Wali-ullah J. was inclined to accept that view, but, not being sure whether such an appointment could be made under O. 40, of the Code, suggested that the provisions of S. 151, Civil P. C. could be resorted to, in the alternative. Allsop J. pointed out, differing from his learned colleagues, that there was no proceeding pending before any Court in which a receiver could be appointed. He therefore, took the view that the High Court could only set aside the orders of the District Judge, which were *ultra vires*, and leave the parties to their remedies at law. It is a title difficult to appreciate the reasonings of the majority of the Full Bench appointing a receiver in respect of the property which had ceased to be the subject-matter of a litigation. But a Division Bench of this Court in the case of *Chandreshwar Prasad Narain Singh* v. *Bisheshwar Pratap*, 5 Pat. L. J. 513 : (A. I. R. (7) 1920 Pat. 501) has clearly held that the power conferred on the Court by O. 40, R. 1 (a), Civil P. C. to appoint a receiver refers only to the appointment of a receiver in respect of property in regard to which litigation is pending, that is to say, as long as the suit remains pending. In agreement with the views of this Court, it must be held that this Court has no power to direct the appointment of

a receiver, or the continuance of the receiver already appointed, to hold charge of the property after these appeals are determined one way or the other.

[16] It was also urged by Mr. Lalnarayan Sinha that there is a decree for costs for a substantial sum of money against defendant 1 in favour of the deceased plaintiff, and for ejectment of defendants 2 and 3 in respect of certain property standing in their names. But, if I am right in holding that the plaintiff's suit related to his personal right as a *shebait*, that right is dead with the plaintiff.

[17] For the reasons given above, it must be held that, on the death of the plaintiff, the suit has become infructuous, and that Parmeshwar Das cannot be substituted in place of the original plaintiff, now deceased. The appeals must, therefore, be allowed, and the judgment and decree passed by the Court below discharged. It follows that the defendants appellants have to bear their own costs in this Court and in the Court below, even as the deceased plaintiff bore his own.

Mahabir Prasad J.— I agree.

D. H. *Appeals allowed.*

A. I. R. (37) 1950 Patna 191 *[C. N. 43.]*

DAS J.

Bibhuti Bhusan Modak and another—Appellants v. *Girish Chandra Pal and others—Respondents.*

A. F. A. D. Nos. 203 and 564 of 1948, Decided on 9th November 1949, from decision of Sub-Judge, Dhanbad, D/- 26th January 1948.

(a) Limitation Act (1908), Ss. 6 and 8 and Arts. 142 and 144—Adverse possession of property belonging to minor—Combined effect of Ss. 6 and 8—Limitation does not cease to run merely because rightful owner is minor—Limitation expiring after 3 years from attainment of majority—Suit for ejectment by minor after expiry of limitation—Proper Article applicable is Art. 142—No extension under combined effect of Ss 6 and 8.

In actions in ejectment, the plaintiffs have to prove their subsisting title, that is, possession within 12 years before they can succeed: A. I. R. (8) 1921 Pat. 237 (F. B.), *Foll.* [Para 8]

Where the guardian conveyed the minor's property in her own right and not as guardian, the transferee's possession is adverse to that of the rightful owner. Limitation does not cease to run from the date of his entering into possession merely because the rightful owner is a minor at the time when limitation starts. [Para 8]

Where the period of 12 years expires after 3 years from the date on which the minor attained majority, the minor is not entitled to any extension of time under the combined effect of Ss. 6 and 8: A. I. R. (7) 1920 Mad. 793, A. I. R. (9) 1922 Mad. 12 and A. I. R. (8) 1921 Cal. 572, *Rel. on.* [Paras 8, 9]

To the suit for ejectment the proper article applicable is Art. 142. [Para 9]

Annotation: ('42-Com.) Lim. Act, S. 6 N. 32; S. 8, N. 4; Arts. 142 and 144, N. 24.

(b) Limitation Act (1908), Arts. 142 and 144—Tacking — Succession of wrong doers claiming through one another — They can tack to their periods of adverse possession.

In computing the period of 12 years of adverse possession, the defendant in the suit is entitled to tack to his adverse possession the adverse possession of the person through whom he claims. [Paras 9 & 10]

Annotation: ('42-Com.) Lim. Act, Arts. 142 and 144, N. 92.

Lala Atul Chandra—for Appellants.
S. C. Mazumdar—for Respondents.

Judgment.—These two appeals arise out of the same judgment and have been heard together. This judgment will govern both the appeals, though I propose, for the sake of convenience, to deal with them separately.

[2] In Second Appeal No. 203, the plaintiffs are the appellants, and the land involved is plot No. 1068. In Second Appeal No. 564, the defendants are the appellants; and the plot involved is 1113. The facts so far as they are relevant for the two appeals are the following: One Bhikhu Mandal was the recorded tenant of holding No. 37 of village Nirsa in which holding were included the two plots in question. Bhikhu died some fourteen years before the suits were instituted, leaving a minor son called Kalipada, and his widow, Jamuna Mandalani. During the minority of Kalipada, Jamuna sold the two plots along with some other land to one Shambhu Mahto by means of a sale-deed executed on 29th April 1932. On 16th April 1943, sometime after Kalipada had attained majority, Kalipada executed an agreement to sell the lands to the plaintiffs. The case of the plaintiffs was that a sum of Rs. 50 was paid at the time of the agreement, and the plaintiffs were put in possession of the lands. On 13th September 1943, Kalipada executed a sale-deed in favour of the plaintiffs, who then paid the balance of the consideration. The plaintiffs remained in possession, but after a proceeding under S 144, Criminal P. C., they were dispossessed in 1351 F. from one plot, and in 1352 F, from the other plot. The plaintiffs then brought the two suits for a declaration of their title and recovery of possession. The defendants were different in the two suits. In suit No. 134 of 1945, out of which has arisen Second Appeal No. 203 of this Court, the defendant was Girish Chandra Pal. His case was that Jamuna Mandalani executed a sale-deed in 1932 as guardian of Kalipada for legal necessity, and Shambhu came in possession as owner on the strength of that sale-deed. On 2nd September 1943, Shambhu and Kalipada jointly executed a sale deed in favour of Girish Chandra Pal in respect of plot No. 1068. The sale-deed was, therefore, prior in time to the sale-deed in favour of the plaintiffs, though, it was registered on 14th September 1943. Girish Chandra Pal based his title on the said sale-deed of 2nd September

1943. He raised various other pleas such as limitation etc., and also pleaded that the agreement dated 16th April 1943, was fraudulent, without consideration and antedated. The defendants in Suit No. 133, relied on another sale-deed, dated 14th September 1943, executed by Shambhu Mahto in favour of Sumitra, one of the defendants, in respect of plot No. 1113. This sale-deed was subsequent to the sale-deed in favour of the plaintiffs; and another distinguishing feature of this sale-deed from the sale-deed in favour of Girish Chandra Pal was that it was executed by Shambhu Mahto alone, and Kalipada was no party to this sale-deed of 14th September 1943.

[3] The learned Munsif disbelieved the story of possession and dispossession which the plaintiffs alleged. He found that Shambhu was in possession since the sale-deed in his favour in 1932, either directly or through a mortgagee, and that the plaintiffs were never in possession. But the learned Munsif held that Shambhu acquired no title on the strength of the sale-deed executed by Jamuna Mandalani in 1932, and therefore the defendants also acquired no title on the strength of their purchase from Shambhu. On the question of limitation the learned Munsif considered only Art. 144, Limitation Act, and held that as Jamuna sold the property as her own property and not as guardian of her minor son, the sale by her was absolutely void, and it was not necessary for the minor Kalipada to set it aside within three years from the attainment of majority. On these findings, the learned Munsif held that the plaintiffs acquired good title by the sale in their favour by Kalipada on 13th September 1943, and he decreed the suits accordingly.

[4] There were two appeals, and the learned Subordinate Judge who heard the appeals allowed the appeal of Girish Chandra Pal in respect of plot 1068, but dismissed the other appeal. The learned Subordinate Judge accepted the finding of the learned Munsif on the question of possession. He further held that the agreement in favour of the plaintiffs dated 16th April 1943 was genuine, for consideration, and was not antedated. He found, however, that the sale deed in favour of Girish Chandra Pal was also genuine and for consideration; and inasmuch as Kalipada was a party to this sale-deed, it had priority over the sale-deed in favour of the plaintiffs which was executed subsequently. The learned Subordinate Judge held that Girish Chandra Pal was a subsequent purchaser for value without notice of the agreement or contract for sale, and was not, therefore, hit by that agreement. As to Shambhu's title on the strength of the sale-deed of 1932, executed by Jamuna Mandalani, the learned Subordinate Judge agreed with the learned Munsif that Shambhu acquired no title on the strength of that sale-deed, and the defendants of suit No. 133, also acquired no title by the sale-deed which they obtained from Shambhu Mahto on 14th September 1943. Therefore, he agreed with the learned Munsif that the sale-deed executed by Kalipada in favour of the plaintiffs would prevail over the sale-deed executed by Shambhu in favour of the defendants of suit No. 133. The question of limitation in the way in which it has been urged before me does not appear to have been considered by the learned Subordinate Judge.

[5] Having stated the facts which are common to both the appeals, I now proceed to consider the two appeals separately.

[6] *S. A 203 of 1948.* — Learned counsel for the appellants has contended that in view of the finding of the learned Subordinate Judge that the contract or agreement for sale dated 16th April 1943, was valid, genuine, and not antedated, he should have treated the suit as a suit for specific performance of the contract. He further contended that the learned Subordinate Judge misdirected himself on the question of onus, inasmuch as it was for Girish Chandra Pal to prove that he was a transferee for value who had paid the money in good faith and without notice of the original contract. My attention has been drawn to the plaint where an alternative prayer was made that the defendant be asked to execute a sale-deed in favour of the plaintiffs. The learned Munsif while dealing with this prayer stated that there was no occasion for entertainment of the alternative prayer, because (1) Girish Chandra Pal had not acquired any valid title by means of the sale-deed in his favour executed on 2nd September 1943, and (2) the plaintiffs had acquired a valid title by means of the purchase from Kalipada Mandal on 13th September 1943. In my opinion, the difficulty of treating the suit as a suit for specific performance of the contract or agreement for sale lies in the fact that on the appellants' own case Kalipada Mandal had performed his part of the contract and executed a sale deed in favour of the appellants on 13th September 1943. Not only that, but the case of the appellants was that they had come in possession and were dispossessed sometime later. It was probably for this reason that Kalipada was not made a party to the action. Therefore, there is no occasion for specific performance, on the case pleaded in the plaint. The case, as presented in the Courts below, was a straightforward case of a competition between two sale deeds, the one in favour of the appellants, dated 13th September 1943, and the other in favour of Girish Chandra Pal, dated 2nd September 1943. It was the case of the appellants that Girish Chandra Pal acquired no title by his purchase inasmuch as Shambhu Mahto,

who had no title himself, could not confer any title on Girish Chandra Pal. In these circumstances, I do not think that the suit can now be treated as a suit for specific performance.

[7] Assuming, however, that the suit can be so treated, the learned Subordinate Judge has not based his decision on the abstract theory of onus only. Firstly, he has found, in agreement with the learned Munsif, that the appellants never came in possession: there was, therefore, no constructive notice on the ground of possession. Secondly, he has found that there is no evidence at all to show that Girish Chandra Pal had notice of the contract for sale prior to, or at the time of, his purchase. Learned Counsel for the appellants has not been able to show to me that this finding of the learned Subordinate Judge is in any way incorrect. The learned Subordinate Judge has also found that the sale deed in favour of Girish Chandra Pal was genuine and for consideration. On these findings, Girish Chandra Pal is entitled, in my opinion, to the protection of S. 27 (b), Specific Relief Act, as he is a transferee for value who has paid his money in good faith and without notice of the original contract.

[8] This finding, by itself, is sufficient to dispose of this appeal. There is, however, another aspect of the case bearing on the question of limitation which does not appear to have been considered by any of the Courts below. In both the suits the defendants raised the plea of limitation. The suits were actions in ejectment, and on the principle laid down in the Full Bench decision in *Shiva Prasad Singh* v. *Hira Singh*, 6 P. L. J. 478: (A. I. R. (8) 1921 Pat. 237) the plaintiffs had to prove their subsisting title, that is, possession within twelve years before they could succeed. The concurrent finding of the Courts below is that Shambhu Mahto came in possession in 1932. He remained in possession till 1943 when he executed the two sale-deeds, one in favour of Girish Chandra Pal in respect of plot No. 1068, and the other in favour of Sumitra in respect of plot No. 1113. Kalipada was a minor at the time when the sale-deed in favour of Shambhu was executed by Jamuna Mandalani in 1932, and attained majority in 1939. It has been found that Jamuna Mandalani purported to transfer the property to Shambhu in her own right, and not as guardian of her minor son. In other words, she transferred the property as an unauthorised person, and Shambhu's possession was without any valid title; therefore, Shambhu's possession was adverse to that of the rightful owner. There are a number of decisions which have laid down that limitation does not cease to run merely because the rightful owner is a minor at the time when limitation starts. The combined effect of Ss. 6, 7 and 8, Limitation Act, has been put very clearly in *Gajapati Narasimha Deo Garu* v. *Gajapati Krishnachandra Deo Garu*, A. I. R. (7) 1920 Mad. 793: (52 I. C. 725). Their Lordships observed at p. 797 of the Report:

> "The effect is that time runs against a minor just as against a person *sui juris*, but in the case of a minor, he will have three years more after the cessation of a disability if the period of time allowed for the suit or application expired before he attained majority. In some cases it may be that the time would not as provided in the articles expire before a minor attains majority. Then he will have that time within which to institute the suit, that is, in no case he shall have less than the time allowed by the articles but in certain cases he will have three years more after the cessation of the disability."

[9] The same view is expressed in *Kalidindi Seetaramaraju* v. *Subbraju*, A. I. R. (9) 1922 Mad. 12: (45 Mad. 361) and also in *Laloo Karikar* v. *Jagat Chandra Saha*, A. I. R. (8) 1921 Cal. 572: (62 I. C. 428). The Calcutta case related to an alienation by a Muhammadan mother who had no power as *de facto* guardian of her infant children to alienate or charge their immovable property, and it was observed that the infant, whose property was thus alienated, was entitled to institute a suit for recovery of possession within 12 years from the date of sale, or within three years from the attainment of majority, whichever might be the later date. In the case before me, Shambhu Mahto was in possession from 1932 to 1943, and in 1943 the persons who purchased from Shambhu Mahto came in possession. If Art. 142 applies, as in my opinion it does, the suits were clearly barred by time, as the plaintiffs had failed to prove their subsisting title. Learned counsel for the plaintiff-appellants has contended that Art 144, Limitation Act, would apply, and has relied on a Single Judge decision of this Court in *Kanchan Teli* v. *Moga Mahton*, A. I. R. (21) 1934 Pat 593: (152 I. C. 906), where it was observed that the question of onus must be determined upon the allegation of the plaintiff and the defendant. That was a case where the defendant alleged that the plaintiff had never been in possession. In the case before me, the allegation of the defendant was that Kalipada ceased to have possession after the sale by his mother in favour of Shambhu Mahto. I do not think that the plaintiffs-appellants are in a better position if Art 144, Limitation Act is applied. Shambhu's possession was undoubtedly hostile to the rightful owner. Shambhu purchased the property from Jamuna: that purchase gave him no title, but he came in possession in open assertion of his hostile title. He continued in such possession till 1943 and sold the lands in that year to the defendant. The defendant is, in my opinion, entitled to tack the

possession of Shambhu. Kalipada attained majority in 1939. That is the finding of the Courts below. The suits were instituted in 1945, that is, more than 12 years after limitation had begun to run, and also beyond the period of three years of attaining majority by Kalipada. It has been contended before me that the possession of the mother who was the guardian of Kalipada was not and could not be adverse to Kalipada, it is further contended that the guardian cannot by a device give possession to somebody else and make it adverse to the minor. This, however, is not a case where the guardian by a device gives possession to somebody else on behalf of the minor. This is a case where the mother purports to sell in her own right, and the finding of the Courts below is that the purchase was genuine and for consideration. My attention has been drawn to a statement in the judgment of the learned Munsif that Shambhu was related to Kalipada's father. Assuming that there was such a relation, the clear finding of the Courts below is that Shambhu came in possession asserting his own right to the property by the purchase from the mother. In such circumstances, Shambhu's possession was undoubtedly hostile to that of the rightful owner. Learned counsel for the plaintiffs-appellants has placed reliance on a decision of the Privy Council in *Ghulam Mohammad* v. *Ghulam Husain*, A. I. R. (19) 1932 P. C. 81 : (54 ALL. 93). That was, however, a case where the mother was in possession on behalf of the minors, and it was held that such possession of the mother was not adverse to the minors. It is not the mother's possession which was adverse to the minors, but the possession of Shambhu, who asserted his own title to the lands.

[10] The question has also been mooted before me if Kalipada's joining in the sale-deed in favour of Girish Chandra Pal makes any difference on the question of limitation. The sale-deed was executed in 1943 before Shambhu had perfected his title by adverse possession of 12 years. The case of Girish Chandra Pal was that Kalipada was made to join by way of abundant caution. I think there are two ways of looking at the matter. If Kalipada had sold the lands to Girish Chandra Pal and had good title to do so, Girish Chandra Pal should succeed on the strength of that sale deed. If, on the contrary, Shambhu alone conveyed the lands to Girish Chandra Pal, and Kalipada joined merely by way of abundant caution, then Girish Chandra Pal is entitled to tack Shambhu's possession to his own, and to say that the suit was barred by time. If Art. 142 applies, as I think it does, then there is no difficulty. The suit was clearly barred by time as the plaintiffs had failed to prove their subsisting title, namely, their possession, or the possession of their predecessor-in-interest, within 12 years of the suit. For these reasons, I would dismiss this appeal with costs.

[11] *S. A. 564 of 1948.* — This is an appeal by the defendants, and the principal question which has been urged before me is that of limitation. It has been contended by learned counsel for the appellants that the suit was barred by time, and the Courts below were wrong in holding otherwise. I have discussed the question of limitation in connection with the other appeal, and I need not repeat what I have already said. Kalipada was no party to the sale-deed in favour of Sumitra in respect of Plot No. 1113. There is, therefore, no such complication as in the other appeal. If Shambhu's possession was adverse to that of Kalipada, the appellants of this appeal were clearly entitled to tack the possession of Shambhu to their own possession, as they were purchasers from Shambhu. Whether Art. 142 or Art. 144, Limitation Act applies, the suit was clearly barred by time as it was not brought within 12 years, nor within three years of the attainment of majority by Kalipada. This aspect of the question of limitation does not appear to have been considered by any of the Courts below. The learned Munsif considered the question of limitation from the point of view of Art. 44, Limitation Act only, and not from the point of view of Art. 142 or Art. 144 of the said Act.

[12] For the reason given above, I hold that the suit was barred by time. This appeal is accordingly allowed, the decision of the Courts below is set aside, and the suit of the plaintiffs-respondents will now stand dismissed. The appellants will be entitled to their costs throughout.

V.B.B. *Order accordingly.*

A. I. R. (37) 1950 Patna 194 *[C. N. 44.]*

REUBEN AND NARAYAN JJ.

Ram Khelawan and others — Appellants v. *Lakshmi Prasad Singh and others — Respondents.*

A. F. A. D. No. 224 of 1947, Decided on 26th September 1949, from decision of Addl. Sub-Judge, Muzaffarpur, D/- 15th November 1946.

(a) Hindu law — Inheritance — Mithila school — Mother inheriting property after son's death — On her death property passes to son's heirs and not to husband's heirs.

The Mithila school of law as laid down in the Vivada Chintamoni does not differ in any way from the Mitakshara school of law, according to which if a mother possesses for her life the property of her deceased son, the property will go to the son's heirs after her death and not to the husband's heirs: A. I. R. (5) 1918 Nag 226, *Rel. on*; 3 W R 140 and A I R (8) 1921 P C 107, *Ref.* [Para 8]

(b) Hindu law — Rules of interpretation — Mimansa sutras — Mimansa looks to words alone for their meaning — Mimansa system is identical with judicial principles of interpretation.

The Mimansa always looks to the words and the words alone for their meaning and the Mimansa system is identical with the judicial principles of interpretation. The fundamental rule of interpretation which is applied in the case of statutes is to be applied even in interpreting these Sutras, and just as a statute is to be expounded "according to the intent of them that made it" the Sutras have also to be expounded in a like manner. [Para 7]

(c) Interpretation of Statutes — Words precise and unambiguous—Nothing further is necessary to expound them — Construction is to be made of all parts together.

If the words are precise and unambiguous and declare the intention of the writer, nothing further is necessary to expound those words in their natural and ordinary sense. It is also a cardinal principle of interpretation that construction is to be made of all the parts together and not of one part only by itself, and the true meaning of a passage is to be found not merely in the words of that passage but in comparing it with the passage preceding it and the passage following it asserting at the same time what were the circumstances with reference to which the words were used and what was the object appearing from those circumstances. [Para 7]

L. K. Jha and Prem Lall — for Appellants.

B. N. Rai, Bhagirathi Rai and Krishna Ballabh Narayan Singh — for Respondents.

Narayan J. — This is an appeal by the defendants arising out of a suit in which a declaratory decree was sought. A lady named Mt. Chandrajote Kuer, who was impleaded as defendant third-party in this action, succeeded to the estate of her son Harish Chandra as a limited owner after his death, and on 24-5-1941 she executed a *mokarrari patta* in favour of defendants second party, who are the appellants before us, with regard to certain *bakasht* lands described in Sch. 1 of the plaint. The plaintiffs as the reversionary heirs of Harish Chandra instituted this present suit for a declaration that the *patta* had been executed without any legal necessity and was not binding on the reversion.

[2] The defendants second-party resisted the plaintiffs' claim on the ground that the *patta* had been executed for legal necessity, and they further pleaded that the plaintiffs had no right to question the *patta* as they were not the next reversioners. According to the allegation of these defendants the last male owner was Urvija Singh, the husband of Chandrajote Kuer, and he has left a sister's son named Ram Padarath, who would be entitled to inherit his properties after the death of the lady. The defendants further contended that according to the Mithila School of law, which governs the parties, even if Urvija had a son Harish Chandra, Chandrajote Kuer would succeed to the estate not as the mother of Harish Chandra but as the widow of Urvija, and, as such, the estate will go to the heir of Urvija after the death of the lady.

[3] Both the Courts below have negatived the contention of the appellants that the last male owner was Urvija Singh, and they have accepted the case of the plaintiffs that Harish Chandra, the son of Urvija, who died in 1919 while he was still a minor, was the last male owner. The Courts below were of the opinion that the Mithila school of law does not differ from the Mitakshara School of law, which lays down that when a woman succeeds to the estate of her son as a limited owner the estate passes on her death to her son's heirs. The Court of first instance, however, held that the alienation was for legal necessity and hence binding on the reversion. The lower appellate Court disagreed with this finding of the Court of first instance and held that the settlement by virtue of the *patta* was not for legal necessity and that "the transaction was not fair and had not been entered into by the Musammat, who is a pardanashin lady, under any independent advice." The lower appellate Court, therefore, decreed the plaintiffs' claim.

[4] The learned Advocate-General, who appeared for the appellants before us, did not question the finding of the lower appellate Court that the *patta* was a document binding on the reversion. But he has strenuously argued that according to the Mithila School of law if a woman gets her husband's estate by inheritance after the death of her son, such estate passes on her death to her husband's heirs and not to those of her son. The authority, which the learned Advocate-General cites, is a text of Katyayana as interpreted in the Vivada Chintamani of Vachaspati Mishra. The learned Advocate-General is himself a Maithil Brahmin and a distinguished Sanskrit scholar, and his opinion on questions of Hindu law is entitled to great respect and weight. But, in this case, he has rested his entire contention on a single sentence in Vivada Chintamani, and therefore, the only question, which we have to decide, is whether that sentence carries the meaning which is being given to it by the appellants. Their Lordships of the Judicial Committee observed in *Sourendra Mohan Sinha* v. *Hari Prasad*, 5 Pat. 135 : (A. I. R. (12) 1925 P. C. 280), that the law of the Mithila School is the law of the Mitakshara except in a few matters in respect of which the law of the Mithila School has departed from the law of the Mitakshara, and the question, therefore, arises whether in the Mithila School there is any departure from the law of the Mitakshara as to the right of a woman to remain in possession of her husband's estate or her son's estate as a limited owner. A somewhat

startling proposition has been propounded in this case and it is this that in Mithila whenever a woman inherits her husband's immovable property not directly from him but mediately through her son, who had inherited it from his father, the property would go to her husband's heir and not to her son's heir after her death. This, in the opinion of the learned Advocate-General, is the view of Vachaspati Mishra as expressed in Vivada-Chintamani. Of course, Vivada Chintamani has always been regarded as paramount authority in the Mithila School of Hindu law, and if this sort of interpretation has been put by Vachaspati Mishra on the text of Katyayana we cannot go beyond it, and it would be conclusive of the point raised before us. The whole question, therefore, is whether Katyayana's text has been so interpreted by Vachaspati Mishra in Vivada-Chintamani. The sentence in Vivada-Chintamani on the basis of which it is contended that the text of Katyayana has been so interpreted by Vachaspati Mishra runs as follows:

एवं पुत्रद्वारा स्त्रीसंक्रान्तेऽपि स्थावरे ।
अत्रात्याकांक्षासत्त्वात्साक्षाद्वचनस्यचाश्रुते :।।

In some copies of the original Sanskrit Vivada-Chintamani there is the word "पत्यु:" before the word "स्थावरे", but the meaning will be the same whether there be this word or that, because the other words suggest this word by implication. Mr. Golapchandra Sarkar, Sastri, is right when he says that

> "The meaning is the same whether there be that word or not; since the other words suggest the word by necessary implication even if that word be omitted."

What is important for our purpose is that Golapchandra Sarkar, Sastri, is definite in his opinion that the legal consequence which follows from the interpretation

> "put by the Mithila commentators on the above text of Katyayana, is that, when a woman gets her husband's estate by inheritance from her son, such an estate passes on her death to her husband's heirs and not to those of her son".

The translation, which he has made of the text of Katyayana, runs as follows.

> "The husband's *daya* (heritage or gift) the wife may use according to her pleasure, when the husband is dead: but when he is living, she shall preserve it; otherwise shall pass her time in his family."
>
> "A sonless (wife) preserving unsullied the bed of her lord, and abiding by her venerable protector, shall enjoy (the husband's property) until her death, being moderate: afterwards the heirs shall take."

[5] While this is his translation of the original text of Katyayana, his translation of the commentary of Vachaspathi Mishra on this text runs as follows:

> "The husband's *daya* is husband's property: that again is (two fold) either subject of the wife's proprietary right, by reason of the default of any other taker, on his death; or subject of the wife's proprietary right, by his permission, during his life.
>
> As regards the first, it is said (by Katyayana), 'The husband's *daya*, the wife may use according to her pleasure, when the husband is dead:'
>
> This however refers to property other than immoveable.
>
> But as regards immoveable property it is said (by Katyayana), 'Shall enjoy until her death, being moderate: afterwars, the heirs shall take.' 'Being moderate', means, not expending too much: the word 'sonless' is an adjective indicative of the circumstances under which her right (of inheritance to her husband's estate) accrues.
>
> As regards the second, however, it is said (by Katyayana),—'But when he is living, she shall preserve it', the meaning of which is, when the husband is alive, she shall preserve his property.
>
> The meaning of 'otherwise &c.' is, that in case there be no property left by the husband, the widow shall pass her time in her husband's family only.
>
> Thus even when the deceased husband's property devolves on the wife, she has no independence in making gift and like alienations by reason of the similarity of expectancy (to know the nature of the wife's right in property inherited by her from her husband); otherwise the expectancy (to know) what kind of interest she has therein would but remain unsatisfied. Hence also the inconsistency of the recital of this text in the Chapter on Saudayika Stridhana, with its application (to property inherited from the husband) is removed. Because the force of expectancy is stronger than that of the context. Just as in immovable property *given* by the husband, a woman has no right to make gift and the like, by reason of this text, so also in husband's immovable property inherited by the wife. The same is the opinion of the Prakasa and the Ratnakara. So also in (husband's) immovable property, inherited by the wife through the son, for herein also there is expectancy, and there is no direct text (to the contrary). (The words within parenthesis are not in the original)."

[6] I can say with respect to the learned author that nobody can find fault with this translation of his, and that the literal translation of एवं पुत्रद्वारा स्त्रीसंक्रान्तेऽपि स्थावरे will be "so also in husband's immovable property inherited by the wife through the son." But what I am not able to understand is how the learned author interpreted this clause to mean that when the wife inherits not directly from the husband but immediately through her son, who after inheriting his father's property had died leaving his mother as his heir, the property would on the death of the wife go to her husband's heir and not to her son's heir. In Edn. 8 of Golapchandra Sarkar Sastri's Hindu Law edited by Mr. Rishindra Nath Sarkar, an advocate of the Calcutta High Court, there is an observation that according to the correct doctrine of the Mithila School, if the immovable property was the son's self-acquired property the same was to descend to the mother's heirs, and if the same was inherited from the father, then it was to descend to the son's heirs. This is hardly consistent with the interpretation which Mr. Golapchandra Sarkar, Sastri, has placed on the

Sanskrit text एवं पुत्रद्वारा स्त्रीसंक्रान्तेऽपि स्थावरे. When the attention of the learned Advocate General was drawn to this passage in Mr. Golapchandra Sarkar Sastri's Hindu Law as edited by Mr. Sarkar, the learned Advocate-General observed that for this interpretation, Mr. Golapchandra Sarkar Sastri, who died long ago, could not be responsible. Apart from the inconsistency pointed out above, the sentence, एवं पुत्रद्वारा स्त्रीसंक्रान्तेऽपि स्थावरे does not at all seem to carry the meaning which has been given to it by Mr. Golapchandra Sarkar Sastri. We cannot overlook the circumstance that the original text of Katyayana only restricts the wife's rights of disposing of the property, which she has got from her husband either by gift or inheritance. The word "*daya*," as used in the first Sloka means only "gift," but even if it was intended to mean "heritage," the intention of the text appears to be only to restrict the widow's right to dispose of the property, which she has got from her husband. The commentary of Vachaspati Mishra is certainly binding on us, but for interpreting this commentary and for understanding its real sense, we would be justified in looking to the original text of Katyayana. The highly learned commentator could not introduce irrelevant matters in his commentary, and if the first sloka refers to movable property and the second sloka refers to immovable property, as Mr. Golapchandra Sarkar Sastri, seems to think, the only proper interpretation of the second sloka would be that it restricts the right of the wife to enjoy the husband's property and does not go further. Not only the slokas of Katyayana but also the commentary of Vachaspati Mishra on these slokas deal only with the right of the wife to dispose of her husband's property, and the particular sentence in the commentary relied upon by the learned Advocate-General has been translated by Mr. Golapchandra Sarkar Sastri, as follows:

> "So also in (husband's) immoveable property, inherited by the wife through the son, for herein also there is expectancy, and there is no direct text (to the contrary)."

This sentence comes after the following two sentences :

> "(1) Just as in immoveable property *given* by the husband, a woman has no right to make gift and the like, by reason of this text, so also in husband's immoveable property *inherited* by the wife.
>
> (2) The same is the opinion of the Prakasa and the Ratnakara."

[7] Can it be urged with any show of reason that while the first sentence says that "just as a woman has no right to make gift out of the immovable property given to her by her husband or inherited by her from him," and the second sentence says that "this is the opinion of Prakasa and Ratnakara," the third sentence would refer to the question of succession and would lay down with regard to property inherited by the wife through the son the succession will be traced from the husband and not from the son. It is important to note that the word "एवं" which means "so" is the connecting link and the use of this word to my mind unmistakably goes to indicate that what the commentator meant was this that the same restriction will apply in the case of immovable property inherited by the wife through the son, or, in other words, that the position of the wife so far as the power to alienate property is concerned would be no better with regard to the property inherited by her through her son. If we bring in matters of devolution in this text that in view of the context would be wholly irrelevant and we would not be justified in reading more into the text or the commentary of Vachaspati Mishra than what it actually contains. The principle of "expectancy" is very much stressed in this text of the commentator and this principle would stand violated if we interpret the last sentence in the commentary in the manner in which Mr. Golapchandra Sarkar Sastri, has interpreted it. We cannot presume that the great commentator digressed and became irrelevant and we would be doing violence to the principle of "expectancy" if we adopt the interpretation which has been placed by Mr. Golapchandra Sarkar Sastri on the last sentence of the commentary. Anybody who is acquainted with the history of the fortunes of Hindu law would at once agree that the duty of interpreting the Hindu law was always in the hands of Brahmins who were fully conversant with that law and those learned Brahmins in order that their decisions might carry weight were bound to follow fixed priciples of interpretation deriving those principles from the highest authority on the subject, the Mimansa Sutras. The Mimansa always looks to the words and the words alone for their meaning and the Mimansa system is identical with the judicial principles of interpretation. The fundamental rule of interpretation which we apply in the case of Statutes is to be applied even in interpreting these Sutras, and just as a Statute is to be expounded "according to the intent of them that made it" the Sutras have also to be expounded in a like manner. If the words are precise and unambiguous and declare the intention of the writer, nothing further is necessary to expound those words in their natural and ordinary sense. It is also a cardinal principle of interpretation that construction is to be made of all the parts together and not of one part only by itself, and the true meaning of a passage is to be found not merely in the words of that passage but in

comparing it with the passage preceding it and the passage following it asserting at the same time what were the circumstances with reference to which the words were used and what was the object appearing from those circumstances. Judged by this standard, there is no room for the view that while the commentator was writing about the power of alienation of a Hindu widow, he all of a sudden came to discuss the question of succession and laid down that when a widow inherits property through a son, succession in the male line will be traced from the husband and not from the son who was the last male owner. Except Mr. Golapchandra Sarkar, Sastri, all others, who have written treatises on Hindu law including that distinguished jurist Sir Dinshaw Mulla, have been of the view that there is no difference between the Mithila School of Hindu law and the Mitakshara School of Hindu law so far as succession of reversioners after the death of a limited owner is concerned. Sir Comer Patheram, one of the distinguished Chief Justices of Bengal, after his retirement from India wrote a series of articles in the Law Quarterly Review, and in his very first article he says that out of the four writers who attempted to define Hindu law, namely, Gurudas Banerji J. of the Calcutta High Court, the late Dr. Trailakya Nath Mitra, Pandit Jogendra Nath Bhattacharji and Mr. Golapchandra Sarkar, Gurudas Banerji J's. authority is perhaps the highest, and he quoted Sir Gurudas Banerji's observation that the peculiar construction of the machinery for the administration of justice in former times also helped to make the Hindu law a law of conscience and right feeling, free from the interference of temporal power, and that the Hindu law is a body of rule intimately mixed up with religion. The commentators were certainly all men of conscience and right feeling, and they could not be arbitrary or whimsical in matters of interpretation. A distinguished scholar of the recent times, Dr. Sir Ganganath Jha, Kt. M. A. D. Litt; LL. D. Vidyasagara, Mahamahopadhyaya, has translated the Vivada Chintamani of Vachaspati Mishra, and his translation does not at all support the view which Mr. Golapchandra Sarkar, Sastri, has taken. The translation made by Dr. Sir Ganganath Jha runs as follows:

> "Thus, then, in regard to the immoveable property of her husband, even when it has become transferred to the wife, she does not have the right to give away or otherwise dispose of that property; that this is also meant by the texts follows from the fact that information on this point is wanted just as much as on those expressly stated. If this were not meant then the need of information in regard to the laws on this point would remain unfulfilled.
>
> This same argument also disposes of the objection that has been raised regarding the incompatibility of these texts being introduced in the context dealing with the *Saudayika* property: because the 'need of information' is always more potent than mere 'Context.' The fact of the matter is that-just as, in accordance with these texts, women have no right to give away or otherwise dispose of the *immoveable property* given to them by their husbands, so also they have no right to sell or give away the husband's *immoveable property* that has come into her possession (on his death).
>
> Such is the opinion of the *Prakasha* and the *Ratnakara* also.
>
> This same law applies also to the case where her husband's property devolved upon the woman, through the son and other heirs of her husband; because here also the said information is needed and it has no where been asserted that the said law applies only in those cases where the property has come to the woman *directly* from her husband."

I have noted all the titles which had been conferred on Dr. Ganganath Jha with a view to show his position in life and the recognition which he had received as a scholar. He was a Maithil Brahmin, who died only recently, and there is no reason for thinking that the translation which he has made is incorrect or not fit to be acted upon. He also attributes the same meaning to the passage

एवं पुत्रद्वारा स्त्रीसंक्रान्तेऽपि स्थावरे।
अत्रात्याकांक्षासत्त्वात्साक्षाद्वचनस्यचाश्रुते :॥

which with reference to the context will be the only proper meaning. His translation is clear enough to indicate that what Vachaspati Mishra meant was that the same law which applies in the case of a woman so far as her right to sell or give away her husband's immovable property is concerned, will apply to the case where her husband's property has devolved upon the woman through the son or other heirs of her husband.

[8] The question which has arisen before us arose in a case *Tortan Bai* v. *Ballabhji Ojha*, 48 I. C. 956 : (A. I. R. (5) 1918 Nag. 226) of the Nagpur Judicial Commissioner's Court, and in that case it was held that Mr. Golapchandra Sarkar, Sastri's reasoning was fallacious and that all that appears from Vivada Chintamani is that just as in respect of property inherited from the husband the widow has no power of alienation, so also in respect of property which she has inherited from the son, the son having inherited it from the father she has no power of alienation. Their Lordships further observed as follows:

> "In our opinion, the Vivada Chintamani was not referring to the devolution of the property after the woman's death, but to the restriction of the woman's power of alienation, and the learned author appears to us to read more into the Vivada Chintamani than is to be found there. He is himself adopting the principle of 'expectancy' so learnedly expounded by him."

With this view I find myself in respectful agreement. In *Panchanund Ojhab* v. *Lalshan Misser*, 3 W. R. 140, the question raised was whether landed estate which in default of other intervening heirs, has been inherited by a mother from her son, descends on the mother's death to her heirs or whether it descends to the heir of the son from whom the mother inherited it. In other words, the question raised was whether the property would become the Stridhan of the lady and would descend to her heirs on her death or whether it would go to the heirs of her son who was the last male owner. It was never argued and never contemplated that after the death of the lady the property would go not to the heirs of the son but to the heirs of the husband. The Vivada-Chintamani was referred to and nobody thought of placing, the interpretation which Mr. Golapchandra Sarkar, Sastri, has placed on the text of Vivada-Chintamani. In the case of *Sureshwar Misser* v. *Mt. Maheshrani Misrain*, 48 Cal. 100 : (A. I. R. (8) 1921 P. C. 107) also it was taken for granted that after the death of the mother the person entitled to inherit the property would be the heir of the son. Mr. De Gruyther, K. C. who argued the case for plaintiffs-appellants, who had claimed to be the nearest reversionary heirs, contended that the appellants were the nearest reversionary heirs of the last male holder of the estate who was son of the limited owner. No question was raised in this case as to right of any other person inheriting the property, except one, who was the nearest reversionary heir of the son of the limited owner. This case also is indirectly an authority in support of the view that the Mithila School of law as laid down in the Vivada-Chintamani does not differ in any way from the Mitakshara School of law, according to which if a mother possesses for her life the property of her deceased son, the property will go to the son's heir after her death. In the circumstance, I am not able to uphold the contention of the learned Advocate-General that the plaintiffs of this suit are not the reversionary heirs and that the person entitled to hold the property after the death of the limited owner would be Ram Padarath who is Urvija's sister's son.

[9] Mr. B. N. Rai for the respondents argued that according to the Hindu law of Inheritance (Amendment) Act, is Harish Chandra's sister's son, and not Urvija's sister's son, who would be entitled to inherit the property after the death of the lady. But if the text of Vivada-Chintamani could be interpreted in the manner suggested by the learned Advocate-General then certainly the property would have gone to Ram Padarath, the sister's son of Urvija.

[10] In the result, this appeal fails and is dismissed with costs.

[11] **Reuben J.** — I agree.

[12] Even if we take the final portion of the passage cited by my learned brother to include a reference to succession, I do not think it will bear the interpretation sought to be put upon it. In the earlier portion Vachaspati Misra deals with property coming to a woman from her husband. He concludes from two *slokas* of Katyayana that, so far as movable property is concerned, she is free to do with it as she pleases after his death, but as regards immovable property she 'shall enjoy until her death, being moderate: afterwards *the heirs* shall take." It is this rule, which, in the later portion of the passage, he applies to "(husband's) immovable property inherited by the wife through the son". When the widow who has inherited such property dies, it will pass to "the heirs"—I emphasise the words "the heirs". The words are not "the husband's heirs"; why should they be interpreted as if they were? The first portion concludes that the widow's interest in the property is a limited one, and when it speaks of "the heirs" taking it evidently refers to some one who is not her heir. Who is it then? It seems to me it is the heir who would take if she were not there, that is, the heir of the last owner of the property, who in this instance is her husband. Applying this rule when the property comes to her through her son, it would go on her death to the heirs of her son.

[13] The learned Advocate-General has laid some stress on the words which have been translated "(husband's) immovable property inherited through the son". They indicate, he urges, that Vachaspati Misra regarded the property as the property of the husband, and thought of the son only as the channel by which it reached the widow. In my opinion, these words are merely descriptive of the property. Property which comes to a Hindu widow from her son is divisible into two categories, property which he got from his father and property which is his self-acquisition. The latter category, according to the Mithila law as Vachaspati Misra understood it, became her stridhan and descended to her heirs, vide Golap Chandra Sarkar, Sastri's Hindu law, 4th edition P. 412, corresponding to 7th edition, P. 726, (I refer to the 4th edition as it is the last edition prepared by G. C. Sarkar, Sastri, and the 7th edition contains an amendment which is inconsistent with the rest of the text). A different rule applied to property of the first category. Hence it was necessary to distinguish it from other property coming to the mother from her son, and this was done by means of the descriptive phraseology in question. It is beyond doubt that, when the property comes to the son, it is the son who is the owner of it, and on his death it passes to his heirs. Therefore, it is difficult to hold that the learned commentator would still regard the property as the property of the father when, on the son's death, it goes to the mother. Such an

interpretation should not be accepted unless it is unavoidable and, as I have shown, a reasonable interpretation is possible which avoids this anomaly.

V.R.B. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 200 [*C. N. 45.*]

AGARWALA C. J.

Jagarnath Ram — Petitioner v. *The King.*

Criminal Revn. No. 1268 of 1949, Decided on 23rd November 1949, against order of Sessions Judge, Gaya, D/-19th August 1949.

Essential Supplies (Temporary Powers) Act (1946), S. 7 — Act extended to 1st April 1949 by resolution of Constituent Assembly — Contravention of Cl. 11 of Bihar Kerosene Oil Control Order 1948 on 25-11-1948 — Sentence under S. 7 of Act is valid — Bihar Kerosene Oil Control Order, 1948, Cl. 11.

Where the conviction and sentence under S. 7, Essential Supplies (Temporary Powers) Act, 1946, for violation of S. 11, Bihar Kerosene Oil Control Order, 1948, on 25th November 1948, was challenged on the ground that the Act had ceased to operate before the offence was committed;

Held that the period of emergency referred to in S. 1 (3) of the Act expired on 1st April 1946, and, but for the India (Central Government and Legislature Act, 1946 (9 & 10 Geo. VI, C. 39), the Act would have spent its force by the 1st of April, 1947. The Notification of the Governor-General keeping alive 9 & 10 Geo. VI, c. 39 up to the 1st April, 1948, had the effect of prolonging the operation of the Essential Supplies (Temporary Powers) Act of 1946 also to the 1st April 1948. By that time the British Parliament had ceased to have power to legislate within the territory of the Dominion of India. But by the India (Provisional Constitution) Order (XIV [14] of 1947) it was provided that for "both Houses of Parliament" there should be substituted "the Dominion Legislature" and paragraph 4-A was inserted conferring on the Constituent Assembly the powers of the Dominion Legislature. By a resolution of the Constituent Assembly published in the Gazette of India, dated 13th March, 1948, p. 310, the statute 9 & 10 Geo. VI c. 39 was extended to 1st April, 1949. Therefore, when this offence was committed on 25th November, 1948, the Essential Supplies (Temporary Powers) Act, 1946, was still in operation by reason of the resolution of the Constituent Assembly and the sentence passed thereunder was perfectly valid. [Para 2]

Rai Parasanath and Rewati Raman Sinha — for Petitioner.

Advocate-General and S. C. Chakravarty — for the Crown.

Order.— This is an application by a licensed kerosene oil dealer, who has been sentenced to pay a fine of Rs. 100/- under S. 7, Essential Supplies (Temporary Powers) Act (XXIV [24] of 1946) for violation of S. 11, Bihar Kerosene Oil Control Order, 1948. That section provides:

> " No dealer shall, unless previously authorized by the District Magistrate, withhold from sale or refuse to sell kerosene oil to any person."

The license held by the petitioner entitled him to a quota of 5 tins of kerosene oil per mensem. On 25th November 1948, he was found to be in possession of 17½ tins. The ground on which the conviction and sentence are challenged is that the Essential Supplies (Temporary Powers) Act, 1946, ceased to operate before this offence was committed. Section 1 (3) of the Act provides that the Act shall cease to have effect on the expiration of the period mentioned in S. 4 of the India (Central Government and Legislature) Act, 1946, except as respects things done or omitted to be done before the expiration thereof, and S. 6, General Clauses Act, 1897, shall apply upon the expiry of this Act as if it had been repealed by a Central Act. The period mentioned in S. 4, India (Central Government and Legislature) Act, 1946, (9 & 10 Geo. VI, C. 39) is one year beginning with the date on which the proclamation of emergency in force at the passing of this Act ceases to operate, or if the Governor-General, by a published notification so directs, the period of two years beginning with that date. There is a proviso which enables the period to be extended for one year at a time by a resolution of "both Houses of Parliament", subject to a maximum of five years. By Notification No. 7-WL (1) 47, published in the Gazette of India of 8th March 1947, p. 296, the Governor-General, in exercise of powers conferred on him by S. 4, extended this Act to the 1st April 1948.

[2] The period of emergency referred to expired on 1st April 1946, and, but for the Statute 9 & 10 Geo. VI, C. 39, the Act would have spent its force by 1st April 1947. The Notification of the Governor-General keeping alive 9 & 10 Geo. VI, C. 39 up to 1st April 1948, had the effect of prolonging the operation of the Essential Supplies (Temporary Powers) Act of 1946 also to 1st April 1948. By that time the British Parliament had ceased to have power to legislate within the territory of the Dominion of India, so that it was impossible, by a resolution of both Houses of Parliament, to extend the operation of any existing statute in India. But by India (Provisional Constitutional) Order (XIV [14] of 1947) it was provided by S. 4. of Part II of the Schedule that for "both Houses of Parliament" there should be substituted "The Dominion Legislature" and para. 4-A was inserted conferring on the Constituent Assembly the powers of the Dominion Legislature. By a resolution of the Constituent Assembly published in the Gazette of India dated 13th March 1948, p. 310, the India (Central Government and Legislature) Act of 1946 was extended to 1st April 1949. By a further resolution of the Constituent Assembly published in the Gazette of India (Extraordinary) dated 28th March, 1949, its life has been further extended to 1st April 1950. Therefore, when this offence was

committed on 25th April (November?) 1948, the Essential Supplies (Temporary Powers) Act, 1946, was still in operation by reason of the resolution of the Constituent Assembly published in the Gazette of India on 13th March 1948.

[3] Section 7 of the Essential Supplies (Temporary Powers) Act 1946, penalises the violation of an order made under S. 3, which confers upon the Central Government the power to make rules and orders for maintaining or increasing supplies of any essential commodities or for securing their equitable distribution and availability at fair prices. By S. 4 of the Act the Central Government is empowered by a notified order to direct that its powers under S. 3 shall be exercisable by a Provincial Government or such officer or authority subordinate to a Provincial Government as may be specified in the direction. By Notification No. P 110 (1), dated 12th December 1946, published in the Gazette of India on 21st December 1946, p. 1889, the Central Government delegated its powers in relation to kerosene oil to the Provincial Government. The latter Government, by Notification No. 18026-K. O.-22/48 P. C., dated 18th October 1948, published in the Bihar Gazette (Extraordinary) of 20th October, 1948, issued the Bihar Kerosene Oil Control Order of 1948, S. 11 of which has been set out above. It has not been contended that the acts in respect of which the petitioner has been convicted do not constitute a contravention of S. 11 of this Order.

[4] It has been contended, however, that the India (Provisional Constitution) Order (XIV [14] of 1947) by which the words "Dominion Legislature" were substituted for the words "both Houses of Parliament" in the Statute (9 & 10 Geo. VI, C. 39) is ultra vires. But no authority or satisfactory reason was given in support of this contention.

[5] The application is rejected.

D.R.R. *Application dismissed.*

A. I. R. (37) 1950 Patna 201 *[C. N. 46.]*

DAS J.

Thakan Sahu and others — *Appellants* v. *Rampartap Mahto and others* — *Respondents.*

A. F. A. D. No. 1741 of 1948, D/- 5th September 1949, from decision of A. Sub-J., Darbhanga, D/- 22nd June 1948.

(a) T. P. Act (1882), S. 77 — Mortgagee to be put in possession or entitled to 10 per cent. per month interest—Mortgagee not put in possession—Mortgagor paying interest — After some period mortgagee put in possession of part — Suit for redemption —Mortgagee alleging fresh contract and claiming 10 per cent. interest on amount proportionate to portion not put in his possession — Fresh contract not proved— Mortgagee held entitled to fall back on original contract.

The contract between the parties was that if the mortgagor would remain in possession of the *bharna* property, he would pay interest at the rate of 10 per cent. per month in respect of the *bharna* money to the mortgagee. The mortgagor remained in possession till 1338 Fasli and paid interest to the mortgagee. Thereafter. the mortgagee was put in possession, not of the entire *bharna* property but a part. The mortgagee set up a plea in a suit for redemption that there was a fresh contract between the parties that the mortgagor would pay interest at 10 per cent. per month on Rs. 766 being the proportionate consideration of the *bharna* in respect of the portion of which mortgagee was not put in possession. The fresh contract, however, was not proved:

Held, that the mortgagee was entitled to fall back on the stipulation in the original mortgage bond. As per stipulations in the original mortgage bond, the mortgagee was entitled to claim interest on the proportionate amount of the *bharna* consideration, if the claim for interest on the original contract was not barred by time. [Para 2]

Annotation: ('45-Com.) T. P. Act, S. 77 N. 1.

(b) Debt laws — Bihar Money-lenders Act (III [3] of 1938), S. 7 — Does not apply to suit by debtor — Redemption suit by mortgagor — S. 7 has no application. [Para 3]

Rajkishore Prasad — for Appellants.

Janak Kishore — for Respondents.

Judgment. — This is a second appeal by the plaintiffs and arises out of a suit for redemption. The point raised in this appeal is a very short one, and would appear from the facts stated below. The ancestor of the appellants had given in *bharna* by a bond dated 28th August 1928, 7 bighas 9 kathas and odd of *kast* land to the ancestor of the defendants for a consideration of Rs. 2100. The contract between the parties was that if the mortgagor would remain in possession of the *bharna* property, he would pay interest at the rate of 10 per cent. per month in respect of the *bharna* money to the mortgagee. The mortgagor remained in possession till 1338 Fasli and paid interest to the mortgagee. Thereafter, the mortgagee was put in possession, not of the entire 7 bighas 9 kathas and odd, but of 5 bighas and odd only, that is, excluding 2 bighas 14 kathas and odd. The defendants-respondents set up a plea with regard to this deficiency of 2 bighas and odd that there was a fresh contract between the parties that the mortgagor would pay interest at 10 per cent. per month on Rs. 766, being the proportionate consideration of the *bharna* in respect of 2 bighas 14 kathas and 6 dhurs. The learned Munsif accepted the case of the defendants, and held that the appellants were entitled to redeem on payment of a further sum of Rs. 938/12/- which was the interest on the proportionate amount of consideration for 2 bighas and odd. The learned Subordinate Judge held that the defendants had failed to establish a subsequent agreement between the parties to pay interest in respect of

Rs. 766 the proportionate amount of the *bharna* consideration for the deficiency of the area of the mortgaged property. The learned Subordinate Judge, however, held that the defendants-respondents were entitled to interest by way of damages. He applied the Bihar Money-lenders Act, and held that the interest which the defendants were entitled to claim could not exceed the amount of Rs. 766. He, therefore, passed a decree for redemption in favour of the appellants on their depositing the sum of Rs. 766 and not Rs. 938/12/- as found by the learned Munsif.

[2] In the appeal before me, learned counsel for the appellants has contended that in view of the finding of the learned Subordinate Judge that there was no subsequent agreement between the parties to pay interest on Rs. 766 the learned Subordinate Judge was wrong in his view that the defendants-respondents could claim interest by way of damages. In my opinion, no question of interest by way of damages arises in this case. It is true that the defendants respondents did plead a subsequent agreement between the parties to pay interest on Rs. 766 the proportionate *bharna* money with regard to the deficit area of 2 bighas and odd. The learned Subordinate Judge held that the defendants-respondents had failed to prove such a subsequent agreement. Accepting this finding of the learned Subordinate Judge to be correct, the defendants-respondents were yet entitled to fall back on the stipulations in the original mortgage bond of 1928. The contract embodied in the original mortgage bond of 1928 is a contract admitted by both parties and is binding on them. In the original mortgage bond of 1928 also, there was a stipulation to the effect that the mortgagor would pay 10 per cent. per month as interest on the *bharna* money if the mortgagee was not given possession. The mortgagee was not given possession of 2 bighas and odd. Therefore, as per stipulations in the original mortgage bond, the defendants-respondents were entitled to claim interest on the proportionate amount of the *bharna* consideration. Therefore, the defendants-respondents were entitled to fall back on the contract embodied in the original mortgage bond, and on that contract they were entitled to claim the stipulated interest on the amount of the consideration money proportionate to the area of which they were not given possession. The learned Subordinate Judge was right in his view that the defendants-respondents' claim for interest on the original contract was not barred by time.

[3] As to the amount which the defendants-respondents are entitled to claim, the Courts below have differed, and the difference is due to the application of the Bihar Money-lenders Act by the learned Subordinate Judge. On behalf of the defendants-respondents a cross-objection has been filed, and it has been contended that S. 7, Bihar Money-lenders Act, presumably the section which the learned Subordinate Judge had in mind, does not apply. Section 7 states, *inter alia*, that no Court shall, in any suit brought by a money-lender before or after the commencement of the Act in respect of a loan advanced before or after the commencement of the Act or in any appeal or proceedings in revision arising out of such suit, pass a decree for an amount of interest for the period preceding the institution of the suit, which, together with any amount already realised as interest through the Court or otherwise, is greater than the amount of loan advanced. Now, the suit out of which this appeal has arisen, was not a suit brought by a a money-lender. It was a suit for redemption brought by the debtor; therefore, S. 7, Money-lenders Act, did not, in express terms, apply. In my opinion, the learned Subordinate Judge was wrong in applying S. 7, Bihar Money-lenders Act, to a suit by a debtor.

[4] For the reasons given above, the appeal is dismissed, and the cross-objection is allowed with costs. With regard to the amount which the appellants have to pay in order to redeem the property, the decision of the learned Subordinate Judge is set aside and that of the learned Munsif is restored. The appellants will have six months' time to deposit the amount with effect from to day.

R.G.D. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 202 *[C. N. 47.]*

SHEARER J.

Darbari Kumar and others—Appellants v. *Khatir Mian and others—Respondents.*

A. F. A. D. No. 1816 of 1948, D/- 28-11-1949, from decision of A. Sub. J., Purulia, D/- 21-6-1948.

(a) Easements Act (1882), Ss. 7, 32 and 35—Right of the owner of upper level land to drain water on land of lower level—It must not, however, interfere with agricultural operations on land of lower level —Dominant owner must show that erection of bandh had interfered with his right.

The owner of land on a lower level is under an obligation to receive surface drainage water from land on a higher level. At the same time, the owner of land on a lower level is entitled to conduct ordinary agricultural operation on it. Where in order to render land on a lower level suitable for the cultivation of paddy it is necessary to enclose it with *bandhs* or *ails*, and there does not appear to be any evidence that the *bandh* which the owners put up is unnecessarily high, or otherwise is a *bandh* of a kind which they are not entitled to construct, in order to succeed in obtaining an injunction against the owners of the land on lower level the owners of the upper level land, who claim right to dig earth for making earthenware, must show that the erection of the *bandh* had interfered with their right. [Para 2]

Annotation : ('46-Man.) Easements Act, S. 7 N. 7 ; S. 32 N. 1 ; S. 35 N. 1.

(b) Easements Act (1882), S. 4—Profit a prendre —Right to dig earth—It is not easement but profit a prendre in gross—It falls within extended meaning of easement in Limitation Act, S. 2 (5) and can be acquired by prescription — Limitation Act (1908), Ss. 2 (5), 26.

A right to take earth from the land of another person is not an easement but a *profit a prendre in gross.* Nevertheless, it falls within the extended meaning given to the word "easement" in the Limitation Act, and a right of this kind can, in consequence, be acquired by prescription. [Para 2]

Annotation: ('46-Man.) Easements Act, S. 4 N. 2.
('42-Com.) Lim. Act, S. 2 (5) N. 6 and 9 ; S. 26 N. 3.

S. K. Sarkar — for Appellants.
Khaleel Ahmad — for Respondents.

Judgment.—The appellants, who are certain *kumhars*, instituted the suit out of which this appeal arises on behalf of themselves and the other *kumhars* of their village, asking for a declaration that they had a right to take earth for the purpose of making earthenware utensils from a tract of land some 5 or 6 bighas in area, which, in the record-of-rights, was recorded as the *gairmazrua* land of the landlords.

[2] A right to take earth from the land of another person is not an easement but a *profit a prendre in gross*. Nevertheless, it falls within the extended meaning given to the word "easement" in the Limitation Act, and a right of this kind can, in consequence, be acquired by prescription. One of the grounds on which the Courts below dismissed the suit was that the plaintiffs had failed to show that they had been taking earth as of right for a period of 20 years. Mr. S. K. Sarkar for the appellants, points out that the two cosharer landlords to whom the land in question belongs were impleaded in the suit as defendants and that one of them unequivocally admitted that the plaintiffs had the right which they assert. That being so, Mr. Sarkar said, although the other *pro forma* defendant may be entitled to stop the plaintiffs from taking earth, if and when there is a partition and this land is allotted to him, no one else, including the other persons who were impleaded in the suit as defendants, is entitled to do so. This argument is, in my opinion, well-grounded. The other defendants have recently reclaimed a portion of the land in suit, and in order to enable them to grow paddy in the land reclaimed have put up an embankment or *bandh*. The plantiffs asserted that, in consequence of the erection of this *bandh* surface drainage water accumulated on the rest of the land in suit and made it impossible for them throughout the greater part of the year to obtain earth suitable for the purpose of their trade and asked for an injunction requiring these defendants to demolish the *bandh*. Mr. Sarkar for the appellants, is, of course, correct in saying that the owner of land on a lower level is under an obligation to receive surface drainage water from land on a higher level. At the same time, the owner of land on a lower level is entitled to conduct ordinary agricultural operation on it. In order to render land suitable for the cultivation of paddy it is necessary to enclose it with *bandhs* or *ails*, and there does not appear to be any evidence that the *bandh* which the contesting defendants have put up is unnecessarily high, or otherwise is a *bandh* of a kind which they are not entitled to construct. Moreover, it has to be remembered that the plaintiffs are not the owners of the *gairmazrua* land. In order to succeed, what they had to show was that the contesting defendants by erecting this *bandh* had interfered with their right to take earth. Now, although water may accumulate to a greater extent than it did prior to the erection of this *bandh*, it seems to me quite impossible to say that in consequence of the erection of the *bandh*, the plaintiffs have, in any way, been prevented from exercising their right to take earth. What is really complained of, is that, prior to the reclamation done by the contesting defendants, the plaintiffs had been taking earth from a number of more or less deep pits in the land, and that water now accumulated in these pits to a much greater extent than it did hitherto. Apparently, earth taken from the surface of the land is not suitable for making earthenware utensils, and has to be obtained from some distance below the surface, and, therefore, most conveniently from the pits which the plaintiffs and their castemen have excavated. The right of the plaintiffs is not, however, a right to take earth from these particular pits; and if they must take earth from them and cannot obtain it elsewhere, they must prevent an excessive quantity of water getting into the pits in the same way as, for instance, the owner of a coal mine must either prevent water getting into the mine or take steps to pump it out. As I have already said, the contesting defendants would not appear to have exceeded their rights in putting up a *bandh* in order to enable them to grow paddy on the land which they have reclaimed. It does not appear that the plaintiffs and their castemen had excavated any pits in the land which has been reclaimed by the defendants, and, in fact, it is scarcely possible that they can have done so, as otherwise the land would have been rendered unfit for purposes of cultivation. Although, therefore, the grounds on

which the lower appellate Court dismissed the suit are, I think, open to criticism, the decision was, in my opinion, correct, and this appeal will accordingly be dismissed with costs.

R.G.D. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 204 [*C. N. 48.*]

IMAM AND JAMUAR J.

Hira Lal Sao — Petitioner v. *Ramrekha Sao — Opposite Party.*

Criminal Revn. No. 766 of 1949, D/- 10-11-1949.

(a) Houses and Rents – Bihar Buildings (Lease, Rent and Eviction) Control Act (III [3] of 1947), S. 11 (1). (2) and (3) — Distinction between sub-sections pointed — Controller need not fix specific period under sub-s. (2) for tenant to deliver possession to landlord.

There is a distinction between the provisions of sub-s. (3) and sub-ss. (1) and (2) of S. 11 of the Act, in that whereas an order passed under sub-s. (3) authorises the Controller to direct a specific period within which the tenant should put the landlord in possession, sub-s. (2) does not specifically direct the Controller to fix any period during which the tenant has to put the landlord in possession. [Para 3]

(b) Houses and Rents—Bihar Buildings (Lease, Rent and Eviction) Control Act (III [3] of 1947), Ss. 11 (2), 18 and 20—Order under S. 11 (2) directing tenant to put landlord in possession within specified time—Appeal by tenant — Tenant need not put landlord in possession within time when appeal is pending — Appeal dismissed — Landlord not put in possession—Application for proceedings to be taken against tenant for offence under S. 20 — Summons on tenant issued — Tenant, however, instituting suit in civil Court, before issue of summons, for declaration that order of Controller was without jurisdiction and obtaining ad interim injunction—Injunction granted – Controller apprised of suit and order shown — Controller must recall summons and await decision of suit — He cannot proceed, on technical ground that no stay has been ordered.

When a right to appeal is given under S. 18 and the aggrieved party (the tenant) has appealed against an order under S. 11 (2) to the Commissioner of the Division to whom appeasl lie under the section, then obviously the tenant is not bound to put the landlord into possession even where the order has fixed a definite period for the tenant to put the landlord in possession, as he is questioning the order itself. Where after the appeal had been disposed of by the Commissioner, the landlord had moved the Sub-divisional Magistrate for proceedings to be taken against the petitioner, for the commission of an offence punishable under S. 20 of the Act, but before the summons had been issued the tenant had filed a suit before the Munsif for a declaration that the order of the Controller was without jurisdiction and not binding upon him and had obtained an ad interim injunction, the Controller ought to recall the summons particularly when he had been informed of the ad interim injunction and shown the order of the Munsif. It would be highly technical for the Controller to say that the proceedings had not been stayed by the civil Court. [Para 3]

It is only when the suit of the tenant is finally disposed of by the civil Court in all stages, that any circumstances arising therefrom which may entitle the landlord to ask the Controller for the issue of a fresh summons upon the tenant, may be brought to the notice of the Controller having jurisdiction who would take the necessary steps according to law. [Para 3]

B. C. Ghosh and D. K. Sinha—for Petitioner.

S. R. Ghoshal— for Opposite Party.

Imam J. — The petitioner is the tenant of a gola, and the opposite party Ramrekha Sao is said to be the landlord of that gola. The petitioner has moved this Court for the quashing of the proceedings against him for an alleged contravention of an order passed by the Controller under the provisions of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 (Bihar Act (III [3] of 1947). The opposite party moved the Sub divisional Magistrate of Dinapore on 5th December 1947, for the eviction of the petitioner from the gola, and the Sub-divisional Magistrate issued a notice to the petitioner under the provisions of the aforesaid Act. It was argued before the Sub-divisional Magistrate that no rent was due from the petitioner to the landlord; on the contrary, if the accounts were examined, then after adjustment of the amount due under the rent payable by the petitioner, there would be a sum due also from the landlord on account of the amount spent by the petitioner in the repairs of the gola. The Sub-divisional Magistrate spent the matter to another Magistrate, Mr Tripathy, for enquiry and report as to this. In the report which Mr. Tripathy submitted on 3rd August 1948, it is said that the landlord did not dispute the amount spent on repairs, but challenged the right of the tenant to make the repairs. On 24th August 1948, the Sub-divisional Magistrate after hearing the parties and considering the report of Mr. Tripathy held that the expenditure made by the petitioner was unauthorised. He directed the petitioner to put the landlord Ramrekha Sao in possession of the gola by 25th November 1948. Against this order, the petitioner appealed to the Commissioner of the Division under S. 18 of the Act, and the Commissioner affirmed the decision of the Sub-divisional Magistrate by his order dated 17th January 1949. The landlord, Ramrekha Sao, moved a petition before the Sub-divisional Magistrate praying that the petitioner should be proceeded against for contravention of his order dated 24th August 1948. On 16th February 1949, the Sub divisional Magistrate ordered that summons should issue against the petitioner for an offence punishable under S. 20 of the Act. On 11th March 1949, the petitioner filed a suit before the Munsif at Patna for a declaration that the order of the Sub-divisional Magistrate dated 24th August 1948, was without jurisdiction and not binding upon him and praying for a permanent injunction against the opposite party restraining him from carrying into effect the order of the Sub-divisional Magistrate dated 24th August 1948, and evicting the petitioner. There was also a prayer for ad interim injunction. On 21st March 1949, the Munsif issued notice on the opposite party to show cause why this prayer should not be allowed, fixing 2nd April 1949 for hearing. The Sub-divisional Magistrate, however, on 21st March 1949, issued summons against the petitioner for an offence punishable under S. 20 (2) of the Act. On 5th April 1949, the petitioner appeared before the Sub-divisional Magistrate in answer to the summons, but the case was adjourned to 29th April 1949. On 23rd April 1949, the Munsif passed an ad interim injunction restraining the opposite party from evicting the petitioner. On 29th April 1949, the petitioner moved the Sub-divisional Magistrate and produced before him a certified copy of the Munsif's order. No action, however, was taken by the Sub-divisional Magistrate on this date. On 6th May 1949, the Sub-divisional Magistrate was of the opinion that as the proceedings before him had not been stayed by a civil Court, the case against the petitioner should continue. The Munsif actually thereafter decreed the suit of the petitioner, and I am informed by the learned advocate for the opposite party Ramrekha Sao that an appeal is pending before the District Judge against that decision. It is in these circumstances that the petitioner prays that the present proceedings against him may be quashed.

[2] Mr. Ghoshal for the opposite party Ramrekha Sao strongly contended that in the eye of the law an offence had been committed by the petitioner and there was no ground for the quashing of the proceedings. The utmost that could possibly be done in the circumstances of the present case was to stay the proceedings until the disposal of the appeal against the Munsif's decision, which was pending before the District Judge. I must say in fairness to Mr. Ghoshal that this latter submission of his was made with the greatest reluctance.

[3] I am inclined to take the view that in the present circumstances the summons which was issued upon the petitioner was premature, and the proceedings should be quashed, subject of course to the right of the opposite party Ramrekha Sao to take such steps as he thinks he is entitled to in law when the appeal before the District Judge is disposed of and the proceedings before the civil Court are finally concluded. As I read S. 11 of the Act, sub-s. (1) is a general protective clause by which a tenant is protected from eviction except in certain circumstances. Sub-section (2) permits a landlord to evict his tenant in the circumstances stated in sub s. (1), if he applies to the Controller for a direction in that behalf. The Controller may, after hearing the parties and if satisfied that the tenant is liable to be evicted under the provisions of sub-s. (1), make an order directing the tenant to put the landlord in possession of the holding. Sub-s. (3) permits a landlord to apply to the Controller for an order directing the tenant to put the landlord in possession of the building, if he requires it reasonably and in good faith for his own occupation or for the occupation of any person for whose benefit the building is held by him, and cl. (b) of this sub-section authorises the Controller, if satisfied that the claim of the landlord is *bona fide*, to direct the tenant to put the landlord in possession of the building on such date as may be specified by him in his order. It will thus be seen that the provisions of sub-s. (3) of S. 11 refer to circumstances quite distinct from those mentioned in sub-ss. (1) and (2) of the section. Sub-s. (4) of S. 11 will, in my opinion, have some relevancy for consideration in the present case. It provides that

> "Where a landlord who has obtained possession of a building in pursuance of an order under sub-s. (3) does not himself occupy it within fifteen days of the date of obtaining possession, or having occupied it re-lets it within two months of the said date to any person other than the original tenant, the original tenant who has been evicted may, within three months of the said date, apply to the Controller for an order directing that he shall be restored to possession of the building and the Controller shall make an order accordingly."

The reason why I have referred to these provisions is to emphasise the clear distinction between the provisions of sub-s. (3) and sub-ss. (1) and (2) of S. 11 of the Act. It seems to me perfectly clear on the provisions of S. 11 that whereas an order passed under sub-s. (3) authorises the Controller to direct a specific period within which the tenant should put the landlord in possession, sub-s. (2) does not specifically direct the Controller to fix any period during which the tenant has to put the landlord in possession. Section 18 of the Act provides for appeals against orders passed by the Controller. It seems to me that when the right to appeal is given, and the aggrieved party has appealed to the Commissioner of the Division to whom appeals lie under the section, then obviously the tenant is not bound to put the landlord into possession, as he is questioning the order itself. In the present case, the landlord had asked that the petitioner should vacate the gola on the ground of non-payment of rent, that is to say in the circumstances stated in sub-ss. (1) and (2) of S. 11 of the Act. The Sub-Divisional Magistrate would not have acted illegally if he had not fixed any definite period for the tenant to put the landlord into possession by his order which could only be made under sub-s. (2) of S. 11. After the appeal had been disposed of by the Commissioner, there is no doubt that the landlord had moved the Sub-Divisional Magistrate for proceedings to be taken against the petitioner for the commission of an offence punishable under S. 20 of the Act. Summons, however, had not been issued till 21st March 1949. In the meantime, on 11th March 1949, the petitioner had filed a suit before the Munsif of Patna for a declaration that the order of the Sub-Divisional Magistrate was without jurisdiction and not binding upon him. There was also a prayer for ad interim injunction. I think that in these circumstances the Sub-Divisional Magistrate ought to have recalled the summons particularly when he had been informed on 29th April 1949, and shown the order of the Munsif. It was highly technical for the Sub-Divisional Magistrate to have said that the proceedings had not been stayed by the civil Court. In my opinion, in the circumstances of the present case, the present proceedings must be quashed. When the suit of the petitioner has been finally disposed of by the civil Court in all stages, any circumstances arising therefrom which may entitle the opposite party, the landlord, to ask the Sub-Divisional Magistrate for the issue of a fresh summons upon the petitioner may be brought to the notice of the Magistrate having jurisdiction, who, no doubt, will take the necessary steps according to law.

[4] I have been referring to the Sub-Divisional Magistrate in this case as the Sub-Divisional Magistrate, but it appears that he is the Controller under the Act under a notification of the Provincial Government.

[5] The application is accordingly allowed, and the rule is made absolute.

Jamuar J.— I agree.

R.G.D. *Rule made absolute.*

A. I. R. (37) 1950 Patna 206 [*C. N. 49.*]

SINHA AND REUBEN JJ.

Batuk Prasad Bhagat and another—Appellants v. *Rudra Das Chakravarty and others—Respondents.*

A. F. O. D. Nos. 56 and 93 of 1946, Decided on 26th October 1949, from decision of Sub-Judge, Hazaribagh, D/- 22nd December 1945.

(a) Limitation Act (1908), S. 8—Three years must be counted from date of cessation of minority and not date of attainment of majority — Date from which period has to be reckoned has to be excluded —Limitation Act (1908), Ss. 6 and 12.

The three-year period mentioned in S. 8 must be counted, not from the date of attainment of majority, but from the date of the cessation of minority. Where the cessation of minority occurred on 3rd May 1940, the three-year period began to run on the 4th May. Under S. 12, Limitation Act in computing limitation, "the day from which such period is to be reckoned shall be excluded." This would exclude the 3rd May. Provision of S. 9, General Clauses Act also is equivalent to S. 12, Limitation Act. Under the provisions of S. 8 the 5th May would be too late for the filing of the suit. [Para 4]

Annotation : ('42-Com.) Limitation Act, S. 6 N. 12; S. 8 N. 4; S. 12 N. 3.

(b) Limitation Act (1908), Art. 142 — Suit by mortgagee upon simple mortgage — Plaintiff in whom equity of redemption entirely vested not party to suit—Decree for sale—Auction purchaser enters upon property as trespasser—Suit for possession is governed by Art. 142 — Section 60, T. P. Act read with Art. 148 has no application — Section 60 requires that possession should be the possession of mortgagee as such — In simple mortgage, possession obtained by mortgagee or auction purchaser, in pursuance of sale is not that of mortgagee—Limitation Act (1908), Art. 148 — T. P. Act (1882), S. 60.

An auction-purchaser at the sale held in pursuance of a mortgage decree for sale obtained in a suit upon a simple mortgage, in which the plaintiff in whom the equity of redemption was entirely vested was not a party, acquires no interest, so that his entry on the property becomes the entry of a trespasser. [Para 6]

A suit by the plaintiff against the auction purchaser therefore, is governed by Art. 142, Limitation Act. Plaintiff is not entitled under S. 60, T. P. Act read with Art. 148, Limitation Act to ask for delivery of possession. This remedy dependson the existence of relationship of mortgagor and mortgagee. This relationship is dissolved as soon as the period limited for a suit to recover possession as from a trespasser expires. Apart from this, S. 60 and the lengthy period of limitation provided by Art. 148 relate to a suit for recovery of possession from a mortgagee as such. A simple mortgagee, who enters into possession by way of purchase of the equity of redemption, cannot be said to be in possession as a mortgagee. Thus, the possession of the auction purchaser is not the possession of the mortgagee: A.I.R. (4) 1917 Nag. 33, *Dissent.*; *Case law considered.* [Para 7]

Annotation : ('42-Com.) Limitation Act, Arts, 142, 144 N. 29; Art. 148 N. 6; ('45-Com.) T. P. Act, S. 60 N. 13.

(c) Civil P. C. (1908), O. 6, R. 2; O. 7, R. 1—Plaintiff in suit for possession alleging dispossession—He must establish that he was in possession within period limited by Art. 142, Limitation Act — Defendant need not plead adverse possession. [Para 9]

Annotation : ('44-Com.) Civil P. C. O. 6, R. 2; N. 9; O. 7, R, 1 N. 6.

(d) Civil P. C. (1908), O. 22, R. 4 — Final decree obtained in suit upon simple mortgage, after the death of the mortgagor defendant, without his legal representative being brought on record, is a nullity so far as the legal representative is concerned. *(Obiter)*. A.I.R. (6) 1919 Pat. 430, *Rel. on.* [Para 11]

Annotation : ('44-Com.) Civil P.C., O. 22 R. 4 N. 19.

Girijanand Prasad (in No. 56) and L. M. Ghosh and S. C. Mazumdar (in No. 93)—for Appellants.

L. M. Ghosh, S. C. Mazumdar, Gouri Shankar Prasad and Ramanugrah Narayan Singh (in No. 56) and Rajani Kant Sinha (in No. 93)
—for Respondents.

Reuben J.—These two appeals are directed against a decision of the Subordinate Judge at Hazaribagh dated 22nd December 1945, decreeing in part a suit impugning the validity of three mortgage decrees and the sales held in execution thereof.

[2] Three simple mortgage bonds were executed on 10th July 1910, each hypothecating a one-third *milkiat* share in villages Dania, Lalpania and Khakhanda in the jurisdiction of Police Station Gomia to secure a sum of Rs. 2,200. The mortgagors sold their entire interest in these villages to the late Kalachand Chakravarty, father of the plaintiff, by a sale-deed dated 23rd March 1914. The mortgagors (mortgagees) sued on their bonds and obtained decrees for sale in Mortgage Suits No. 123 of 1917, 48 of 1918 and 49 of 1919. The property hypothecated was sold in execution of these decrees on 3rd February 1920, 4th February 1921 and 4th July 1921, respectively. In each case, the purchasers were the mortgagees decred-holders who subsequently transferred their rights under the purchase to Ram Ratan Bhagat, who was himself a joint decree-holder. Defendant 2 is the heir of Ram Ratan Bhagat, and his possession over the property is admitted. The plaintiff sued for a declaration of the nullity of the mortgage decrees and the sales thereunder and for recovery of the property. The validity of the decree and sale in Mortgage Suit No. 123 is challenged on the ground that the final decree was passed and the execution was levied against Kalachand after his death, in Mortgage Suit No. 48 on the ground that the plaintiff was not impleaded either in the suit or the execution and in Mortgage Suit No. 49 on the ground that the plaintiff, then a minor, was not properly represented and, in the alternative, that there was gross negligence on the part of his guardian *ad litem*. In addition, there was a prayer for a decree for redemption of the simple mortgages.

[3] The Subordinate Judge decreed the suit in respect of Mortgage Suit No. 123 of 1917 accepting as established the allegations of the plaintiff. He has held that the plaintiff was properly represented in the other two suits, and has refused relief in respect thereof. Hence, the present appeals. Defendant 2 is the appellant in Appeal No. 56 and the plaintiff in Appeal No. 93.

[4] The first hurdle in the way of the plaintiff is that of limitation. He was a minor when the sales in question took place, and it is admitted that by the time he attained his majority on 4th May 1940, the period of limitation for the filing of a suit for recovery of possession had expired. Under S. 6 read with S. 8, Limitation Act, the period of limitation for the filing of a suit was extended by three years. This suit was filed on 5th May 1943. In holding that limitation is saved, the learned Subordinate Judge reckoned this period of three years from the date of attainment of majority, and excluded this date itself under the provisions of S. 12 of the Act. It appears to me that there are two mistakes in his reckoning. Under S. 6, sub-s. (1), a person labouring under a disability is entitled to institute a suit within the same period "after the disability has ceased" as would otherwise have been allowed under Sch. 1 to the Act. Under S. 8 the extension of time given by S. 6 shall not extend for more than three years "from the cessation of the disability." The three year period, therefore, must be counted, not from the date of attainment of majority, but from the date of the cessation of minority. In this case the cessation of minority occurred on 3rd May 1940, and the three-year period began to run on 4th May. Section 12 provides that, in computing limitation, "the day from which such period is to be reckoned shall be excluded." This would exclude 3rd May. According to the Subordinate Judge, 4th May was to be excluded. Even so, the period of three years would commence on 5th May 1940, and would expire at the last moment of 4th May 1943. Under the provisions of S. 8, therefore, 5th May would be too late for the filing of the suit. Mr. Ghosh has appealed to S. 9, General Clauses Act of 1897, which provides that where time is to be reckoned "from" a particular date that date shall be excluded. This is a provision equivalent to S. 12, Limitation Act, and, as I have shown, does not help the plaintiff.

[5] Mr. Ghosh meets this difficulty by arguing that the suit was not merely a suit for recovery of possession, but also a suit for redemption, limitation for which is sixty years under Art. 148 of the Schedule to the Limitation Act and has not yet expired. He says that, when his client was dispossessed, there were two remedies open to him: either, firstly, he could bring a suit for recovery of possession, or, secondly, he could sue to redeem the mortgagee. It appears to me that the moment it is conceded that a suit for recovery of possession lay the plaintiff comes within the mischief of S. 28, Limitation Act. Under that section, at the determination of the period limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished. The period in this case expired on 3rd May 1943; after that date, the plaintiff has no interest in the property and is not entitled to redeem.

[6] Following another course of reasoning Mr. Ghosh has contended that the possession of the auction-purchaser in the mortgage sales was not illegal, that a purchaser in execution of a mortgage decree obtained in the absence of a necessary party acquires thereby the position of a mortgagee, and takes subject to the right of redemption of the party who was not impleaded in the suit. He cites in particular *Jugdeo Singh* v. *Habibulla*, 12 C. W. N. 107 : (6 C. L. J. 612) and *Hemanta Kumar* v. *Jitendra Nath*, A.I.R.

(32) 1945 Cal. 135 : (219 I. C. 59), as authorities that, where such a purchaser does not get possession, it is open to him to sue for possession subject to this right of redemption. The line of decisions of which these cases are instances is explained in *Bidhu Ranjan* v. *Soleman Pramanik*, I. L. R (1941) 2 Cal. 209 : (A. I. R (28) 1941 Cal. 613), by Mukherjea J, who delivered the leading judgment in *Hemanta Kumar Bose* v. *Jitendra Nath Pal*, (A. I. R. (32) 1945 Cal. 135 : 219 I. C. 59) :

> ". . . . . If the mortgagor himself or the person, in whom the mortgagor's rights were vested, was impleaded as a party defendant, but some person interested in the equity of redemption, as for example, a puisne mortgagee, was left out, then the purchaser acquires not only the rights of the mortgagee plaintiff but the interest of the mortgagor as well, and he can sue for possession as purchaser of the mortgagor's rights subject to his first mortgagee's rights being redeemed by the puisne mortgagee, and he, in turn, being allowed to redeem the latter in his capacity as a mortgagor. But when the equity of redemption is entirely unrepresented in the mortgage suit and the holder of the equity of redemption is not at all made a party to such suit, the possession of the purchaser cannot be higher than that of the assignee of the mortgagee's rights. As a purchaser of the mortgagee's rights he cannot sue for possession, and his only remedy would be to institute a suit for enforcement of the mortgage bond."

In the present case, the equity of redemption was entirely vested in the plaintiff, and, in his absence, the auction-purchaser would acquire no interest, so that his entry on the property would be the entry of a trespasser.

[7] Great stress has been laid by Mr. Ghosh on the provisions of Art. 148 of the Schedule to the Limitation Act read with S. 60, T. P. Act. Article 148 relates to a suit against a mortgagee to 'redeem or to recover possession" of immovable property mortgaged. A suit for redemption is defined in S. 60, T. P. Act, under which the mortgagor has a right at any time after the principal money has become due, on payment or tender of mortgage money, to require the mortgagee, among other things, "where the mortgagee is in possession of the mortgaged property to deliver possession thereof to the mortgagor. Mr. Ghosh argues that, even if the plaintiff's right to sue for recovery of possession as from a trespasser is barred, he is still entitled under S. 60 read with Art. 148 to ask for delivery of possession. The remedy in question depends on the existence of the relationship of mortgagor and mortgagee between the parties. As I have pointed out, this relationship was dissolved as soon as the period limited for a suit to recover possession as from a trespasser expired. Apart from this, it seems clear to me that S. 60 and the lengthy period of limitation provided by Art. 148 relate to a suit for recovery of possession from a mortgagee as such. Here, we are concerned with a simple mortgage. It is difficult to see how a simple mortgagee, who enters into possession by way of purchase of the equity of redemption, can be said to be in possession as a mortgagee. I am supported in this opinion by *Jiwa Khan* v. *Lakhmi Chand*, 11 I. C. 429 : (232 P. L. R. 1911) and *Munna Lal* v. *Hamid Ali*, 79 I. C. 39 : (A. I. R. (12) 1925 Lah. 53) (*vide* also *Humayun Qadar* v. *Suraiya Begam*, A.I.R. (18) 1931 Oudh 69 (2) : (127 I. C. 252) and *Luchi Rai* v. *Jagarnath Sahu*, A. I. R. (15) 1928 ALL. 197 : (114 I C. 187). In *Nizam Din Khan* v. *Rashid Ali Khan*, 16 Lah. 12 : (A.I.R. (21) 1934 Lah. 902), their Lordships went even further and applied the same principle to a case in which a usufructuary mortgagee who was not in possession under the mortgage obtained possession under an invalid sale. In reply, Mr. Ghosh has drawn our attention to several decisions as authorities that a purchaser in execution of a mortgage decree, which by reason of some defect does not operate to extinguish the mortgage, becomes himself a mortgagee. *Khiarajmal* v. *Diam*, 32 I. A. 23 : (32 Cal. 296 P. C.), which was followed in *Mir Wajid Ali* v. *Alidad Khan*, A. I. R. (27) 1940 Pat. 45 : (184 I. C. 124), is distinguishable in as much as it deals with a usufructuary mortgage. It is based on the principle that a person who has entered into possession of a property as a usufructuary mortgagee cannot, during the subsistence of the mortgage, make his possession adverse by asserting an independent title in himself, *Baijnath Prasad Singh* v. *Muneshwar Singh*, A.I.R. (23) 1936 Pat. 63:(160 I. C. 1066) is also a case of usufructuary mortgage. On facts further it was held by Wort J. that the usufructuary mortgagee did not set up an adverse title. It is easy to see why in the case of such a mortgage the possession of the mortgagee cannot become adverse for, so long as the mortgage subsists, the mortgagee is entitled to possession, and, whatever interest in himself the mortgagee may assert, it cannot be said that the owner of the equity of redemption is being wrongly excluded from possession. In *Mt. Ramjhari Koer* v. *Kashi Nath Sahai*, 5 Pat. 513 : (A. I. R. (13) 1926 Pat. 337), there were three incumbrances on the property, the first a usufructuary and other two simple mortgages. The second mortgagee obtained and executed a decree for sale on the foot of his mortgage without impleading the third mortgagee. He was himself the auction-purchaser and took delivery of possession. The third mortgagee then sought to redeem him and the possession of the second mortgagee for twenty years was set up as adverse. Their Lordships rejected this defence. This decision is only apparently in support of the contention of Mr. Ghose. It was not a case of adverse possession

at all, for the possession of the property seems to have been with the usufructuary mortgagee all along, in *Nunnu Mal* v. *Ram Chander*, 53 ALL. 334 : (A. I. R. (18) 1931 ALL. 277 F. B.), the point at issue was the application of Ss. 63 and 70, T. P. Act, and the question of adverse possession was not considered. *Gulabchandsao* v. *Bashiruddin Nasiruddin*, A. I. R. (28) 1941 Nag. 141 : (I. L. R. (28) 1941 Nag. 244), the decision of a single Judge is distinguishable on the facts, being a case for foreclosure. His Lordships did not lay down any principle inconsistent with what I have said above. He observes at p. 143 :

> "Whether mortgagee's possession becomes adverse or not depends upon the nature of the right which the mortgagee asserts while entering into possession of the mortgaged property. If he enters into possession pursuant to the rights acquired by him under the mortgage his possession will in my opinion not be adverse. It is only when he takes possession in assertion of a right independently of the mortgage that his possession will become adverse."

In the case before him, he held that the mortgagee entered into possession as such and, therefore, his possession did not operate to bar the remedy of the non-impleaded party by way of redemption. *Sulleman Hashim* v. *Esso*, A. I. R. (13) 1926 Sind 145 : (20 S. L. R. 277) was a case of simple mortgage, but is distinguishable on the facts as the mortgagor, being unable to discharge the mortgage debt, handed over possession to the mortgagees qua-mortgagees to enable them to realise, if not the principal, at least the interest out of the income of the mortgaged property. *Vallabhdas Mulji* v. *Pranshankar Narbheshankar*, A. I. R. (16) 1929 Bom. 24 : (113 I. C. 813) is similarly distinguishable. There, the mortgagee, exercising under the mortgage deed, his power of sale transferred the property to himself. Fawcett J. held in the circumstances that he entered into possession as a mortgagee. *Kali Mahmud Talukdar* v. *Dina Bandhu Dutt*, A. I. R. (7) 1920 Cal. 937 : (62 I. C. 502) was decided on its own peculiar facts. The simple mortgagee got into possession of the mortgaged property under a sale which was subsequently set aside. He was allowed to continue in possession, however, and was treated as a mortgagee in possession being made to account for the actual realisations made by him. The only case comparable on the facts is *Awadh Singh* v. *Nanhai*, 46 I. C. 872 : (A. I. R. (4) 1917 Nag 33), a decision of the Additional Judicial Commissioner, Nagpur. The learned Judge applied to a case of simple mortgage an observation of their Lordships of the Privy Council in *Khiarajmal* v. *Daim*, 32 I. A. 23 : (32 Cal. 296 P. C.) which, in his opinion, was independent of the form of the mortgage. With respect, I would disagree. The very first sentence of the passage relied on —"Their Lordships are satisfied that the possession has been that of the mortgagees throughout" distinguishes that case from a case of simple mortgage. In the one case the mortgagee enters as such and cannot alter the nature of his possession by subsequent assertion of title. In the other case, the mortgagee is not in possession and enters into possession in assertion of an absolute title in himself.

[8] Mr. Ghosh has suggested somewhat half-heartedly that this is not really a case of dispossession, and has drawn our attention to the assertion in the plaint that, at the time the mortgage suits were filed and when the property was sold, the *thika* was still existing and the property was in the possession of the thikadars. Except for a statement by one of the witnesses that the *thika* was given for a period of six years, there is no evidence on record regarding the terms or the duration of the *thika*. On the contrary, it is expressly stated that the defendants (according to the plaintiff, the other defendants along with defendant 2 are the successors-in-interest of Kalachand Chakravarty) have been in possession of the mortgaged property since the date of their purchase, have sold wood from the jungle and have appropriated the usufruct of the villages.

[9] Firstly, it was contended that the defendant has not pleaded adverse possession, and the point cannot be taken in appeal. It does not appear to me that the question of adverse possession really arises. The plaintiff has come to the Court with a clear case of dispossession. According to his story, the defendant 2's predecessors-in-interest entered into possession as trespassers and have dispossessed him. He seeks to recover possession from them. He cannot get relief unless he establishes that within the period limited by Art. 142 of the Schedule to the Limitation Act read with Ss. 6 and 8 of the Act he was in possession of the property. There is no evidence whatever to prove his possession within this period.

[10] In view of my conclusions on the point of limitation, it is not necessary to go into the merits of these appeals on the facts. Since the issues have been raised before us, however, I shall briefly deal with them.

[11] As regards Mortgage Suit No. 123 of 1917, the evidence is one-sided as to the date of the death of Kalachand Chakravarty, and the correctness of the finding of the Subordinate Judge is not challenged. Kalachand Chakravarty died before the passing of the final decree, which was, therefore, a nullity so far as the present plaintiff is concerned (*Jungli Lall* v. *Laddu Ram*, 4 P. L. J. 240 : (A. I. R. (6) 1919 Pat. 430

F. B.)). In the execution case proceedings were taken against Kalachand Chakravarty. There can, therefore, be no doubt that the sale was a nullity.

[12] It appears from the order-sheets of Mortgage Suits 48 and 49 that the plaintiff under the denomination "minor son (name not known) of Kalachand Chakravarty", was impleaded as a defendant under the guardianship of his mother Hemangini Devi. Notices were issued both to him and to his proposed guardian. After service of the notices, and the failure of his mother to appear and consent to act as his guardian, a pleader Mr. Bimal Krishna Ghosh was appointed as the guardian *ad litem*. The pleader was given about one and a half months' time within which to file a written statement. During this period, he tried to get into touch with the minor but got no response. He was, therefore, unable to file any written statement. All this happened a long time ago, and there is no oral evidence available of what happened. Proceeding on the presumption that all official acts have been regularly performed, there can be no doubt that Hemangini Devi, who was herself a defendant in one of these suits, was aware of the proceedings and her failure to appear herself and to instruct the guardian *ad litem* of the minor indicates the consciousness that there was no defence to these suits. On the evidence, therefore, the Subordinate Judge has rightly held that the minor was properly represented, and the plea of gross negligence against the pleader guardian is not justified.

[13] The only evidence available regarding the proceedings in execution is contained in the register of civil suits, an extract copy of which has been placed upon the record. This contains entries relating to execution, and, in column 23 of the register, are entered the names of the persons against whom execution is taken out. In the entry relating to Mortgage Suit No. 48, there is no mention of the minor. We find from the decree (Ex. 8A) that he has also been omitted from the decree. In these circumstances, there is no certainty that execution was levied after notice to the minor. The sale would, therefore, be ineffective against him and, if this suit had not been barred, the plaintiff would have been entitled to a decree in respect of the property covered by this sale. In the register of civil suits relating to Mortgage Suit No. 49, we find fifteen named persons against whom execution was taken out and a further entry "name not known." From the copy of the final decree (Ex. 8B), it is clear that this entry relates to the plaintiff. In the circumstances, there is no reason to suppose that notice was not issued to him before execution was levied. The sale in this case, therefore, must be held to have been a valid sale. For the reasons given by me above, I consider that the appeal of defendant 2 should succeed and that of the plaintiff should fail. I would, therefore, modify the decree of the Subordinate Judge and direct that the suit be dismissed. In the peculiar circumstances of the case, as the plaintiff has failed on what is a technical point, I consider it fair that the parties should bear their own costs. There will be no order as to costs.

Sinha J.—I agree.

R.G.D. *Order accordingly.*

A. I. R. (37) 1950 Patna 210 [*C. N. 50.*]

AGARWALA C. J.

Sudia Bhuskaulia and another—Petitioners v. *The King.*

Criminal Revn. No. 1416 of 1949, D/- 24th November 1949, from order of S. J., Darbhanga, D/- 24th September 1949.

Criminal P. C. (1898), S. 235 — Misjoinder of charges — Accused caught while committing theft by owner —Owner subsequently assaulted with garasa and stick by accused's father and brother on his refusal to release accused — Offence of theft held was separate from offences under Ss. 323 and 326, Penal Code, and should not be tried together. [Para 1]

Annotation : ('49-Com.) Criminal P. C., S. 235 N. 2.

Gopal Prsaad, K. D. De and S. Akbar Imam — for Petitioners.

Raghunath Jha — for the Crown.

Order. — The petitioner Ghutar has been convicted under S. 326, Penal Code and his son, the petitioner Sudia, under Ss. 323 and 379. The convictions are assailed on the ground of misjoinder of charges. The facts are that the complainant Vaidyanath Jha saw Sudia and his brother Karia cutting the gram crop in his field. On Vaidyanath protesting Karia ran away in one direction and Sudia in another direction. Vaidyanath followed Sudia and caught him and then took him towards the village. When they neared the house of Sudia, the latter's father and brother emerged, the former armed with a garasa and the latter with a stick. They demanded that Vaidyanath release Sudia. On his refusal Ghutar assaulted him with a garasa and Karia with a stick, with the result that he fell. Thereupon he was still further assaulted by Karia and Sudia. Later, he was removed to hospital and a first information was laid. It is quite obvious that the offence of theft was quite separate from the offences under Ss. 323 and 326 and should not have been tried together. The convictions and sentences must, therefore, be set aside. The petitioners must now be retried separately, that is to say, Sudia must be tried on the charge under S. 379 by himself

and must be retried separately on the charge of assault with his father Ghutar, Sudia under S. 323 and Ghutar under S. 326.

V.B.B. *Revision allowed.*

A. I. R. (37) 1950 Patna 211 *[C. N. 51.]*

SHEARER AND REUBEN JJ.

Bhagirath Prasad Kamalia—Appellant v. *Sm. Jamuna Devi and another—Respondents.*

A. F. O. O. No. 20 of 1948, D/- 5-9-1949, from order of Sub-J., Gaya, D/- 15-1-1948.

(a) Civil P. C. (1908), S. 47—Decree against dead person—Objection to execution by legal representatives falls under S. 47.

A final decree was passed against a deceased judgment-debtor, and his legal representatives challenged its executability :

Held that the dispute was one which arose between the parties within the meaning of S. 47 : A. I. R. (6) 1919 Pat. 430 (F.B.), *Rel. on.* [Para 4]

Annotation : ('44-Com.) Civil P. C., S. 38, N. 8, Pt. (18).

(b) T. P. Act (1882), S. 8 — Decretal debt — Transfer by registered instrument — Securities are also transferred.

Where a decretal debt is transferred by a registered instrument, the securities therefor are also transferred to the transferee. [Para 6]

Annotation : ('45-Com.) T. P. Act, S. 8, N. 17.

Janak Kishore—for Appellant.
Raj Kishore Prasad—for Respondents.

Reuben J.— This appeal arises out of an application for the execution of a decree for sale. The property sought to be sold is 3 annas 6 pies share in a house bearing holding No. 136 in Ward No. 2 in the Municipality of Gaya.

[2] This house formerly belonged to one Gopalji who executed a mortgage bond in 1930 hypothecating this property. The mortgagee sued on the bond on 19th September 1936 (Suit No. 62 of 1936), and obtained a preliminary decree on 28th January 1938. The decree was made final on 4th August 1941. One Bajrang Sahay figures in the final decree as judgment-debtor No. 51. The respondents, who are transferees from the heirs of Bajrang Sahay, objected to the execution of the decree on the ground that Bajrang Sahay died on 21st May 1941 and that, as no substitution was made in his place, the decree cannot be executed against them. The objection has been sustained. Hence, the present appeal.

[3] Before the Subordinate Judge there was a contest as to whether Bajrang Sahay died before the decree was made final. The correctness of the finding that he died has not been challenged before us. The only point pressed by Mr. Janak Kishore for the appellant is that Bajrang Sahay acquired his interest in the property during the pendency of the mortgage suit, that he was therefore not a necessary party in the mortgage suit and the failure to implead his legal representatives will not affect the executability of the decree. Mr. Raj Kishore Prasad resists this contention, asserting that Bajrang Sahay's interest in the property commenced before the institution of the suit. He also raises a preliminary point, that the opposite party being strangers to the decree their objection was not under S. 47 but under O. 21, R. 58, Civil P. C., and so no appeal lies.

[4] As I consider that on the merits the appeal fails the preliminary point is of academical interest. Since it has been argued before us I would express my opinion. Had a decision been necessary, I would have rejected the contention relying on *Jungli Lall* v. *Laddu Ram*, 4 P. L. J. 240 : (A. I. R. (6) 1919 Pat. 430 F. B.). The facts in that case were similar to the one before us. A final decree was passed against a deceased judgment-debtor, and his legal representatives challenged its executability. The Courts below rejected the objection, holding that the execution Court could not go behind the decree. The decision was reversed by a Full Bench of this Court, which held that the dispute was one which arose between the parties within the meaning of S. 47 (*vide* pp. 247, 251 and 261 of the report).

[5] The papers necessary for the decision of the question of fact involved in the remaining point have been filed before us. The relevant facts are as follows. Gopi Nath filed a partition suit and obtained from the Court an interim maintenance order against the *karta* Gopalji for a monthly allowance of Rs. 160. The suit was finally disposed of by compromise on 1st August 1931. Nevertheless, Gopinath took out execution of the order for payment of maintenance as if it was a decree. Gopalji appealed against the order permitting the execution to proceed (M. A. No. 46 of 1932). Certain property was sold in the course of the execution proceeding and Gopi Nath deposited Rs. 1082-6-0 under O. 21, R. 89 for setting aside the sale. Under the order of the High Court in M. A. No. 46, Gopalji withdrew this money after furnishing security for its repayment in the event of the appeal being decided against him. The security was given on 31st May, 1932, and consisted of the sixteen annas interest in the house in question. The appeal was ultimately decided in favour of Gopi Nath on 5th September 1933, and the amount which Gopi Nath was entitled to recover (including the amount deposited by him) was assessed at Rs. 1933. On 15th August 1936, Gopi Nath transferred his dues under the High Court order to Bajrang Sahay by a registered document. Bajrang Sahay executed this order in Execution Case No. 252 of 1936 in the Court of the Subordinate Judge, 1st Court, Gaya and put to sale and himself purchased the sixteen annas interest in the house on 8th March

1937. By reason of this purchase, Bajrang Sahay was impleaded as a defendant in Mortgage Suit No. 62 of 1936 on an application filed by the plaintiff on 31st March 1937. A previous petition filed by the plaintiff on 10th February 1927, was dismissed on 18th February 1927, on the ground that no document had been filed to show that Bajrang Sahay had any interest in the equity of redemption.

[6] The question is whether Bajrang Sahay's interest in the property commenced on 15th August 1936 or on 8th March 1937. Mr. Janak Kishore points out that the transfer under the deed of assignment of 15th August 1936, was expressly confined to the decretal amount. In my opinion there is no force in his contention. The transaction is governed by S. 8, T. P. Act:

> "Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof."

Instances of what is meant by "incidents" are given in the section and among them we find an exact analogy:

> 'Where the property is a debt or other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer."

In this case the deed of transfer, though expressed to refer to the debt alone, clearly shows the intention that the security should be transferred at the same time, for in para. 7 of it we find:

> 'That the vendee has also been informed that the house in Ward No. 2, bearing former holding No. 138, present holding No. 136, (situate on the road) at Sonarpatti where jewellers reside, is in security and is liable for the said decree; that is, Gopal Jee, the decree-holder, filed a petition in Execution Case No. 359 of 1931 in the First Court of the Subordinate Judge for withdrawing the amount deposited by me, the executant, against which I, the executant-appellant, took steps in the High Court for issue of injunction. But the lower Court took the said property in security and paid the money deposited by me, the executant, to Gopal Jee, the decree-holder. It was in this hope that the vendee-claimant purchased the said decree on payment of sufficient consideration money. Hence the claimant also shall be fully competent to realise (the amount) from the property given in security in the said execution case or by such other means as he may think proper. I, the executant, or my heirs neither have nor shall have any objection to this and if I put forward any claim it shall be deemed quite illegal."

The deed of transfer having been duly registered there was nothing to prevent the security from passing along with the decretal dues.

[7] Mr. Janak Kishore has stressed that the execution taken out by Bajrang Sahay was not a mortgage execution, that he proceeded not merely in respect of the secured amount but for the whole decretal amount, and that he asked for attachment of the property prior to sale—a procedure which would not be necessary if he intended to enforce the security. I cannot see that the nature of the execution taken out by Bajrang Sahay affects the question before us. By his purchase on 15th August 1936, Bajrang Sahay acquired an encumbrance on the property and became a necessary party to the suit. By his purchase of the property in his execution case he increased his interest in the property. This increase in his interest could not put him in a worse position than he was in before. Hence, he must have continued to be necessary party.

[8] It follows that the objection of the respondents has rightly been sustained. It is not necessary for us to consider in this appeal what remedy, if any, is now open to the decree-holder.

[9] On the above grounds, I would dismiss this appeal with costs.

Shearer J.—I agree.

V.B.B. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 212 *[C. N. 52.]*

SINHA AND REUBEN JJ.

Nandlal Singh—Appellant v. *Ram Kirit Singh and others—Respondents.*

A. F. A. D. No. 2325 of 1947, D/- 23-11-1949, from decision of Sub. J., 2nd Court, Gaya, D/- 24-7-1947.

Contract Act (1872), Ss. 43 and 69—Decree for arrears of rent for 1342 to 1345 Fasli against plaintiffs who were *dar-mokararidars* — Defendant not impleaded in rent suit—Defendant becoming co-sharer *dar-mokararidar* by purchasing share from another *dar-mokararidar* — Defendant undertaking to pay arrears of rent for 1342—Plaintiffs satisfying decree and suing defendant for contribution even in respect of year 1342—Plaintiffs held could not ask for reimbursement under S. 69 but were entitled to decree for contribution under S. 43—Defendant held was not liable to contribute in respect of year 1342 but was liable to contribute in respect of decree for costs in rent suit.

Section 69 makes a distinction between a person interested in the payment of money and a person bound by law to pay it. The word "reimbursed" is significant and contrasts with the words "contribute" and "contribution" in S 43 which empowers each of two or more joint promisors to compel every other joint promisor to contribute to the performance of the promise. Contribution is between persons equally bound, reimbursement between a person interested in payment and a person bound to pay. *Case law referred.* [Para 6]

A decree for arrears of rent for the years 1342 to 1345 Fasli having been passed against the plaintiffs, who were *dar-mokararidars*, they deposited the necessary amount to satisfy the decree and brought a suit for contribution against the defendant who was not impleaded in the rent suit and who had become a co-sharer *dar-mokararidar* by reason of his purchase of a share in the *dar-mokarari* tenure from one of the other *dar-mokararidars* in 1345. On the allegation that the defendant had in his sale deed undertaken to pay the arrears for 1342, the plaintiffs sought contribution from him in respect of that year also.

Held (1) that the plaintiffs were judgment-debtors in the rent decree and, therefore, bound by law to pay it and hence they could not ask for reimbursement under S. 69, particularly from a person who was not himself a party to the decree; [Para 6]

(2) that the plaintiffs and the defendant were in the position of joint promisors as regards the payment of rent and, therefore, the plaintiffs were entitled to a decree for contribution under S. 43; [Para 7]

(3) that the plaintiffs not being a party to the agreement whereby the defendant had bound himself to pay the arrears of rent for 1342 fasli, they and the defendant could not be regarded as co-promisors and, therefore, the latter was not liable to contribute in respect of the year 1342; and [Para 8]

(4) that the defendant was liable to contribute in respect of the decree for costs in the rent suit as there was no equity in his favour: A. I. R. (23) 1936 Pat. 49, *Foll.*; 45 C. W. N. 357, *Expln.* [Para 9]

Annotation: ('46-Man.) Contract Act, S. 43 N. 1, 5 and 10: S. 69, N 1 and 7.

B. N. Rai and Girijanandan Prasad — for Appellant.

J. C. Sanyal—for Respondents.

Reuben J.—This appeal is directed against a decision of the Subordinate Judge, Second Court, Gaya, affirming a decision of the Munsif, First Court, Gaya, in a suit for contribution. The appellant was defendant 1 in the suit. In village Dardha, under the proprietress Sayeeda Khatoon, there is a *dar-mokarari* tenure comprising a share of eight annas Dokhta of the village. It is held in the following shares: (1) Plaintiff's two annas; (2) defendant 1, one anna, and (3) defendants 2 and 3 five annas. The one anna share was formerly held by Tufail Ahmad (defendant 5), from whom defendant 1 acquired it by purchase in 1345 Fasli. *Darmokarari* rent having fallen in arrears, the proprietress sued and obtained a decree against the plaintiffs for the arrears of rent for the years 1342 to 1345 Fasli. Defendant 1 was not impleaded in the rent suit. The plaintiffs deposited Rs 1,945-7 0 towards satisfaction of the decree and, the other co-sharer *dar mokararidars* having paid their quota of the dues in accordance with their respective shares, brought this suit for contribution against defendant 1. On the allegation that defendant 1 in his sale-deed undertook to pay the arrears for 1342, they sought contribution from defendant 1 in respect of that year also, but in the alternative, sought contribution for this year from Tufail Ahmad.

[2] Defendant 1 resisted, disclaiming liability on the ground that he was not a party to the rent suit, and further that, in the course of the execution of the decree for arrears of rent, his share of one anna was exempted from sale on an objection under O. 21, R. 58, filed by him. Tufail Ahmad being dead, his legal representatives have taken the defence that defendant 1 having undertaken the liability in the sale-deed, was liable to contribute and not Tufail Ahmad.

[3] The learned Munsif accepted the defence of the representatives of Tufail Ahmad and, on considerations of equity, found defendant 1 liable to contribute in proportion to his share in the *darmokarari* interest. In view of the fact that the rent decree was not passed against him, and that his one anna share was exempted in the execution proceedings, he considered that Ss. 69 and 70, Contract Act, have no application. On these findings he proceeded to decree the suit in full. The Subordinate Judge in appeal has based the decree against defendant 1 on S. 43, Contract Act. Like the Munsif, he has relied upon the sale-deed as imposing on defendant 1 the liability to contribute in respect of the year 1342. He has pointed out that the Munsif inconsistently with his findings decreed the suit against the representatives of Tufail Ahmad, but he found himself unable to interfere as there was no appeal or cross-objection by them before him.

[4] Three contentions have been pressed before us: (1) That defendant 1 is not liable to contribute at all, (2) that he is not liable to contribute in respect of the year 1342, and (3) that he is not liable to contribute in respect of the decree for costs in the rent suit.

[5] The first contention is rested on the decision of Das J. in *Kamaleshwari Prosad* v. *Jagarnath*, A. I. R. (7) 1920 Pat. 155 : (56 I. C. 949). In that case, the landlord had obtained a decree for arrears of *mokarari* rent for the years 1315 to 1318 Fasli against two sets of tenants who formed defendants second and third parties in the subsequent suit for reimbursement. The plaintiff in the reimbursement suit, who was a co-sharer *mokararidar*, and who apparently had not been impleaded in the rent suit, paid Rs. 1067-4-9 in satisfaction of the decree and sued for reimbursement. Defendant 1 in the suit, who was a co-sharer *mokararidar* to the extent of two annas, having purchased this share on 8th September 1909, and was the mortgagee in possession as to three annas share from before the period covered by the rent suit had not been impleaded as a defendant in the rent suit. His Lordship held that defendant 1, not being a party to the decree, was not bound to pay it as to the two annas share, but, as the mortgagee in possession of three annas, he was to that extent bound to pay it and, therefore, to this extent the plaintiff, subject to limitation, was entitled to succeed against him. That was a suit to which S. 69, Contract Act, in terms applied. Under this section reimbursement is sought from the persons "bound by law to pay." Having found that as regards the two annas share the

defendant 1 was not liable under S. 69, Das J. did not investigate whether he could be made liable under any other provision of the law.

[6] It is necessary to consider further the applicability of S. 69 to the present case, as Mr. Sanyal for the respondent-plaintiffs has urged strongly that this section applies. I reproduce below the provisions of this section :

> "A person who is interested in the payment of money which another is bound to pay, and who therefore pays it, is entitled to be reimbursed by the other."

Apparently, the section makes a distinction between a person interested in the payment of money and a person bound by law to pay it. The word "reimbursed" is significant and contrasts with the words "contribute" and "contribution" in S. 43, which empowers each of two or more joint promisors to compel every other joint promisor to contribute to the performance of the promise. Contribution is between persons equally bound, reimbursement between a person interested in payment and a person bound to pay. My reading of S. 69 is in accord with *Manindra Chandra* v. *Jamahir Kumari*, 32 Cal. 643 : (9 C.W.N. 670), *Jinnat Ali* v. *Fateh Ali*, 15 C. W. N. 332 : (9 I. C. 219) and *Biraj Krishna* v. *Purna Chandra*, I. L. R. (1939) 2 Cal. 226 : (A. I. R. (26) 1939 Cal. 645). The same view was expressed by a Bench of the Madras High Court in *Jagapatiraju* v. *Sadrusannama Arad*, 39 Mad. 795 : (A. I. R. (3) 1916 Mad. 980), which cited a still earlier decision of the Calcutta High Court reported in *Futteh Ali* v. *Gunganath Roy*, 8 Cal. 113 : (10 C. L. R. 20). In the case before us, the plaintiffs were judgment-debtors in the rent decree and, therefore, bound by law to pay it. Hence, they cannot ask for reimbursement under S. 69, particularly from a person who was not himself a party to the decree.

[7] Coming back to the applicability of S. 43, Contract Act, the learned counsel does not cite any authority other than *Kamleshwari Prasad* v. *Jagarnath*, A. I. R. (7) 1920 Pat. 155: (56 I.C. 949) *(ante)* in support of his contention. Rent is a matter of contract between the landlord on one side and the tenant on the other. It has been faintly suggested that the liability of the tenants in this case was not joint. This is a question of fact which should have been raised in the pleadings. The proceedings in the Courts below seem to have been on the basis that the liability for rent was in this instance a joint one and the appellant cannot be allowed to change his position at this stage. The appellant and the plaintiffs, therefore, are in the position of joint promisors as regards the payment of rent and the plaintiffs are entitled to a decree for contribution under S. 43.

[8] Coming to the second point, I think the appellant is entitled to succeed. It is not clear from the judgment of the Subordinate Judge whether in fact the appellant under the terms of the sale-deed bound himself to pay the arrears of rent for 1342 Fasli. It is not necessary for us to go into the question, however. Whether he bound himself to do so or not, this was a matter between him and his vendor. The plaintiffs were not a party to that agreement and, therefore, in respect of the year 1342 Fasli, the plaintiffs on one side and the appellant on the other cannot be regarded as co-promisors. That relationship existed for that year between the plaintiffs and Tufail Ahmad. Hence, the decree unintentionally passed by the Munsif against the legal representatives of Tufail Ahmad was correct.

[9] For the third contention reliance is placed on *Kanto Mohan* v. *Gour Mohan*, 45 C. W. N. 357. The point of the decision is that the contribution sought under S. 43 must be in respect of the performance of the joint promise, and costs imposed by the Court in legal proceedings have, apart from special provision regarding them in the agreement, nothing to do with the promise. That decision is merely an authority that S. 43 does not generally apply to recovery of contribution in respect of costs imposed by a Court of law. It does not exclude contribution on equitable considerations. In fact, their Lordships, before refusing the plaintiff before them contribution in respect of costs incurred by him in legal proceedings carried by him to the Privy Council, considered whether on general equitable principles the plaintiff's co-debtors should be made to contribute towards those costs. The test adopted by a Division Bench of this Court in *Bisambhardeo Narayan Singh* v. *Hitnarayan Singh*, A. I. R. (23) 1936 Pat. 49 : (15 Pat. 219) is laid down in the following extract from the judgment of Fazl Ali J. (as he then was) :

> "It appears to me that the decision of Sir Dawson Miller in the last mentioned case, *Mahabir Prasad* v. *Darbhangi Thakur*, A. I. R. (6) 1919 Pat. 165: (4 Pat. L. J. 486) fully meets the points which have been raised before us in the present appeal and having regard to the clever and well reasoned decision of his Lordship we have no hesitation in adopting his view for the purpose of deciding the present case. In that case the learned Chief Justice expressed his views in these terms :
>
> 'It seems clear therefore that the doctrine of contribution is well recognised in this country and that the only cases in which it will not be enforced are those in which a liability arises out of a joint wrong or where the equities of the case demand that the plaintiff should not recover as where the party sued was merely a formal defendant in the previous suit and not personally interested in result of it.'
>
> "These remarks merely emphasise the fact that the claim of the plaintiff being based not upon any contract but upon the principle of equity cannot be enforced against a person against whom it will be inequitable to

enforce it. Keeping this principle in view we have to decide whether there is any equity in favour of defendant 5 who is the appellant in Appeal No. 1207."

Considering the facts of the present case, I do not see any equity in favour of the appellant. The appellant and the plaintiffs were equally in the wrong in withholding the dues of the proprietress on account of rent. But each of them were responsible for their own share of the rent and it was not a case of joint wrong. So far as the plaintiffs were in the wrong they have suffered in being mulcted for costs to the extent of their share of the arrears of rent. There is no reason why they should be penalised further by bearing the costs in respect of the arrears due from the appellant.

[10] In the result, I would allow this appeal in part and direct that the decree of the Munsif be modified so as to relieve the appellant-defendant 1 of liability in respect of the year 1342 as regards rent, interest and other incidental expenses. The appellant will get costs proportional to his success.

Sinha J.—I agree.

V.R.B. *Appeal partly allowed.*

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* A. I. R. (37) 1950 Patna 215 [*C. N. 53.*]

DAS AND MAHABIR PRASAD JJ.

Ram Das Ram and others — Appellants v. *Dominion of India—Respondent.*

A. F. A. D. No. 2620 of 1947, D/- 25th November 1949, from decision of Adl. Sub.-J., Arrah, D/- 3rd September 1947.

(a) Railways Act (1890), S. 72 (2) — Risk note — Execution of—Proof—Secondary evidence—Execution is different from existence — Railway receipts referring to risk notes produced— Existence of risk notes held proved but not their execution.

To prove the execution of risk notes by secondary evidence the railway administration produced certain railway receipts, which referred to the risk notes :

Held that, that merely proved that there were such documents; that did not prove the due execution of the risk notes with particular reference to the conditions to be fulfilled under sub-s. (2) of S. 72, Railways Act. There is difference between the existence of a document and the execution of a document. [Para 4]

Annotation : ('46-Man.) Railways Act, S. 72, N. 8.

* (b) Railways Act (1890), S. 72 (2) — Risk note — Proof of — Railway receipt does not prove special agreement contemplated by sub-s. (2).

The railway receipts are merely evidence to show that certain goods were placed in the custody of the railway and that a certain sum was paid as freight. The entry of the letter *B* against the column 'Risk Note Form" does not prove the execution of a special agreement, as contemplated by sub-s. (2) of S. 72: A. I. R. (31) 1944 Cal. 50, *Foll.*; *Case law referred.* [Para 5]

Annotation : ('46-Man.) Railways Act, S. 72, N. 22.

(c) Railways Act (1890), S. 72 (2) — Risk note — Execution of — Onus of proof —Risk note must be proved by railway company.

The risk note is an exception to the ordinary responsibility of the railway company, and as an exception to the general responsibility, the risk note must be proved by the railway company to have been duly executed. [Para 5]

Mere charging of the lower rate would not take away the liability of the railway company unless the railway company brings itself within the provisions of sub-s. (2) of S. 72: A. I. R. (14) 1927 Mad. 639, *Rel. on.* [Para 5]

Annotation : ('46-Man.) Railways Act, S. 72, N. 4, 22.

(d) Railways Act (1890), S. 72—Proof of negligence —Loss or damage of goods consigned is prima facie evidence of negligence — Contract Act (1872), Ss. 152, 161.

Loss or damage of goods entrusted to a bailee is *prima facie* evidence of negligence; the burden of disproving negligence lies on the bailee, and this burden lies also on a railway administration in the absence of a special contract to the contrary. [Para 6]

Annotation : ('46-Man.) Railways Act, S. 72, N. 24; Contract Act, Ss. 151 and 152, N. 3, 6.

Sarjoo Prasad and Kanhayaji —for Appellants.
N. C. Ghose and P. K. Bose—for Respondent.

Das J. — This second appeal is by the plaintiffs, proprietors of a firm of the name of Messrs. Gopal Ram Ram Das of Arrah. The short facts, out of which this appeal has arisen, are the following. Two consignments of mustard oil were booked at a railway station, named Jamuna Bridge, on the railway known as the East Indian Railway Administration now represented by the present respondent. The consignments were booked on 16th November 1943, and two railway receipts were given numbered 751151 and 751152. These railway receipts show that the consignor was the Deputy Regional Food Controller, Agra and the consignee was a firm of the name of Banshidhar Premsukh Das. The consignee firm endorsed the railway receipts in favour of the Imperial Bank of India. The latter, in turn, endorsed an order on the receipts directing delivery of the goods to the plaintiffs' firm. The case of the appellants was that the goods arrived at Arrah, another station within the E. I. R. Administration, in a highly damaged condition, and when delivery was taken it was found that 13 maunds 5 seers and 3 chattaks of oil out of one consignment, and 12 maunds and 25 seers of oil in the other consignment were short. It was further found that 76 tins were partly damaged and 23 tins completely damaged. The appellants' firm alleged that the short delivery of the two consignments and the damage to the tins were due to the negligence and want of proper and due care on the part of the Railway Administration, and furthermore, to the misconduct on the part of the servants of the Railway Administration during the time the two consignments were in their custody. It was alleged that there was loose shunting of the wagons in which the two consignments were placed, and the shortage of oil and the damage were due to such loose shunting. On these allegations, the appellants' firm claimed the price of 25 and odd maunds of mustard oil, the price of the damaged tins, profit at 10 per cent. and certain incidental expenses laying their total claim at Rs. 1266-2-6. The defence of the respondent, so far as it is relevant at the present stage, was that the consignments were booked at a reduced rate of freight under a special agreement embodied in Risk Notes in Form B, under which the consignor agreed to hold the Railway Administration free from all responsibility for loss or damage from any cause whatever except upon proof of misconduct on the part of the Railway Administration, or their servants. The respondent pleaded that the onus of proving misconduct was on the appellants' firm, and the shortage and damage were due not to loose shunting or want of proper care on the part of the Railway Administration or their servants, but to improper packing of the mustard oil in the tins.

[2] It appears that the respondent did originally file some documents including the alleged Risk Notes in Form B. While the documents were in the custody of the Court of the third Munsif, they were damaged by rats. The original risk notes could not, therefore, be proved in the case The respondent proved two documents (Exs. B and B1) which have been stated to be office copies of the risk notes in question. I may state here that the two railway receipts, to which I have already made a reference, were marked as Exs. A and A1 in the record. In these two receipts there is a reference to a Risk Note in Form B. On the top of the receipts the letter 'B' is written against the column "Risk Note Form," and there is a further note on the top of the receipts to the effect "At Owner's Risk."

[3] The learned Munsif who dealt with the suit in the first instance, held that the consignments were despatched under Risk Notes in Form B. This finding, the learned Munsif arrived at, mainly on the aforesaid entries in the two receipts, as also on the alleged office copies (Exs. B and B1). He found however, that the appellants' firm had proved misconduct against the Railway Administration or their servants inasmuch as the shortage or damage could be caused in only one of two ways (a) either the pilferage during transit by the employees of the Railway Administration, or (b) on account of loose shunting or bump shunting of the wagons on the way from Jamuna Bridge to Arrah. On that finding, the learned Munsif passed a decree in favour of the appellants for a sum of Rs. 1149-2-6, disallowing the claim for profits and incidental expenses. The learned Subordinate Judge, who heard the appeal, accepted the finding of the learned Munsif that the consignments in question were covered by Risk Notes in Form B, but disagreed on the question of misconduct. He held that the shortage or damage was probably caused because of insufficient or defective packing, and was not due to any misconduct. On that finding the learned Subordinate Judge allowed the appeal and dismissed the suit. Hence, this second appeal by the appellants' firm.

[4] The point which has been urged before us on behalf of the appellants, is that the Courts below had misdirected themselves on a quetion of law with regard to the liability of the Railway Adminstration. It is pointed out that under S. 72, Railways Act, the responsibility of a railway administration for the loss, destruction or deterioration of goods delivered to the administration to be carried by railway shall, subject to the other provisions of the Act, be that of a bailee under Ss. 151, 152 and 161, Contract Act. Sub-section (2) of the said section, however, provides that an agreement purporting to limit that responsibility shall, in so far as it purports to effect such limitation, be void, unless it is in *writing* signed by or on behalf of the person sending or delivering to the railway administration the goods, and is otherwise in a form approved by the Central Government It is contended by learned counsel for the appellants that it was for the Railway Administration to prove such an agreement as is referred to in sub-s. (2), and the Railway Administration had failed to do so; therefore, the responsibility of the Railway Administration in this case was that of a bailee under the Indian Contract Act. It seems clear to me on the evidence in the record, as it stands, that the Railway Administration have failed to prove the execution of Risk Notes in Form B by or on behalf of the person sending or delivering the goods to the Railway Administration so as to entitle them to say that a special agreement limiting their responsibility exists in this case. I have already stated that certain original documents, filed by the Railway Administration were damaged by rats. Therefore, it was open to the Railway Administration to give secondary evidence of the special agreement alleged to be embodied in Risk Notes in Form B. The Railway Administration produced two documents marked Exs. B and B1, stated to be office copies of the Risk Notes. The witness, who proved these two documents, stated that the copies were written by one Radha Krishna and were compared with the original Risk Notes. He did not, however, say that they were correct copies. In cross examination he made the admission that no copy is ever prepared of the Risk Notes, thus completely nullifying what he had stated in examination-in-chief about these

office copies. These two documents purport to have been signed by one Ambika Prasad for the Deputy Regional Food Controller, Agra. There is no evidence as to who this Ambika Prasad was, and whether he was signing on behalf of the sender or as the person delivering the goods to the Railway Administration Moreover, there is no evidence that Ambika Prasad did actually sign or execute the original Risk Notes. It should be noted that there is a difference between the existence of a document and the execution of a document The railway receipts (EXS. A and A1) no doubt, refer to Risk Notes in Form B: that would merely prove that there were such documents. But that does not relieve the Railway Administration from proving the due execution of the the risk notes, with particular reference to the conditions which have to be fulfilled under sub-s. (2) of S. 72, Railways Act. It was open to the Railway Administration to give secondary evidence of due execution, but this they failed to do. It is unfortunate that the Railway Administration failed to do so, because a few more questions to the witness examined on behalf of the Railway Administration with regard to the risk notes might have proved the due execution of the original risk notes.

[5] Mr. N. C. Ghose, appearing on behalf of the respondent, has very strenuously contended before us that the suit having been based on the two railway receipts, it was not open to the appellants to say that the Risk Notes in form B were not duly executed. Mr. Ghosh has relied on a Single Judge decision of the Calcutta High Court in *E. I. Rly. Co. Ltd.* v. *Ram Chabila*, A. I. R. (12) 1925 Cal. 915 : (86 I. C. 558) and a large number of Lahore decisions which have followed the Calcutta decision. The Lahore decisions are *Kundan Lal* v. *Secretary of State*, A. I. R (16) 1929 Lah. 698 : (11 Lah. 4) ; *Secretary of State* v. *Shib Dayal*, A. I. R. (16) 1929 Lah. 887 : (114 I. C. 51) ; *B B. and C. I. Rly.* v. *Mt. Abdul Raquib*, A.I.R. (21) 1934 Lah. 186 : (15 Lah. 596) and *Secy. of State* v. *Devidutta Mal*, 148 I. C. 489 (Lah.). He has also relied on certain observations in another Calcutta decision in *B. N. Rly. Co.* v. *Moolji Sicka and Co.*, A. I. R. (17) 1930 Cal. 815 : (58 Cal. 585). The earlier Calcutta decision in *E. I. Rly. Co. Ltd.* v. *Ramchabila*, A. I. R. (12) 1925 Cal. 915 : (86 I. C. 558) relied on an English decision *H. C Smith* v. *G. W. Rly.*, (1922) 1 A C 178 : (91 L. J. K B. 423). That was, however a case in which the suit was brought on the basis of an agreement by which the railway company was held free from any liability for loss, damage, misdelivery etc., except upon proof that such loss, damage or misdelivery etc., arose from the wilful misconduct of the servants of the Railway Administration. Lord Buckmaster said that as the suit was based on that contract, it was not open to the plaintiff to say that the suit was based on the delivery of goods only because then the plaintiff "would be suing outside the only contract upon which he would have been entitled to recover." In the case before us, I do not think it would be correct to say that the appellants were suing on the railway receipts. They were suing on the contract of carriage of goods, of which the railway receipts are merely evidence. In the Calcutta decision, the matter was not put on the ground of estoppel, so as to preclude the plaintiffs from showing that there was no special agreement but it was put on the footing that the plaintiffs' case was found upon the railway receipt which referred to the risk note and embodied the contract itself. This decision was considered by another Single Judge of the Calcutta High Court in *B. N. W. Rly.* v. *Sobrati Mia*, A. I. R. (31) 1944 Cal. 50 : (I. L. R. (1943) 1 Cal. 397) and it was pointed out that the railway receipt in that case did not contain the terms of the contract and that it was merely evidence to show that certain goods were placed in the custody of the railway and that a certain sum was paid as freight. It was further pointed out that if the contract was contained in the railway receipt the railway authorities would obviously not be justified in realising further money when the freight had been wrongly calculated. It was stated that even if the railway receipt did contain the terms of the contract, it did not contain anything about the risk note, and the hieroglyphic letter H did not prove the execution of a special agreement. If I may say so with respect, I agree entirely with the observations made by Henderson J. in *B.N.W. Rly.* v. *Sobrati Mia*, A. I. R. (31) 1944 Cal. 50 ; (I. L. R. (1943) 1 Cal. 397). The railway receipts of this case stand on no better footing than the railway receipt to which Henderson J. referred in the Calcutta case. The railway receipts are merely evidence to show that certain goods were placed in the custody of the railway and that a certain sum was paid as freight. The entry of the letter B against the column 'Risk Note Form'' does not, in my opinion, prove the execution of a special agreement, as contemplated by sub-s. (2) of S. 72, Railways Act. I do not propose to examine the Lahore decisions in detail, some of them go to the extent of saying that the plaintiff is estopped and concluded, and cannot show that there was no such special agreement as is contemplated in sub-s. (2) of S. 72, other decisions do not go to that length, but say that the onus will shift, and it will be for the plaintiff to show that there is no such agreement as is referred to in the railway receipt.

Those decisions which say that the plaintiff is estopped or concluded by the railway receipt, certainly go beyond even what was decided in *E. I. Rly. Co. Ltd.* v. *Ram Chabila*, A. I. R. (12) 1925 Cal. 915 : (86 I. C. 558). If the matter is looked at from the point of view of onus only the question presents no difficulty in this case. On the evidence, as it exists in the record, it is clear that there was no due execution of Risk Notes in form B. The observations made in *B.N. Rly. Co.* v. *Moolji Sicka & Co.*, A. I. R. (17) 1930 Cal. 815 : (129 I. C. 769) are of no particular help to the respondent, because in that case it was found as a fact that the risk notes were signed by one Nathu Singh who had delivered the goods. In *Ganesh Dass Bisheshwar Lal* v. *E. I. R. Co.*, 6 Pat. 189 : (A. I. R. (14) 1927 Pat. 193) Jwala Prasad A. C. J., pointed out that the risk note was an exception to the ordinary responsibility of the railway company, and as an exception to the general responsibility, the risk note must be proved by the railway company to have been duly executed. The same view was again expressed in *S. I. Ry.* v. *V. M. S. P. Brothers*, A. I. R (14) 1927 Mad. 639 : (101 I. C. 55) where it was pointed out that to limit the liability of a railway company, it must be shown under S. 72 (2), Railways Act that the person delivering the goods entered into an agreement to that effect, and the mere fact that the goods clerk wrote on the receipt given to the consignor the words "O. R. H." signifying owner's risk as per H form would not take away the liability of the railway company in the absence of proof that the person who delivered the goods authorised the clerk to enter the aforesaid letters on the receipt or at least he consented or was aware that such letters were written thereon. The fact of charging a lower rate of freight was also considered in that case, and it was held that mere charging of the lower rate would not take away the liability of the railway company unless the railway company brings itself within the provisions of sub-s. (2) of S. 72 of the Act.

[6] For the reasons given above, my view is that the liability of the railway company in the present case is that of a bailee under the Contract Act. It is not seriously disputed that on that footing the appellants are entitled to a decree. Both the Courts below have found that there was negligence on the part of the railway company, though they differ as to whether that negligence amounted to misconduct or not, the learned Munsif holding that there was misconduct and the learned Subordinate Judge holding otherwise. It has been held in a long line of decisions of Indian Courts that loss or damage of goods entrusted to a bailee is *prima facie* evidence of negligence, that the burden of disproving negligence lies on the bailee, and that this burden lies also on a railway administration in the absence of a special contract to the contrary. I have already held no special contract has been proved in this case. The railway administration as bailee was, therefore, liable for the shortage of the mustard oil and the damage caused to the tins.

[7] For the reasons given above, I would allow this appeal, set aside the decision of the learned Subordinate Judge and restore the decree passed by the learned Munsif. The appellants will be entitled to costs proportionate to their success throughout.

Mahabir Prasad J.—I agree. I have nothing further to add.

V.B.B. *Appeal allowed.*

A. I. R. (37) 1950 Patna 218 *[C. N. 54.]*

DAS AND MAHABIR PRASAD JJ.

Bishwanath Tiwari and others—Appellants v *Mt Bachni and others—Respondents.*

A. F. A. D. No. 753 of 1948, D/- 28-11-1949, from decision of Addl. Sub-Judge, Arrah, D/- 13-3-1948.

(a) Deed — Construction — Will — Principles of construction — Bequest by Hindu to female heirs dependent on him for maintenance—Deed mentioning only permanent possession and no other right —Females held did not get absolute estate.

The principles of construing a will are (a) that it is always dangerous to construe the words of one will by the construction of more or less similar words in a different will which is adopted by a Court in another case (b) that the meaning of every word in an Indian will must always depend upon the setting in which it is placed, the subject to which it is related and the locality of the testator from which it may receive its true shade of meaning ; and (c) that the will should be read as a whole, and all the clauses must be considered to find out the intention of the testator : A. I. R. (9) 1922 P. C. 63, *Rel. on.* [Para 5]

A Hindu executed a will in favour of his two female heirs who were dependent on him for maintenance. The words used meant that the females were to remain in permanent 'possession' only, the word "malik" was nowhere used and there was no suggestion of giving any other 'right' as distinguished from mere 'possession'. The obvious intention appearing from the will was to provide for the maintenance of the females during their lifetime :

Held that they did not get any absolute estate under the will, but were entitled to remain in possession only during their lifetime. [Para 5]

(b) Limitation Act (1908), Art. 125—Applicability — Article applies to cases where alienations by female holders are binding on reversioners — Alienations void ab initio— Article does not apply.

Article 125 is limited to cases where an alienation is good so long as the female alienator is alive; therefore, the article cannot apply to cases where the alienation is *ab initio* void, or where it is not necessary to bring a suit to set aside such an alienation. The article contemplates cases of alienations by female holders which cannot be ignored by reversioners and which are good unless they are set aside either on grounds of want of consideration or legal necessity or on other grounds: A. I. R. (34) 1947 Lah. 290 (F.B.), *Rel. on.* [Para 7]

Annotation: ('42-Com.) Lim. Act, Art. 125, N. 2, 3.

(c) Limitation Act (1908), Arts. 120, 125 — Applicability—Bequest by Hindu to his two female heirs —Only right to possession during lifetime granted — Possession of females is only of Hindu females as such — Suit by reversioner is governed by Art. 125 and not by Art. 120.

Where a Hindu bestows by a will on his female heirs merely the right to remain in possession of his property during their lifetime only, what the females get is only the Hindu women's limited estate in the property, to which they are entitled even under the Hindu law. The will, therefore, does not make any difference in their status and their possession is all the while only as Hindu females as such. A suit, therefore, by the reversioners for declaration that the alienations made by the widows are not binding on them would be governed by Art. 125, Limitation Act and not by the residuary Art. 120: *Case law referred.* [Para 7]

Annotation: ('42-Com.) Lim. Act, Art. 125, N 5.

Sarjoo Pd. and Mrs. D. Lall — for Appellants.

L. K. Jha, D. N. Varma and S. C. Prasad — for Respondents.

Das J. — This is a second appeal by the plaintiffs and arises out of a suit for a declaration that a sale-deed dated 27th August 1936, executed by defendants 1 and 2 in favour of defendant 3 was without consideration, not justified by legal necessity and therefore, not binding on the plaintiffs. I shall presently refer to the findings of the Courts below on the facts in issue between the parties, but it would be convenient to state at the very beginning that the main question involved in the appeal is one of limitation, the only ground on which the Courts below have dismissed the action. There is also a cross-objection by respondent 3, who was defendant 3 in action, which raises the question of the interpretation of the terms of a will executed by one Ramnihora Tiwari on 22nd June 1923. Therefore, the two questions for decision in this appeal are, (1) whether the suit of the plaintiffs-appellants was barred by time, and (2) what right two widows, defendants 1 and 2 in the action, got under the said will.

[2] The facts are the following. Ramnihora Tiwari was admittedly the last male owner of the property in question. He executed a will dated 22nd June 1929, in favour of defendants 1 and 2. Defendant 1 was his daughter and defendant 2 was the widow of his nephew Ram Nandan Tiwari. Both these ladies were widows at the time when the will was executed, and were apparently dependent on Ramnihora for maintenance. Ramnihora died in 1930, and the widows came in possession on taking probate of the will. The appellants alleged that they were the next reversioners to the estate of Ramnihora. They said that the two widows had a life estate under the terms of the will. The widows had been executing several documents to fritter away the estate without any valid necessity, and on 27th August 1936, they executed a sale-deed in favour of defendant 3 in respect of 5.82 acres of land. This sale-deed the appellants challenged as being without consideration and not justified by legal necessity. The defence raised several pleas—challenging the claim of the appellants to the reversionary right, also challenging the appellants' interpretation of the terms of the will, etc. One of the pleas raised was that the suit was barred by limitation having been brought in 1944, about six years after the execution of the sale-deed.

[3] The Courts below concurrently found that (a) the appellants are the next reversioner to the estate of Ramnihora; (b) under the will the two widows got nothing more than a life estate; and (c) the sale-deed in question was without consideration and not justified by legal necessity. These three findings were in favour of the appellants, but on the question of limitation the Courts below held that the action was barred by time. Hence the second appeal by the appellants. As already stated, respondent 3 the purchaser under the sale-deed of 27th August 1936, has preferred a cross-objection challenging the finding of the Courts below that under the will the widows got a life estate only. The contention of respondent 3 is that the ladies got an absolute estate in the property in question under the terms of the will.

[4] It would, I think, be convenient to examine the terms of the will first; for, if it is found that the two ladies got an absolute estate under the terms of the will, then no other question need be considered and the suit of the appellants must fail on that ground only. We have had the will translated by an official translator of this Court. The particular terms of the will on which learned counsel for the respondents has placed great reliance are the following:

> "Therefore, I, the executant of my own accord and free will, in sound state of my body and mind, in perfect enjoyment of my senses, after fully understanding everything and after getting the contents of the will read over to me execute this will without any force or pressure in favour of Mt. Keshari Kueri widow of Ramanand Tiwari and Mt. Bachni Kueri, my daughter, residents of mauza Patarkona, pargana Bhojpur, district Shahabad, thana Dumraon, Sub-registry Office Buxar, District Sub-registry Office Shahabad, by caste Brahman, by occupation cultivators with this stipulation that after the death of me the executant Mt. Keshri Kueri and Mt. Bachni shall enter in possession and occupation of my entire movable and immovable properties in half and half share and they shall remain in possession and occupation in absolute right. In case any of the two musammats dies in my life-time the surviving musammat shall enter in possession of the entire properties."

If the aforesaid official translation is correct, then there can be no doubt that the two ladies obtained an absolute estate under the will. The official translation has, however, been very seriously challenged by the appellants, and the official translator has been examined in this Court by both parties, with particular reference to the actual words occurring in the will. The deposition of the official translator shows that actual words used in the will are "Bahaisiyat Mushtaquil Kabiz Dakhil Rahenge." There is no such word as "Malik" following the word "Mushtaquil." The official translator admits that "Mustaquil" merely means "permanent, fixed, immovable, stable, firm, constant" etc. That is also the meaning of the word as given in Fallon's Dictionary. It is clear, therefore, that the word "Mushtaquil" by itself will not mean an absolute interest, unless it is coupled with some other word such as "Malik." The words "Mushtaquil Kabiz Dakhil Rahenge" would literally mean that they would remain in possession 'permanently;' the word 'permanently' qualifying, and in the context of, possession can only mean possession as long as they would be alive. There was some discussion before us as to whether the use of the word "Bahaisiyat" preceding "Mushtaquil" showed that the word "Malik" was omitted by the draftsman through inadvertence. "Bahaisiyat" will literally mean "by way of" or "according to." The official translator admitted, to a question put by this Court, that there was no word in the whole of the document which would convey the sense of giving a "right" as distinguished from mere "possession." He further admitted that in his translation he not merely translated the words used, but interpreted the document according to his light. It is clear that the interpretation of a document is not the duty of the translator and is the business of the Court.

[5] Having given my best consideration to the terms of the will as a whole, I am unable to accept the contention of learned counsel for the respondents that the ladies got an absolute estate under it. It is mentioned in the will that Mt. Keshari Kueri was living jointly with the executant and was getting maintenance. It is further stated that the daughter, Mt. Bachni, was a widow and had long ago severed her connection with the place of her husband and was maintained by the executant. It was stated that Mt Bachni got no property from her husband. It is obvious from the aforesaid statements in the will that the intention of Ramnihora was to provide for the maintenance of the widows during their life-time, and for that reason he gave the widows the right to remain in possession during their life time and each was to get half share. There was a stipulation that if any of the two ladies died in the life time of the executant, then the surviving lady would enter in possession of the entire property. Everywhere the document talks of possession and not of any other right. Nothing is stated as to what would happen after the death of the two ladies; in the absence of any such stipulation it would be difficult, indeed, to hold that Ramnihora intended that the property should be inherited by strangers to the family. On a careful consideration of the terms of the will in their entirety, I am of the opinion that the Courts below were right in holding that under the will the two widows got nothing more than the right to remain in possession during their life time. In other words, Mt. Bachni, daughter of Ramnihora, got nothing more under the will than what she was entitled to as a Hindu female under Hindu law. Mt. Keshri got merely the right to remain in possession of half share during her life time. I have construed the terms of the will as they stand, and in so doing I have not been unmindful of the principles laid down by their Lordships of the Judicial Committee, the principles being (a) that it is always dangerous to construe the words of one will by the construction of more or less similar words in a different will which was adopted by a Court in another case: (b) that the meaning of every word in an Indian will must always depend upon the setting in which it is placed the subject to which it is related and the locality of the testator from which it may receive its true shade of meaning; and (c) that the will should be read as a whole, and all the clauses must be considered to find out the intention of the testator. (See *Mt. Sasıman* v. *Shib Narain*, 26 C. W. N 425; (A. I. R. (9) 1922 P. C. 63) and the decisions referred to therein). Keeping in mind the aforesaid principles, I think, the only true construction of the will is what I have indicated above.

[6] I now turn to the question of limitation. The question is if Art. 125 or Art. 120, Sch. II, Limitation Act, applies in this case. The Courts below have held that Art. 120 applies and not Art. 125. It is not in dispute that if Art. 125 applies, then the suit was in time. The Courts below have relied on a decision of this Court in *Kanhaya Lal* v *Mt. Hira Bibi*, 15 Pat 151 : (A. I. R. (23) 1936 Pat. 323), in which it was observed that Art. 125 applies when the possession is that of a Hindu or Muhammadan female as such, that is to say, by virtue of her being a Hindu or Muhammadan, and does not apply if her possession is by virtue of a grant or transfer made *inter vivos* or by virtue of a bequest, or in other words, when her possesssion is irrespective of her being a Hindu or Muhammadan female. Their Lordships differed from the view expressed in *Mt. Nandan* v. *Wazira*, 8 Lah.

215 : (A. I. R. (14) 1927 Lah. 198) and followed and decision in *Girijanand Datta* v. *Sailajanand Datta*, 23 Cal. 645, in which Art. 128, providing a period of limitation for a suit by a Hindu for arrears of maintenance, was similarly interpreted. Learned counsel for the appellants has drawn our attention to a Full Bench decision of the Lahore High Court in *Arura Mal* v. *Mt. Sandhuran*, A. I. R. (34) 1947 Lah. 290 : (49 P. L. R. 167), where the aforesaid Patna view has been accepted, and it has been held that Art. 125 does not govern the case where a female is in possession of the property under a gift *inter vivos* or by bequest, and a suit for a declaration in respect of an alienation made by such a female is governed by Art. 120 and not 125. There is, I think, a danger of misunderstanding the observations made above, unless they are appreciated with reference to the context in which they were made. In *Kanhya Lal Missir's case*, 15 Pat. 151 : (A. I. R. (23) 1936 Pat. 323), one Madan Mohan Lall executed the will by which he bequeathed his estate to Mt. Ratan Kuer, widow of his paternal cousin Ghanshyam Das Missir, for her life time and after her death to her daughter, Mt. Hira Bibi, and her children successively one after another. There was a proviso that in case a son was born to Mt. Hira Bibi, he would take the estate absolutely. It was not disputed that only a life estate was given to Mt. Ratan Kuer and the son of Mt. Hira Bibi was to get an absolute estate but the nature of the estate given to Hira Bibi and her children, if she had no son, was one of the matters in controversy in the suit. It is to be observed that neither Ratan Kuer nor Hira Bibi were heirs of Madan Mohan under Hindu law; therefore, their possession of the property was not possession as Hindu females. The suit was brought by a person who claimed to be the sister's son of Madan Mohan for a declaration that alienations of Madan Mohan's properties by some of the defendants including Hira Bibi were not binding on him. In those circumstances, it was held that Art. 125 did not apply, and as no other Article applied the Court had to fall back on residuary Art. 120 of Sch. II, Limitation Act.

[7] In the case before us, Mt. Bachni was the heir of Ramnihora under Hindu law, and I have already found that she got nothing more under the will than what she was entitled to under Hindu law. It is clear, therefore, that she held possession as a Hindu female as such. The will made no difference to her status as a Hindu female with limited powers of alienation. As to the other widow, she was no heir, but as was observed in *Aruna Mal's case*, A. I. R. (34) 1947 Lah. 290 : (49 P. L. R. 167 F. B.), Art. 125, in plain terms contemplates a case where an alienation has to be declared void except for the life time of the female. Mt. Keshri Kuer did not get anything more than a life estate ; therefore, no question of any alienation made by her enuring beyond her life time could arise, and there could not be any necessity or bringing a suit for a declaration that an alienation made by her was not binding on the appellants after her death. It was rightly pointed out in the Full Bench decision of the Lahore High Court that it must be presumed that the applicability of Art. 125 was limited to cases where an alienation is good so long as the alienator is alive; therefore, the Article could not apply to cases where the alienation was *ab initio* void, or where it was not necessary to bring a suit to set aside such an alienation. Article 125, however, contemplates cases of alienations by female holders which cannot be ignored by reversioners and which are good unless they are set aside either on grounds of want of consideration or legal necessity or on other grounds. In the case before us, it was necessary for the reversioners to bring the suit for a declaration that the alienation made by Mt. Bachni was without consideration and not justified by legal necessity. As reversioners the appellants could not ignore the alienation made by Mt. Bachni who could, under Hindu law, make an alienation under certain circumstances which would be binding even after her death. It was necessary for the appellants to get this obstacle out of their way and the suit was brought on the footing that Mt. Bachni held the property as a Hindu female. In this view of the matter, Art. 125 clearly applied even on the principle laid down in *Kanhya Lal Missir's case* (15 Pat. 151). In my opinion, the Courts below were wrong in holding that the suit was barred by time. The other concurrent findings of the Courts below on question of fact are in favour of the appellants, and cannot be challenged.

[8] For the reasons given above, I would allow the appeal, set aside the decision of the Courts below and decree the suit of the appellants. The appellants will get their costs throughout. The cross-objection of respondent 3 is dismissed.

[9] **Mahabir Prasad J.**— I agree. In considering the question of limitation, arising in this case, what has to be borne in mind is that a suit for a declaration that an alienation made by a limited owner is not binding on a person who is entitled to suceed on the death of such an owner can be raised only when the property alienated is a part of an estate held by such an owner as a Hindu female or a Muhammadan female who by custom is governed by law of

property applicable to Hindus. For, only such an owner and no other limited owner can make alienation for legal necessity binding beyond her or his life time. If in the present case, the contention of Mr. Jha for the respondents, that the daughter in question was not holding the estate as a Hindu female but that, failing to hold as an absolute owner, was only a life tenant under the will, is accepted, the declaration sought for by the appellants becomes unnecessary. The impugned alienation in that event, cannot be binding on the appellants even if it be for legal necessity, and even if the suit be dismissed on that finding, either as not being maintainable or barred by limitation, the purpose for which the suit is brought will be achieved. The reason why Art. 125 limits itself to suits for declaration that an alienation made by a Hindu or a Muhammadan female is not binding on the reversioners, is, that a suit for such a declaration in regard to alienation of other life tenants cannot possibly arise. Such an alienation can under no circumstances be good after the death of the life owner making the alienation.

D.R.R. *Appeal allowed.*

A. I. R. (37) 1950 Patna 222 *[C. N. 55.]*

REUBEN AND DAS JJ.

Subodh Gopal Bose—Appellant v. *Province of Bihar and others—Respondents.*

A. F. O. O. No. 303 of 1949, D/-16-12-1949, from order of Sub-Judge, Sasaram, D/-21-9-1949.

(a) Civil P. C. (1908), O. 39, R. 1 — Temporary injunction — Granting of — Principles stated — Party in possession having buildings, etc., on property—Removal causing irreparable injury—Injunction can be granted.

Where a party is in possession and has kilns, buildings, bungalows, dwelling houses, tram lines, railway sidings, fixed plant and machineries, etc., thereon and very serious injury would be caused to him if he is asked to remove them pending the hearing of his suit, he is entitled to ask for an order of injunction to avoid that irreparable injury both on the grounds of *prima facie* title and balance of convenience. [Para 15]

[Principles on which temporary injunction is granted stated]. [Para 6]

Annotation: ('44-Com.) Civil P. C., O. 39, R. 1, N. 3.

(b) Transfer of Property Act (1882) S. 116 — Holding over — Agreement that lessee should continue in possession till final decision as to fresh lease—Possession of lessee under agreement does not constitute holding over.

Section 116 in terms states that unless there is an agreement to the contrary, assent by the lessor to continuance of possession and acceptance of rent from the lessee after the expiry of the lease would constitute holding over. Where the lease had expired and the lessee continued in possession under an express agreement to do so till the lessor reached a final decision as to granting of fresh lease, there is no holding over by the lessee. [Para 7]

Annotation : ('45-Com.) T. P. Act, S. 116, N. 11.

(c) Specific Relief Act (1877), S. 9—Possessory title—Suit for ejectment against any person except true owner can be maintained.

Possession is a good title against all but the true owner, and entitles the possessor to maintain an action in ejectment against any person other than the true owner who dispossesses him: (1865) 1 Q. B. 1 and 1907 A. C. 73, *Ref.* [Para 8]

Annotation: ('46-Man.) Specific Relief Act, S. 9, N. 3.

(d) Contract Act (1872), S. 188—Agent—Rights of—Agent who has some interest in property can maintain action to protect that interest even if it is a qualified interest: (1831) 172 E. R. 841, *Rel. on.* [Para 10]

Annotation : ('46-Man.) Contract Act, S. 188, N. 1.

(e) Civil P. C. (1908), O. 39, R. 1 — Temporary injunction —Grant of—Injunction cannot be granted to a trespasser.

It is well-settled that the law does not lean in favour of a trespasser, and the possession of a trespasser, for which he can seek protection, is ordinarily confined to what is actually possessed, and does not extend to what he may take in future by continuing in trespass. *Prima facie*, this is all the protection to which he is entitled. To grant an injunction in such a case would be tentamount to giving *right*, both present and future, to a trespasser, which he cannot legally claim. [Para 10]

Annotation: ('44-Com.) Civil P. C., O. 39, R. 1, N. 3.

P. R. Das, A. K. Bose and A. C. Mitter —for Appellant.

Baldeva Sahay, Sarjoo Prasad, R. P. Katriar, P. N. Gour and Government Pleader —for Respondents.

Judgment.—This is an appeal from an order dated 21st September 1949, of the learned Subordinate Judge of Sasaram, rejecting an application for an *ad interim* order of injunction made by the plaintiff of Title Suit No. 51 of 1949 pending before the said Subordinate Judge. The plaintiff-petitioner is the appellant before us. The respondents, who were defendants in the action, are (1) the Province of Bihar, (2) the Collector of Shahabad, (3) the Additional Subdivisional Officer, Sasaram and (4) Dalmia Jain and Co. Ltd.

[2] The material facts are the following: The appellant styling himself as the proprietor of Kuchwar Lime and Stone Company (which company has to be distinguished from Messrs. Kuchwar Lime and Stone Company Limited, now in voluntary liquidation) brought the suit for a declaration that he is entitled to quarry lime Stone and manufacture lime from certain properties known as upper Murli hill and lower Murli hill, with details of area, boundaries, etc., mentioned in a schedule appended to the plaint, and for a permanent injunction restraining the respondents from dispossessing, or disturbing the possession of, the plaintiff from the said properties. The allegations made by the appellant in his plaint were of the following nature. It was alleged that with regard to upper Murli hill, which has an area of about 137 acres, the appellant was the local agent of Messrs. Kuchwar

Lime and Stone Company Ltd., now in voluntary liquidation (hereinafter to be referred to as the lessee company for brevity and convenience). On 1st April 1928, the Secretary of State of India in Council, the then competent authority, gave a lease to the lessee company in respect of the said 137 acres, being the upper portion of Murli hill, with amongst other rights, the right to quarry lime stone and convert it into lime and do all acts necessary for the extraction of the stone or the manufacture of lime including the erection on the land leased of buildings and plants required for these purposes. There were various other clauses in the lease providing for the payment of rent and royalty with which we are not at present concerned except one clause, cl. 20. This clause was a renewal clause and read as follows:

> "That on the expiration of the period of this lease the lessee may, if it has duly observed all the foregoing conditions, have a renewal of the lease on terms to be agreed upon by the Collector and the lessee, subject to the approval of the Commissioner."

The lease was for a period of twenty years commencing from 1st April 1928, and ending on 31st March 1948. The lessee company went into voluntary liquidation in 1933, and on 30th September 1933, there was a deed of agreement between the liquidators and the appellant, the liquidators being Messrs. Lovelock and Lewes, Chartered Accountants of Calcutta. This agreement of 1933 does not appear to have been printed in the paper book, but was the subject-matter of protracted litigation resulting in the decision of their Lordships of the Judicial Committee in *Secretary of State* v. *Kuchwar Lime & Stone Co. Ltd.*, 65 I. A. 45 : (A. I. R. (25) 1938 P. C. 20). In the lease of 1928, there was a clause against transfer or assignment without the assent of the Board of Revenue, and the penalty for an infringement of this clause was forfeiture of the lease. The agreement of 1933, which the lessee company made in favour of the appellant, was treated by the Board of Revenue as a sub-lease without the Board's assent, resulting in forfeiture of the lease. The lessee company then brought a suit in 1934 (Title Suit No. 39 of 1934) against the Province of Bihar and its officers. This litigation ultimately went up to the Privy Council, the decision of which we have already referred to above. Their Lordships of the Judicial Committee held that the deed of agreement dated 30th September 1933, in favour of the present appellant did not constitute a sub-lease, but created an agency in favour of the appellant with regard to certain matters coupled with an interest in the property. As, however, the document was not registered, there was no *effective* transfer of any interest in the property. Therefore, the document did not, in law, constitute an infringement of the clause against assignment or transfer. The agreement of 1933 was renewed in favour of the appellant in 1943, and the appellant continued as the local agent of the lessee company until 29th February 1948. There is an endorsement at the foot of this agreement of 1943 which states that the agreement has been renewed for a term of three years with effect from the date of its termination; therefore, the allegation of the appellant is that he still continues as the local agent of the lessee company and is entitled to quarry lime stone in upper Murli hill. We may here state that Mr. P. R. Das appearing for the appellant based the case of the appellant with regard to upper Murli hill, not on any legal title acquired by the deeds of agreement; for, it is obvious that no legal title with regard to any interest in the leasehold property itself passed under the said deeds of agreement, which were not registered. Mr. Das has referred to the title, if any, of the appellant with regard to upper Murli hill as an equitable title; in other words, he has contended that with regard to upper Murli hill the appellant may be a person in possession without legal title, but he is entitled to the protection of his possession against another trespasser. We have mentioned this aspect of the case at the very outset, because this is the principal point to be considered in connection with upper Murli hill. We shall advert to the details of the argument on this point in due course. Thus, though the appellant said in his plaint that he was a local agent of the lessee company in respect of upper Murli hill, his claim was not based on mere agency. It is urged that the averments made in the plaint show that the appellant has been in possession of upper Murli hill for a number of years—may be without title—and is entitled to the protection of his possession against another trespasser.

[3] With regard to lower Murli hill, the position is somewhat different. The case of the appellant with regard to lower Murli hill, which has an area of about 250 bighas, is that the appellant is the owner of the entire surface land having purchased the right of the tenants or the maliks therein. The surface of lower Murli hill appertains to two villages Baknaur and Samhauta. It is alleged that between the years 1908 and 1928 the lessee company purchased the rights of the tenants and the maliks in the surface land. This was done because there was some opposition by the tenants to possession of the lessee on the strength of two leases made in 1908 in favour of Octavius Steel Company, the then Managing Agents of the Kuchwar Lime and Stone Company Ltd. Those two leases were also for twenty years and related, one to upper

Murli hill and the other to lower Murli hill. On 1st April 1928, the lessee company got two fresh leases : the one relating to upper Murli hill, which we have already mentioned the other relating to lower Murli hill, which contained similar clauses with one material difference. The lease relating to lower Murli hill made no reference to the surface land, but gave merely the right to the lessee to quarry lime stone and convert it into lime. When, therefore, the lessee met with opposition from the owners of the surface land, it purchased the rights of such owners. On the same day, on which there was the deed of agreement in favour of the appellant (namely, 30th September 1933) by which the local agency was created, there was a sale by the lessee company of its goodwill, etc. and all the movable and immovable properties of the lessee company, set forth in Schs. A and B, for a consideration of Rs. 35,000. This deed of sale was duly registered. Now, Sch. A, it is stated, related to the rights which the lessee company had acquired over the surface land of lower Murli hill, namely, the rights of the tenants and maliks therein. Therefore, with regard to lower Murli hill, the claim of the appellant is a two-fold claim. Firstly, the appellant claims that as owner of the surface land he cannot be dispossessed or evicted. Secondly, it is claimed, on the strength of certain entries in the *Fardreyaz*, of villages Baknaur and Samhauta, that the tenants have the customary right to quarry limestone and manufacture lime for sale, and those rights the appellant has now got by reason of his purchase. As the respondents wish to dispossess the appellant from the property and deprive him of his right, the appellant seeks an order of interim injunction.

[4] On behalf of the respondents it is alleged that the two leases in favour of the lessee company expired by efflux of time on 31st March 1948, and thereafter its lessee company neither had an absolute right of renewal, nor was it granted any renewal of the lease The present appellant unsuccessfully tried to get leases in his favour; but on 10th August 1949, the Province of Bihar made two leases in favour of respondent 4, Dalmia Jain & Co. Ltd., in respect of both upper and lower Murli hill. It is alleged that respondent 4, has taken possession and begun quarrying lime stone at least on upper Murli hill. As to local agency, the respondents allege that such agency terminated with the determination of the lease in favour of the lessee company, if not earlier, and in any view the agent has no right to sue on behalf of the principal It is further alleged that with the determination of the lease in favour of the lessee company the appellant has no title nor possession. As to lower Murli hill, it is not admitted that the entire extent of the surface land is owned by the appellant. It is denied that the tenants have any customary right to quarry lime stone and manufacture lime in derogation of the right of the Province of Bihar. It is contended that the appellant in any case is estopped from saying that the Province of Bihar had no right to grant a lease for quarrying lime stone in lower Murli hill, even though the surface land belonged to, or was in possession of, others. It is alleged that the Province of Bihar has the right to break up the surface, if necessary, in order to reach the underground lime stone. On the question of the issue of an *ad interim* injunction, the case of the respondents is that the appellant has made out no *prima facie* case, either on the question of title or balance of convenience.

[5] The learned Subordinate Judge in the order complained against accepted the contention of the respondents and held that (1) the plaintiff-appellant failed to make out a case of *prima facie* title with regard to either upper or lower Murli hill; (2) the possession of the Province of Bihar was accepted as soon as the leases terminated; and (3) the balance of convenience was on the side of the respondents.

[6] It would, we think, be convenient to consider separately the case of the appellant with regard to upper and lower Murli hill; for, in our view the legal position is not the same with regard to upper and lower Murli hill. It is well settled that before granting a temporary injunction the Court must be satisfied that the plaintiff has a *prima facie* case; that the Court's interference is necessary to protect him from irreparable or at least serious injury: that the balance of convenience is in favour of the person who asks for the injunction; and that there is no other sufficient remedy open to him by which to protect himself. These principles are in consonance with commonsense and are so well settled that it is unnecessary to cite authority in support of them.

[7] Keeping those principles in mind, we proceed to consider the case of the appellant with regard to upper Murli hill. Mr. P. R. Das thus put the case of the appellant: he said that the Province of Bihar accepted rent or royalty from April 1948 to June 1949 from the lessee company, the bills whereof have been printed at pages 85 to 90 of the appellant's paper book (Parts I and II). Mr. P. R Das contends that there was thus, a case of holding over, and as the lease was a manufacturing lease, there was no proper determination of the lease without the necessary six months' notice. The correspondence between the present appellant and the Province of Bihar or its officers which has been printed at pages 118 to 141 of the appellant's paper book (Parts I and II) and through which we have been taken by

learned counsel for the parties, shows clearly enough that the lessee company was allowed to remain in possession only till such time as a final decision was reached by the Province of Bihar with regard to fresh leases. The petition of the present appellant dated 2nd April 1948, shows that a request was made to allow the appellant to proceed with the normal working till a final decision was reached in the matter of fresh leases. The order of the District Magistrate of Shababad dated 5th April 1948, shows that the lessee company was allowed to continue the work until further orders were passed by Government. Obviously, therefore, the agreement between the parties was that the lessee company, or the present appellant as the agent of the lessee company, would continue the work of quarrying till such time as the Province of Bihar took a final decision on the question of fresh leases. Section 116, Transfer of Property Act in terms states that unless there is an agreement to the contrary, assent by the lessor to continuance of possession and acceptance of rent from the lessee after the expiry of the lease would constitute holding over. Here, there is an agreement as to the continuance of possession till such time as a final decision is reached by the Province of Bihar regarding fresh leases. It is obvious, therefore, that there is no holding over. When this was brought to the notice of Mr. P. R. Das, he conceded with his usual candour that he could not sustain the plea of holding over by the lessee company.

[8] He urged, however, very strenuously the case that the lessee company was entitled to a renewal under the clause of the lease which I have mentioned that it was for the lessor to give the lessee an opportunity of exercising the option of renewal, and in the absence of such opportunity being given, any fresh lease made by the Province of Bihar would be void; and therefore, the position of respondent 4, Dalmia Jain & Co., Ltd., was no better than that of a trespasser; that, in fine, the appellant may be in possession without any legal title, but he is entitled to protection of his possession as against another trespasser. As an abstract proposition of law, we do not think that there is any doubt that possession is a good title against all but the true owner, and entitled the possessor to maintain an action in ejectment against any person other than the true owner who dispossesses him: *Asher* v. *Whitlock*, (1865) 1 Q. B. 1: (35 L. J. Q. B. 17) and *Perry* v. *Clissold*, 1907 A. C. 73: (76 L. J. P. C. 19). Learned counsel for respondent 4 referred to S. 9, Specific Relief Act, and contended that the only remedy of a trespasser was under that section. In *Sahodra Kuer* v. *Gobardhan Tewari*, 2 Pat. L. J. 280: (A. I. R. (4) 1917 Pat. 546), it was held by a Division Bench of this Court that previous possession even for a period short of the statutory period of twelve years entitles the plaintiff to a decree for possession in a suit against a trespasser, and the view of the Calcutta High Court in *Nisa Chand* v. *Kanchiram Bagani*, 26 Cal. 579 (3 C. W. N. 568), with regard to remedy under S. 9, Specific Relief Act, was not accepted.

[9] The question here is if respondent 4, who now holds a lease from the Province of Bihar, is a trespasser. It is not seriously disputed that with regard to upper Murli hill at least, the Province of Bihar has the right to grant a lease; but it is contended that the lease in favour of respondent 4 is void, because the lessee company was not given an opportunity to exercise the option of taking a renewal of the lease. Mr. P. R. Das has relied on *Hemanta Kumari* v. *Sefatulla Biswas*, 37 C. W. N. 9: (A. I. R. (20) 1933 Cal. 477) and *Prodyot Coomar* v. *Maynuddin Mia*, A. I. R. (25) 1938 Cal. 724: (68 C. L. J. 435) for this part of his argument. He has also drawn our attention to the affidavit of the appellant, dated 19th September 1940, (printed at pp. 48 to 54 of the appellant's paper book, Parts I and II) in para 10 of which it was stated that the lessee company at first made an application for renewal of the lease in the name of the appellant and thereafter applied for renewal in their own name. From the letter of the appellant, dated 15th February 1949, it appears that the lessee company requested Government to grant a fresh lease to the appellant on the expiry of the two leases: this request was, however, made in 1944—some four years before the expiry of the leases. On behalf of the respondents, it has been contended that—(1) from the circumstances of the case, and inference of waiver by the lessee company should be drawn, and (2) under S. 205, Companies Act, it was not open to the lessee company to engage in a new undertaking by renewal of the lease. In reply Mr. P. R. Das has urged that there cannot be any inference of waiver in respect of the renewal clause, merely because in 1944, four years before the right of renewal accrued, the lessee company had requested Government to grant a lease to the appellant; and further more, the averment that the lessee company had asked for renewal has not been denied. He has also referred to S. 212 (1) (b) read with S. 179, Companies Act in support of his argument that the lessee company could ask for renewal, and such renewal would not in any way contravene the provisions of S. 205, Companies Act. Learned counsel for the Province of Bihar said that the renewal clause was uncertain and not enforceable. For the purpose of the present appeal, it is not necessary to decide these contentions and counter-contentions.

[10] There is another aspect of the case which has a more direct bearing on this question. In the suit the main relief which the appellant has claimed (as disclosed by the plaint) is a declaration that the appellant is entitled to quarry lime stone and manufacture lime from the Murli hill. As a mere local agent of the lessee company, the appellant has no such right of suit. An agent who has some interest in the property—may be a qualified interest—can maintain an action to protect that interest (see *Whittingham* v. *Bloxham*, (1831) 172 E. R. 841: (4 Car. & P. 597). In Smith's Leading Cases, Vol. II, p. 395 (12th Edn.) the following statement of the law is made:

> "But it is not merely in cases where the agent has contracted in his own name for an unnamed principal that he has a right, at law, to sue upon the contract, when he has made a contract in the subject-matter of which he has a special property, he may, even though he contracted for an avowed principal, sue in his own name."

In the case before us, the appellant did not get an effective transfer of any interest in the property of upper Murli hill: he is, therefore, in the position of a trespasser. It is well-settled that the law does not lean in favour of a trespasser, and the possession of a trespasser, for which he can seek protection, is ordinarily confined to what is *actually* possessed, that is, any limestone actually extracted, and does not extend to what he may take in future by continuing in trespass. *Prima facie*, this is all the protection to which he is entitled. To grant an injunction in such a case would be tantamount to giving a *right* both present and future, to a trespasser, which he cannot legally claim.

[11] There has been some argument before us if respondent 4 has taken possession of upper Murli hill, either after the lease of 10th August 1949, or shortly before it. The learned Subordinate Judge found that possession reverted to Government sometime after the expiry of the lease. That finding has been challenged before us. We have scrutinised the correspondence at pp. 113 to 141 (already referred to) on which the learned Subordinate Judge relied, and, in our view, though the quarrying operations might have been stopped for some time, the appellant or the lessee company did not make over possession to anybody. It is possible, however, that on some occasions the men of Dalmia Jain & Co., Ltd., did some work on upper Murli hill. Whether they approached by an old District Board road, the existence of which has been disputed before us, or went over the surface land of lower Murli hill in order to reach upper Murli hill cannot be decided on the materials before us.

[12] In view of the scope of the suit, the question is really one of right to quarry limestone on upper Murli hill, and there is no dispute as to possession or removal of limestone actually extracted. For the reasons mentioned above, we do not think that the appellant as a trespasser is entitled to ask for an injunction for the protection of a right which he cannot legally claim. The claim for an injunction with regard to upper Murli hill was, therefore, rightly rejected.

[13] The claim of the appellant with regard to lower Murli hill stands on a different footing. On the materials placed before us the appellant has made out a *prima facie* case of title to the surface land of lower Murli hill. The sale deed in favour of the appellant dated 30th September 1933, printed at pp. 55 to 70 of the appellant's paper book, shows that the rights of the tenants and maliks which the lessee company had acquired between the years 1908 and 1928 were transferred to the present appellant. In the proceeding under S. 144, Criminal P. C., which was fought between the parties, it was admitted that the surface right of lower Murli hill was held by the present appellant (*vide* the statement in the judgment of the Additional District Magistrate, Shahabad, printed at p. 101 of the repondents' paper book). As to the right of the tenants to quarry limestone and manufacture lime in lower Murli hill, our attention has been drawn to the "Fard-reyaz jungle" of villages Baknaur and Samhauta. The entries in the Fard-reyaz have been made in the form of questions and answers. Question 13 in the Fard-reyaz of village Baknaur was to the following effect:

> "Have the raiyats of the village any right to collect lime, lac or other jungle products? If so, what right?"

The answer is given as follows:

> "They can prepare lime from the jungle in the mahal for agricultural purposes. Nothing is realised for this. If the lime is prepared for sale, fee is realised according to the schedule bearing No. 279, dated 14th December 1904. Settlement is made of the lac jungle."

The schedule of fees shows different rates for limestone, etc. There is a similar entry with regard to village Samhauta also. In the Fard-reyaz of Murli Pahari which related to upper Murli hill, it is stated that the raiyats cannot get stones from the hill as it has been let out on thica lease. There is no similar entry with regard to lower Murli hill. Learned counsel for the respondents has drawn our attention to register D of tauzi No. 4769 of the Banskati Mahal in the remarks column of which it is stated that this estate consists of incorporeal rights in the mauzas mentioned below as per notification No. 1457 dated 6th March 1909. The nature of these incorporeal rights has been referred to at p. 127 of the District Gazetteer of Shahabad (Edn. 1924). It is stated there that the Banskati Mahal is an estate of an exceptional order as Government does not possess any proprietary rights in the land, but only incorporeal rights to certain spontaneous products, fuel, grass, minerals and the like. The history of these incorporeal rights is also mentioned. Similar observations occur also in the final report on the survey and settlement operations in the district of Shahabad, 1907-1916. There has been some argument before us if the right is merely to levy the banskati dues, such as the right which Raja Shah Mal and Harbans Rai, who held the mahal previously, exercised, or the right to extract minerals. That is a question which need not be considered at this stage. It is clear to us that the appellant has made out a *prima facie* case of title, both with regard to the surface land of lower Murli hill and the right to quarry limestone and manufacture lime in the area of lower Murli hill. Learned counsel for the respondents has, no doubt, contended that the effect of the entries in the Fard-reyaz is not what is contended for by the appellant. He has further contended that the appellant is estopped from saying that the Province of Bihar had no right to quarry limestone in lower Murli hill. It is not necessary to decide these questions at this stage. It is sufficient to state that *prima facie* the appellant has made out a case with regard to lower Murli hill, both as to title and the serious injury which is likely to follow if no injunction is granted.

[14] I may shortly refer to one other argument of Mr. Sarjoo Prasad appearing for respondent 4. He has contended that even if the surface land of lower Murli hill is owned by the appellant, the Province of Bihar and the lessee under the Province of Bihar have a right to reach the mineral by breaking up the surface. He relied on the statement of the law in Para. 1419 of Halsbury's Laws of England, Vol. 22, Edn. 2, at p. 661. The statement is as follows:

> "Upon the severance of mines from the surface, whether by grant or exception, working powers and liberties are usually expressly granted or reserved, but in the absence of express provision, there is incident, by implication of law, to the ownership of mines a power to get and carry away the minerals; . . . . There is *prima facie* incident to the ownership of mines, power on the part of the mine-owner to enter upon the surface, to dig pits and get the minerals."

This is a statement of the law as between grantor and grantee. Mr. Sarjoo Prasad has not been able to give us any authority which would show that a person, who is not a grantee but a complete stranger, has a right to go upon somebody-else's land in order to reach the minerals underneath.

[15] As to the possession of the surface land of lower Murli hill, there is very little doubt. The appellant is in possession and has kilns, buildings, bungalows, dwelling houses, tram lines, railway sidings, fixed plant and machineries, etc., thereon. It is obvious that very serious injury would be caused to the appellant if he is asked to remove them pending the hearing of his suit. It would be irreparable injury for the avoidance of which he is entitled to ask for an order of injunction—both on the grounds of *prima facie* title and balance of convenience.

[16] A reference has been made before us to certain notifications made by the Province of Bihar under the provisions of the Land Acquisition Act which seem to show that the Province of Bihar is proposing to acquire the surface land of lower Murli hill. It is stated that the notifications constitute a breach of the order of this Court, date 24th November 1949, by which it was directed that the *status quo* would be maintained pending the hearing of the appeal. Mr. P. R. Das has stated that his client, if so advised, would institute proceedings in contempt. We do not think it proper to say anything about these land acquisition proceedings at this stage, because we have not sufficient materials before us; nor should we like to make any remarks which might prejudice the parties with regard to any future proceeding. Under S. 56 (d), Specific Relief Act no injunction can be granted to interfere with the public duties of any department of the Provincial Government. We do not know whether these land acquisition proceedings are in the performance of public duties or not. Therefore, the order which we are proposing to pass in this appeal will not affect these land acquisition proceedings.

[17] For the reasons given above, we would allow this appeal in part to the extent indicated below. The prayer for an order of injunction in respect of upper Murli hill is refused; but the appellant will get an order of injunction, pending the decision of his suit, restraining the respondents from dispossessing, or disturbing the possession of the appellant in respect of lower Murli hill. This order will not, however, affect the land acquisition proceedings, in respect of which the parties will be at liberty to take such steps as they may be advised to take. We express no opinion as to the propriety or impropriety of instituting and continuing such land acquisition proceedings during the pendency of the suit, and in spite of the order of the Bench, dated 24th November 1949.

[18] It is unnecessary to put the appellant on terms in view of the order which we are passing. We are giving no decision as to the existence or otherwise of an old District Board road to reach upper Murli hill. But under the order of injunction which we are passing, the respondent will have no right to go to upper Murli hill over

any part of the surface land of lower Murli hill owned and possessed by the appellant. In the circumstances of the case, the parties will bear their own costs of the hearing in this Court as also in the Court below.

[19] In conclusion we should make it clear that the observations which we have made should not be construed as a final or concluded decision on any of the questions of law or fact which will arise for decision in the suit. The observations have been made with a view to determining the question of *prima facie* title and the balance of convenience only, and for no other purpose.

D.R.R. *Order accordingly.*

A. I. R. (37) 1950 Patna 228 *[C. N. 56.]*

IMAM AND JAMUAR JJ.

Tabarak Khan —Petitioner v. *Province of Bihar—Opposite Party.*

Criminal Misc. No. 784 of 1949, D/- 23-12-1949.

(a) Public Safety—Bihar Maintenance of Public Order (No. 2) Ordinance (IV[4] of 1949), S. 4 (1), Proviso — Propriety of detention can be enquired into—**It is within competence of legislature to curtail liberty of individual by valid legislation—Ordinance is *intra vires* — Proviso to S. 4 (1) before its amendment is valid and does not make sub-s. (1) ultra vires—Amendment of proviso by Bihar Ordinance 5 of 1949 does not render Ordinance IV [4] of 1949 *ultra vires.***

It is always open to a Court of law to enquire into the propriety of a detention made under a particular legislation in order to see whether the order of detention was a valid one or not. The Courts of law, however, at the same time have to administer the law as it exists, and if the particular legislation is validly enacted, it is not within the scope of the authority of a Court of law to ignore that legislation because it interferes with the liberty of the subject. The liberty of the subject is not an abstract or an absolute freedom. It is capable of being regulated by legislation when the safety of the State is involved. The safety of the State may be involved in various ways. In all these circumstances and others where the established Government finds it necessary to maintain law and order in the State, it is compelled to legislate and in so legislating may have to curtail the liberty of the subject. It may also have to curtail the powers of the Courts of law. So long as the legislation is within the legislative field of the legislating authority, such legislation would be valid legislation :1942 A. C. 206 and *other case law relied on.* [Para 4]

The Bihar Ordinance IV[4] of 1949 was declared to be *intra vires* by Federal Court in Lakhi Narayan Das's case, A. I. R. (37) 1950 F. C. 59, by its judgment dated 28th November 1949. It is quite clear that its provisions cannot be declared to be invalid merely on the ground that it confers powers on the executive to interfere with the liberty of the subject. The decision of the Federal Court was not obiter and the proviso to S. 4 (1) of the Ordinance before its amendment was within the competency of the legislative authority to enact, and, consequently the proviso was a valid provision, and, it did not render the entire provisions of the Ordinance *ultra vires*, nor the powers exercised under it *ultra vires.* Provisions of sub-s. (1) of S. 4 are mandatory and must be complied with by the authority making the order in respect of any person, under cl. (a) of sub-s. (1) of S. 2. The proviso does not nullify any of these provisions. It is a saving clause to the effect that neither the order nor the detention of the person thereunder shall be invalid or unlawful or improper on the ground of any defect, vagueness or insufficiency of the communication made to such person under this section. What has been saved by the proviso, however, is not that the detaining authority shall not comply with the mandatory provisions of the sub-section—on the contrary, it shall comply with these provisions—but that if there was any defect, vagueness or insufficiency in the communications made to the detenu, that by itself would not make the detention invalid or unlawful or improper. [Paras 7, 8]

The proviso to sub-s. (1) of S. 4 of the Ordinance no doubt makes ineffective the decision in *Nek Mohammad's case,* A. I. R. (36) 1949 Pat 1 F. B. in this respect. That, however, was within the competence of the Legislative authority to do. In construing the wording of sub-s. (1) with its proviso, the decision in *Nek Mohammad's case,* A. I. R. (36) 1949 Pat. 1 F.B. or in *Murat Patwa's* case, A. I. R. (35) 1948 Pat. 135 regarding the vagueness or insufficiency of the particulars supplied to a detenue cannot be taken into consideration. [Para 9]

The amendment of the proviso to sub-s. (1) of S. 4 by the Bihar Ordinance No. V [5] of 1949 which directed that the words "where the Provincial Government is of opinion that it would be against the public interest to disclose all the grounds of the order" shall be omitted, does not render the Ordinance No. IV [4] of 1949 *ultra vires.* [Para 10]

(b) Government of India Act (1935), S. 88 (2) (c) — **Governor can amend Ordinance by another Ordinance—Amendment of Bihar Maintenance of Public Order (No. 2) Ordinance (IV [4] of 1949) by Bihar Ordinance V [5] of 1949 is valid.**

The power to enact laws in legislative authority contains within it the inherent power to repeal or amend an enacted law. Clause (c) of S. 88 (2), is merely an enabling provision by which the Governor could by some order withdraw an Ordinance duly promulgated by him without having recourse to promulgating a fresh Ordinance repealing the previous Ordinance. This does not mean that if the Governor wished to amend an Ordinance already promulgated by him, it was not within his competence to do so by duly promulgating an Ordinance under S. 88, Government of India Act.

Amendment of Bihar Ordinance IV [4] of 1949 by Bihar Ordinance V [5] of 1949 was within the power of the Governor : A. I. R. (36) 1949 Cal. 1 F. B., *Rel. on.* [Para 11]

(c) Public Safety— Bihar Maintenance of Public Order (No 2) (Amendment) Ordinance (V [5] of 1949)— **It has retrospective operation — Interpretation of Statutes — Retrospective operation — Declaratory and amending statute.**

No statute shall be construed so as to have a retrospective operation, unless its language is such as plainly to require such a construction, and a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary : (1892) 3 Ch. 402, *Rel. on.* [Para 12]

Where an Act is in its nature declaratory the presumption against construing it retrospectively is inapplicable. Where a statute is passed for the purpose of supplying an obvious omission in a former statute, or "to explain" a former statute, the subsequent statute has relation back to the time when the prior Act was passed. [Para 12]

The amending Bihar Ordinance V [5] of 1949 should be read as one to which the presumption against construing it retrospectively is inapplicable. The amending Ordinance has a retrospective effect, that is to say, applies to cases where orders of detention had been passed before the date of the amending Ordinance. [Para 12]

(d) Public Safety — Bihar Maintenance of Public Order (No. 2) Ordinance (IV [4] of 1949), Ss. 23 and 24 —Sections are not *ultra vires* : *Lakhimi Narayan Das'* case decided by Federal Court on 28th November 1949, *Foll.* [Para 13]

(e) Public Safety—Bihar Maintenance of Public Order (No. 2) Ordinance (IV [4] of 1949), S. 4 (1) —"As soon as may be" does not mean that in all cases grounds of detention should be served within 15 days from the date of order of detention — Delay of 58 days held not such delay as to render detention illegal. A. I. R. (35) 1948 Pat. 135, *Expl.* [Paras 14 & 17]

(f) Public Safety—Bihar Maintenance of Public Order (No. 2) Ordinance (IV [4] of 1949), S. 4— Detention *mala fide*— Detention can be declared illegal — But it does not make Ordinance *ultra vires*. [Para 15]

Basanta Chandra Ghose and D. K. Sinha — for Petitioner.

Govt. Advocate—for Opposite Party.

Imam J.—This is an application by Tabarak Khan under S. 491, Criminal P. C. complaining that his detention is illegal. Mr. Basanta Chandra Ghosh, who has appeared for the petitioner, has made general arguments, which, according to him, arise not only in this application but in a series of other applications by other detenus, for whom he has also appeared in this Court. It may be mentioned that Mr. Ghosh has represented the case of eleven detenus including the detenu Tabarak Khan. Mr. Bhabanand Mukherji has appeared for the detenu Madhub Chandra Sen in Criminal Miscellaneous No. 780 of 1949. Mr. Baidyanath Prasad No. II has appeared for two detenus, namely, Jagdish Sao in Criminal Miscellaneous No. 813 of 1949, and Musahari Sao in Criminal Miscellaneous No. 848 of 1949. Mr. J. N. Varma has appeared for one detenu Tribeni Choudhury in Criminal Miscellaneous No. 876 of 1949. Mr. Umesh Chandra Prasad has appeared for four detenus, namely, Syed Alley Nabi in Criminal Miscellaneous cases Nos. 829 and 861 of 1949, Chittaranjan Hati in Criminal Miscellaneous No. 862 of 1949, Birendra Nath Das Gupta in Criminal Miscellaneous No. 869 of 1949, and Rajdeo singh in Criminal Miscellaneous No. 879 of 1949. In the case of nine detenus, no one has appeared for them and their applications in the various criminal miscellaneous cases have been sent to this Court from the Jail. The various advocates other than Mr. Ghosh appearing in their respective cases were asked if they had any further arguments to make then what had been urged by Mr. Ghosh by way of general submissions, and they stated that they had nothing further to add to what Mr. Ghosh had urged by way of general submissions. They have, however, urged the cases of the detenus represented by them regarding the merits of the applications made by them or on their behalf. The case of each detenu will be taken up separately and separate orders will be passed on the merits of their applications. The general submissions made by Mr. Ghosh will be dealt with in the present application of Tabarak Khan in Criminal Miscellaneous No. 784 of 1949, and the decision with respect to them will be applicable to the cases of the other detenus in the various criminal miscellaneous applications, which were heard after the case of Tabarak Khan.

[2] The Federal Court in the case of *Jatindra Nath* v. *Province of Bihar*, A. I. R. (36) 1949 F. C. 175: (50 Cr. L. J. 897) had declared ultra vires the proviso to S. 1 (3), Bihar Maintenance of Public Order Act of 1947. It has also declared the Bihar Act of 1949, which purported to amend the provisions of S. 1 (3) of the said Act invalid in law inasmuch as the enactment which it purported to amend was not legally in existence when the Bihar Act V of 1949 was passed. Subsequent to this decision of the Federal Court, the Governor of Bihar promulated an ordinance, namely, Bihar Ord. No. II of 1949, on 3rd June 1949. This Ordinance was declared by this Court to be void and inoperative on 21st of June 1949, as the Legislature of the Province of Bihar though not actually sitting was neither prorogued nor dissolved. Consequently, the Governor could not promulgate an Ordinance under S. 88 (1), Government of India Act. The Governor of Bihar then promulgated an Ordinance, namely, Bihar Ord. No. IV of 1949, hereinafter referred to as the Ordinance, on 22nd June 1949. The Ordinance was declared *intra vires* by this Court and that decision was upheld by the Federal Court in the case of *Lakhi Narayan Das* v. *Province of Bihar*: (A. I. R. (37) 1950 F. C. 59) by its judgment dated 28th November 1949.

[3] The detenu Tabarak Khan was ordered to be detained by the Provincial Government by its order dated 27th June 1949, under the provisions of S. 2 (1) (a) of the Ordinance. The document containing the grounds of detention under S. 4 (1) of the Ordinance is dated 22nd August 1949, and it was served upon Tabarak Khan on 24th August 1949. Such arguments as were made by Mr. Ghosh with reference to the case of Tabarak Khan only will be considered later after the general submissions which have been made by him challenging the validity of the detention not only of Tabarak Khan but of several detenus, whose case he has represented in this Court, have been dealt with. The cases of Tabarak Khan and of many other detenus were heard

after the decision of the Federal Court in the case of *Lakhi Narayan Das* v. *Province of Bihar*, (A. I. R. (37) 1950 F. C. 59). It was necessary to await this decision, as it was thought that the decision of the Federal Court would make it clear as to whether the Ordinance was ultra vires or not.

[4] Mr. Ghosh commenced his arguments by referring to the observations of Sir Patrick Spens C. J., Federal Court of India, in the case of *Basanta Chandra* v. *Emperor*, 23 Pat. 678 at p. 692: (A. I. R. (31) 1944 F. C. 86) to the following effect:

> "In our judgment, no further curtailment of the power of the Court to investigate and interfere with orders for detention has been imposed by Or. III [3] of 1944. The Court is and will be still at liberty to investigate whether an order purporting to have been made under R. 26 and now deemed to be made under Ordinance III [3] or a new order purporting to be made under Ordinance III [3] was in fact validly made, in exactly the same way as immediately before the promulgation of the ordinance. If on consideration the Court comes to the conclusion that it was not validly made on any of the grounds indicated in any of the long line of decisions in England and this country on the subject, other than the ground that R. 26 was *ultra vires*, S. 10 of Ordinance III [3] will no more prevent it from so finding than S. 16, Defence of India Act did. Such an invalid order, though purporting to be an order, will not in fact be an 'order made under this Ordinance' or having effect by virtue of S. 6 as if made under this Ordinance at all for the purposes of S. 10."

No one could doubt the validity of the observations made by the learned Chief Justice. I am of opinion that it is always open to a Court of law to enquire into the propriety of a detention made under a particular legislation in order to see whether the order of detention was a valid one or not. Mr. Ghosh, however, urged that where the liberty of the subject was involved, unless there were safeguards in the particular legislation to protect such liberty, that legislation was invalid. No one can doubt that the preservation of the liberty of the subject is of the utmost importance to the State and to a Court of law. The Courts of law, however, at the same time have to administer the law as it exists, and if the particular legislation is validly enacted, it is not within the scope of the authority of a Court of law to ignore that legislation because it interferes with the liberty of the subject. In this connection I would like to quote the opinions of their Lordships of the House of Lords in the case of *Liversidge* v. *Sir John Anderson*, 1942 A. C. 206: (110 L. J. K. B. 724). Viscount Maugham observed at p. 218 as follows :

> "Before dealing with the construction of the regulation, it is desirable to consider how the matter should be approached. The appellant's counsel truly say that the liberty of the subject is involved. They refer in emphatic terms to Magna Carta and the Bill of Rights, and they contend that legislation dealing with the liberty of the subject must be construed, if possible, in favour of the subject and against the Crown. Adopting the language of Lord Finlay L. C in this House in the case of *Rex* v. *Halliday*, 1917 A. C. 260 at p. 270 : (86 L. J. K. B. 1119). I hold that the suggested rule has "no relevance in dealing with an executive measure by way of preventing a public danger" when the safety of the State is involved. The language of the Act of 1939 (above cited) shows beyond a doubt that Defence Regulations may be made which must deprive the subject 'whose detention appears to the Secretary of State to be expedient in the interests of the public safety' of all his liberty of movement while the regulations remain in force. There can plainly be no presumption applicable to a regulation made under this extraordinary power that the liberty of the person in question will not be interfered with and equally no presumption that the detention must not be made to depend (as the terms of the Act indeed suggest) on the unchallengeable opinion of the Secretary of State. The legislature obviously proceeds on the footing that there may be certain persons against whom no offence is proved nor any charge formulated, but as regards whom it may be expedient to authories the Secretary of State to make an order for detention."

Lord Atkin, who had expressed a dissenting opinion in the case when referring to the case of *Rex* v. *Halliday*, 1917 A. C. 260 : 86 L. J. K. B. 1119) observed at p. 238 :

> "In that case the regulation undisputedly gave to a Secretary of State unrestricted power to detain a suspected person, though only on the recommendation of an advisory Committee presided over by a Judge. The argument for the appellant was that the regulation was *ultra vires* because though the words of the Defence of the Realm Act under which that regulation was made were plainly wide enough to enable a regulation to be made giving unrestricted powers, yet they ought to be read with a limitation in favour of liberty. Every Judge who dealt with the case, including the noble Lords, refused to limit the natural meaning of the words, pointing out that a state of war would itself tend to confine the construction to the plain meaning of the words and would discourage any attempt to make the words lean in favour of liberty. What that case has to do with the present I cannot see.
>
> *No one doubts that the Emergency Powers (Defence) Act, 1939, empowers His Majesty in Council to vest any minister with unlimited power over the person and property of the subject.* The only question is whether in this regulation His Majesty has done so."

Lord Macmillan observed at p. 257 :

> "I yield to no one in my recognition of the value of the jealous secrutiny which our Courts have always rightly exercised in considering any invasion of the liberty of the subject. But I remind myself, in Lord Atkinson's words, that 'however precious the personal liberty of the subject may be there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in the war or escape from national plunder or enslavement': *Rex* v. *Halliday*, (1917 A. C. 260 : 86 L.J.K.B. 1119). The liberty which we so justly extol is itself the gift of the law and as Magna Carta recognizes may by the law be forfeited or abridged. At a time when it is the undoubted law of the land that a citizen may by conscription or requisition be compelled to give up his life and all that he possesses for his country's cause it may well be no matter for surprise that there should be confided to the Secretary of State a discretionary power of enforcing the relatively mild prosecution of detention."

Lord Wright observed at p. 260 :

> "What is involved is the liberty of the subject. Your Lordships have had your attention called to the evils of the exercise of arbitrary powers of arrest by the executive and the necessity of subjecting all such powers to judicial control. Your Lordships have been reminded of the great constitutional conflicts in the seventeeth century, which culminated in the famous constitutional charters, the Petition of Right, the Bill of Rights, and the Act of Settlement. These struggles did, indeed, involve the liberty of the subject and its vindication against arbitrary and unlawful power. They sprang (to state it very broadly) from the Stuart theory that the King was King by divine right and that his powers were above the law. Thus a warrant of arrest 'per special mandatum Domin Regis' was claimed to be a sufficient justification for detention without trial. But by the end of the seventeenth century the old common law rule of the supremacy of law was restored and substituted for any theory of royal supremacy. All the Courts to-day, and not least this House, are as jealous as they have ever been in upholding the liberty of the subject. *But that liberty is a liberty confined and controlled by law, whether common law or statute. It is in Burke's words, a regulated freedom. It is not an abstract or absolute freedom.*"

Lord Romer also cited the passage from the speech of Lord Atkinson in *Rex* v. *Halliday*, (1917 A. C. 260 : 86 L. J. K. B. 1119), which has already been referred to above. It will thus be seen that in the opinion of their Lordships in *Liversidge's case*, (1942 A. C. 206 : 110 L. J. K. B. 724) the liberty of the subject is not an abstract or an absolute freedom. It is capable of being regulated by legislation when the safety of the state is involved. The safety of the State may be involved in various ways. The degree of the safety of the state may vary according to circumstances. The threat of invasion by another state would be involving the safety of the state in the highest degree. Maintenance of law and order would also be a matter of very great importance for the safety of the state. Disaster of a very great magnitude caused by natural events would also involve the safety of the state in some degree. In all these circumstances and others where the established Government finds it necessary to maintain law and order in the state, it is compelled to legislate and in so legislating may have to curtail the liberty of the subject. It may also have to curtail the powers of the Courts of law. So long as the legislation is within the legislative field of the legislating authority, such legislation would be valid legislation. After referring to the following passage from Lord Atkinson's speech in the case of *Rex* v. *Halliday*, (1917 A. C. 260 : 86 L. J. K. B. 1119).

> "However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in the war or escape from national plunder or enslavement. It must not be assumed that the powers conferred upon the executive by the statute will be abused."

Lord Wright in Liversidge's case observed :

> "These speeches embody statements of principle very relevant to the present case, and, notwithstanding, difference in the particular enactments, furnished an important and direct precedent for the conferring of powers to exercise preventive detention upon his own responsibility on the Home Secretary, and, subject to theoretical exceptions not relevant here, *ousting the jurisdiction of the Court.* In ordinary administrative measures, the legislative practice of substituting for the jurisdiction of the Court that of a specially constituted tribunal is well established, and increasingly frequent, particularly since the decision of this House in *Local Government Board* v. *Arlidge*, 1915 A. C. 120 : (84 L. J. K. B. 72). That case dealt with closing orders under the Housing, Town planning, etc. Act, 1909, Lord Haldane, L. C., pointed out that in regard to these administrative orders; "The jurisdiction both as regards original applications and as regards appeals was in England transferred from the Courts of Justice to the local authority and the local Government Board, both of them administrative bodies." It is true that the personal liberty of the subject is there not affected, but only his liberty to do what he likes with his own, *but the principle is the same.* Parliament excludes the jurisdiction of the Courts and substitutes in the one case a specially constituted administrative body in a case like the present, the Secretary of State. In no case are ordinary legal rights to be affected, unless to the extent that Parliament has said."

[5] The Ordinance and the entire provisions of S. 4 (1) of the Ordinance were declared to be *intra vires* by their Lordships of the Federal Court by their judgment dated 28th November 1949, in the case of *Lakhi Narayan Das* v. *Province of Bihar*, (A. I. R. (37) 1950 F. C. 59) and it would be just as well to quote the various passages from their Lordships' judgment as to this. There Lordships observed :

> "That all the provisions of the Ordinance relates to or are concerned primarily with the maintenance of public order in the Province of Bihar and provide for preventive detention and similar other measures in connection with the same."

And

> "It is true that detention of a person without a judicial order in a sense goes against the provision of the Criminal law but that is the very essence of preventive detention. The ordinance lays down what in the opinion of the legislative authority is essential for maintenance of public order in the province. That is the true nature and character of the legislation which unquestionably brings it within Item (1) of List II."

And

> "The word 'arbitrary' connotes want of reasonable or proper justification. If a particular piece of legislation is entirely within the ambit of the Legislature's authority, there could be nothing arbitrary in it so far as a Court of law is concerned. The Courts have nothing to do with the policy of the Legislature or the reasonableness or unreasonableness of the legislation."

And

> "The Court has got to decide on a consideration of the true nature and character of legislation whether it is really on the subject of preventive detention or not. Once that point is decided in favour of the legislative authority, and it is held that it has not trespassed beyond the limits of its assigned powers, it is not for the Court to criticise the wisdom and policy of the Legislature."

The Ordinance having thus been declared to be *intra vires* by their Lordships and to have been validly legislated, it is quite clear that its provisions cannot be declared to be invalid merely on the ground that it confers powers on the executive to interfere with the liberty of the subject.

[6] It was, however, contended by Mr. Ghosh that the decision of their Lordships in *Lakhi Narayan Das's case*, (A. I. R. (37) 1950 F. C. 59) was obiter. In my opinion, this is an idle contention. Their Lordships could not have been clearer in terms than they have been in declaring the Ordinance as *intra vires*. Their Lordships had decided the matter after considering the various provisions of the Government of India Act and of the Ordinance concerned. Mr. Umrigar, who had appeared for some of the detenus before their Lordships had raised as his fourth contention that the provisions of Ss. 23 and 24 and the proviso of S. 4 (1) of the Ordinance were illegal and *ultra vires*, and as they were not severable from the rest of the Ordinance, the entire Ordinance was bad on account of these offending provisions. So far as S. 23 is concerned, their Lordships held that it was superfluity for the reasons already stated in their judgment and it could certainly be ignored but it would not affect the validity of the Ordinance itself in any way. With reference to S. 24 of the Ordinance, their Lordships held that assuming its provisions to be bad, it was not so inextricably woven into the scheme of the whole Ordinance and so inseparably connected with its other provisions that this invalid section would make the whold Ordinance invalid and that if the section is struck out, the rest of the Ordinance would certainly survive as an effective piece of legislation fulfilling the identical object for which the Ordinance was passed.

[7] So far as S. 4 (1) of the Ordinance was concerned, Mr. Umrigar had urged before their Lordships that this clause was beyond the capacity of any Provincial Legislature to enact and it was not a matter included in any of the items in the Provincial list. Their Lordships then referred to the provisions of S. 4 (1) of the Ordinance and dealt with the contention of Mr. Umrigar that the proviso in it wholly took away the only safeguard which was provided for in S. 4 (1) and which enabled a detenu to make an effective representation by way of reply to the allegations made against him. Mr. Umrigar had further contended that once this safeguard available to a detenu was whittled down and rendered illusory by the proviso, the detention was no longer a "preventive detention", which item (1) of the Provincial List contemplated; it degenerated into 'arbitrary detention' and in respect of such a matter no power of legislation had been given to the province by the Government of India Act. Reference was made by Mr. Umrigar to the Full Bench decision of this Court in *Murat Patwa* v. *Province of Bihar*, 26 Pat. 628 : (A. I. R. (35) 1948 Pat. 135 : 49 Cr. L. J. 132 F.B.). After considering the arguments of Mr. Umrigar, their Lordships rejected the arguments made by him. They were of the opinion that the observations made in *Murat Patwas's case*, 26 Pat. 628 : (A. I. R. (35) 1948 Pat. 135 : 49 Cr. L. J. 132 F.B.), where a distinction was made between 'preventive' and 'arbitrary' detention, were obiter dicta and were of the opinion that the provisions of S. 4 (1) of the Ordinance with its proviso were validly enacted. They clearly approved of the view taken by a Bench of the Calcutta High Court in *Sushil Kumar* v. *Government of West Bengal*, 53 C. W. N. 545. The only question which their Lordships left open was as to whether the proviso to S. 4 (1) of the Ordinance practically nullified the main section to which it was engrafted and whether it would prevail over the section itself. This was a question of construction in the opinion of their Lordships which could be raised on a proper occasion. It seems to me that Mr. Umrigar had specifically raised various questions in support of his argument that the Ordinance was *ultra vires* and had specially raised the question that the proviso to S. 4 (1) of the Ordinance was beyond the capacity of any Provincial Legislature to enact. His contentions having been rejected by their Lordships, it cannot be said with any good sense that the observations of their Lordships in this connection were obiter. I think, we must proceed, after the decision of their Lordships, on the basis that the Ordinance was not *ultra vires* and that the proviso to S. 4 (1) of the Ordinance was within the competency of the legislative authority to enact, and, consequently the proviso was a valid provision.

[8] It was argued, however, by Mr. Ghosh that even if the proviso to S. 4 (1) of the Ordinance was validly enacted, whenever recourse was taken to it, it was to render the Ordinance *ultra vires* or at least the powers exercised under it *ultra vires*. This contention was made with reference to the proviso before its amendment under Bihar Ordinance No. v of 1949 promulgated by the Governor of Bihar on 21st September 1949, by which the words

> 'where the Provincial Government is of opinion that 'it would be against the public interest to disclose all the grounds of the order."

in the proviso were directed to be omitted. As I have already indicated, the proviso to S. 4 (1) before the amendment was declared by their

Lordships of the Federal Court was validly enacted, and, consequently whenever, recourse was taken to it, it could not render the entire provisions of the Ordinance ultra vires, not the powers exercised under it ultra vires. At best, it could be urged as a matter of construction that the proviso before the amendment practically nullified the main sub-section itself to which it was engrafted. It is now to be seen as to whether this is so. The provisions of S. 4 (1) with the proviso before the amendment are in the following terms:

> "Where an order is made in respect of any person under clause (a) of sub-s. (1) of S. 2, as soon as may be after the order is made, the authority making the order shall communicate to the person affected thereby, so far as such communication can be made without disclosing facts which the said authority considers it would be against the public interest to disclose, the grounds on which the order has been made against him and such other particulars as are in the opinion of such authority sufficient to enable him to make, if he wishes, a representation against the order and such person may within fifteen days of the receipt of such communication make a representation in writing to such authority against the order and it shall be the duty of such authority to inform such person of his right of making such representation and to afford him the earliest practicable opportunity of doing so:
>
> Provided that where the Provincial Government is of opinion that it would be against the public interest to disclose all the grounds of the order, neither the said order nor the detention of the said person thereunder shall be invalid or unlawful and improper on the ground of any defect, vagueness or insufficiency of the communication made to such person under this section."

It will be apparent from these provisions that the sub-section provides that *as soon as may be* after an order is made in respect of any person under cl. (a) of sub-s. (1) of S. 2 of the Ordinance, the authority making the order shall communicate to the person affected thereby, (1) the grounds on which the order has been made against him, (2) such other particulars as are in the opinion of such authority sufficient to enable him to make, if he wishes, a representation against the order, (3) it shall be the duty of the said authority to inform such person of his right to make such a representation, and (4) to afford him the earliest practicable opportunity of doing so. These provisions are mandatory and must be complied with by the authority making the order in respect of any person under clause (a) of sub-s. (1) of S. 2. The proviso does not, in my opinion, nullify any of these provisions. It is a saving clause to the effect that neither the order nor the detention of the said person thereunder shall be invalid or unlawful or improper on the ground of any defect, vagueness or insufficiency of the communication made to such person under this section. The main part of sub-s. (1) does give certain safeguards which would prevent it from being described as an 'arbitrary detention'. The provisions of sub-Ss. (2), (3), (4) and (5) of S. 4 of the Ordinance do provide further safeguards in that an Advisory Council has to be constituted by the Provincial Government to consider the case of every detenu and to make a report to the Provincial Government. Lord Macmillan observed in *Liversidge's case*: (1942 A. C. 206: 110 L. J. K. B. 724) as to this at page 254:

> "Were the person detained left without any safeguard, this might be an argument against holding that an absolute discretion has been conferred on the Secretary of State, but the argument is the other way when it is found, as it is in this regulation, that elaborate provision is made for the safeguarding of the detained person's interests. I refer to the constitution of advisory committees to which any person aggrieved by a detention order may make representations. The duty is imposed on the chairman to inform the objector of the grounds on which the detention order has been made and to furnish him with such particulars as are in the chairman's opinion sufficient to enable him to state his case. I say nothing as to the efficacy of this safeguard, for I do not know how it operates in practice, but I emphasize the significance of its presence in the regulation. *It suggests that this special procedure was introduced for the very reason that review by the law Courts was excluded.* Yet here again the paramount concern not to diminish the personal authority and responsibility of the Secretary of State is evidenced by the recognition of his right to decline to follow any advice given to him by an advisory committee."

What has been saved by the proviso, however, is not that the detaining authority shall not comply with the mandatory provisions of the sub-section on the contrary, it shall comply with these provisions but that if there was any defect, vagueness or insufficiency in the communications made to the detenu, that by itself would not make the detention invalid or unlawful or improper. The reason why this proviso was made would appear to be clear from the provisions of sub-ss. (2)-(3), (4) and (5) of S. 4 of the Ordinance. By these provisions, the Provincial Government is bound to constitute an Advisory Council of at least three members before whom the Provincial Government shall place the grounds on which the order has been made, and the representation, if any, of the detenu with any other relevant matter which the Provincial Government may consider necessary. The Advisory Council has to submit a report within three weeks from the date of its receiving the materials and further information which it may have asked for. No doubt it was left to the Provincial Government after considering the report, to either confirm, modify or cancel the order made under cl. (a) of sub-s. (1) of S. 2. If there was any defect, vagueness or insufficiency in the communication made to a detenu, it is clear the Advisory Council could ask for further information from the Provincial Government or from the detenu. I have no doubt that after having been supplied with the materials and such further information as it called for, the Advisory Council would be in a position to make a report that, in the circumstance in its opinion the detention was uncalled for or otherwise. In other words, the Ordinance set up a procedure beyond the jurisdiction of the Courts of law to consider the case of each detenu by an Advisory Council. Although it was left open to the Provincial Government either to confirm, modify or cancel the order of detention after considering the report of the Council. If the detaining authority did not comply with the main provisions of sub-s. (1) of S. 4 of the Ordinance, that is to say, did not supply as soon as may be the grounds of detention or any particulars at all, or did not inform the detenu as to his right to make a representation, or did not afford him the earliest practicable opportunity of doing so, the proviso could not stand in the way of a Court of law declaring, in such circumstances, such a detention illegal. A Court of law could and would in an application made to it under S. 491, Criminal P. C., examine the grounds of detention in order to ascertain amonst other things as to whether they contained any particulars at all. If such grounds contained no particulars at all, the provisions of sub s. (1) of S. 4 of the Ordinance would not have been complied with. Very great care would have to be taken in distinguishing between vagueness in the particulars supplied and particulars not being supplied at all.

[9] Mr. Ghosh, however, relied upon the Full Bench decisions of this Court in *Murat Patwa's case*: (26 Pat. 628: A. I. R. (35) 1948 Pat. 135: 49 Cr. L. J. 132 F. B.) and the case of *Nek Mohammad* v. *Province of Bihar*, A. I. R. (36) 1949 Pat. 1: (50 Cr. L. J. 44 F. B.) to the effect that the vagueness in the particulars in the grounds as supplied to a detenu which could not enable him to make an effective representation would make the detention illegal. Consequently, the effect of the proviso in sub-s. (1) of S. 4 of the Ordinance had the effect of nullying the mandatory provisions of the main sub-section. It is, however, to be remembered that these decisions were given with reference to Bihar Act V [5] of 1947 (The Bihar Maintenance of Public Order Act, 1947). Section 4 of the said Act is in similar terms to sub-s. (1) of S. 4 of the Ordinance but without the proviso. It did not contain such provisions as are found in sub-ss. (2), (3), (4) and (5) of the Ordinance. The proviso to sub-s. (1) of S. 4 of the Ordinance no doubt makes ineffective the decision in *Nek Mohammad's case*: (A. I. R. (36) 1949 Pat. 1: 50 Cr. L. J. 44 F. B.) in this respect. That, however, was within the competence of the Legislative authority to do. In construing the provisions of a statute, the Court has to look to the provisions contained therein and if the words are clear, effect has to be given to those provisions. I am very doubtful, if S. 4 of the Act V [5] of 1947 had a similar proviso to it as is to be found in sub-s. (1) of S. 4 of the Ordinence, that the decision in *Nek Mohammad's case*: (A. I. R. (36) 1949 Pat. 1: 50 Cr. L. J. 44 F. B.) would have been what it has been. Bihar Act V [5] of 1947 was no longer law when the Ordinance was enacted. As I have already pointed out, the proviso to sub-s. (1) of S. 4 of the Ordinance has been found by their Lordships of the Federal Court to have been validly enacted, and on a matter of construction, I can find no such thing in it as would nullify the main provisions of sub-s. (1) as they stand in the Ordinance. In construing the wording of sub-s. (1) with its proviso, I am unable to take into consideration the decision of this Court in *Nek Mohammad's case*: (A. I. R. (36) 1949 Pat. 1: 50 Cr. L. J. 44 F. B.) or in *Murat Patwa's case*: (26 Pat. 628: A. I. R. (35) 1948 Pat. 135: 49 Cr. L. J. 132 F. B.) regarding the vagueness or insufficiency of the particulars supplied to a detenu.

[10] It was next urged by Mr. Ghosh that the proviso to sub-s. (1) of S. 4 of the Ordinance had been amended by Bihar Ordinance, No. V [5] of 1949 which directed that the words "where the Provincial Government is of opinion that it would be against the public interest to disclose all the grounds of the order" shall be omitted, and this rendered the whole of Ordinance No. IV [4] of 1949 *ultra vires*. As I understood his argument, by this amendment, the detaining authority could make the communication of the grounds and the particulars vague and insufficient with all kinds of defects and the detenu would not be in a position to make an effective representation. The exercise of such power would make the detention arbitrary, and the provisions of the Ordinance could not be said to be with reference to preventive detention. I am unable to accept this contention as the detaining authority would have still to comply with the main provisions of sub s. (1). So long as the detaining authority observed the mandatory provisions of the main provisions of sub s. (1), any defect, vagueness or insufficiency in the communication to the detenue would not render the order of detention or the detention itself unlawful or improper. I cannot see how the Ordinance in its entirety could be said to be *ultra vires* because of the amendment made by Ordinance No. V [5] of 1949.

[11] Mr. Ghosh further argued that the Governor of Bihar had no power to amend the Ordinance. He argued that under S. 88, Government of India Act, the power of the Governor to legis-

late was a limited authority. He argued that once an Ordinance was enacted by the Governor, he could neither repeal nor amend it. He could only withdraw it under cl. (c) of sub-s. (2). He relied upon the decision of the Dacca High Court in the case of *Tamizuddin Ahmad* v. *Province of East Bengal*, (36) A. I. R. 1949 Dacca 33 : (51 Cr. L. J. 65). This decision, however, is not in point as it decided that the Governor had no power to extend an ordinance. In that decision itself, reference has been made to the case of *Jnan Prasanna* v. *Province of West Bengal*, 53 C. W. N. 27 : (A. I. R. (36) 1949 Cal. 1 F. B.) and the observations of Harries, C. J. have been quoted. In my opinion, the power to enact laws in a legislative authority contains within it the inherent power to repeal or amend an enacted law. Clause (c) of S. 88 (2) in my opinion, is merely an enabling provision by which the Governor could by some order withdraw an Ordinance duly promulgated by him without having recourse to promulgating a fresh Ordinance repealing the previous Ordinance. This does not mean that if the Governor wished to amend an Ordinance already promulgated by him, it was not within his competence to do so by duly promulgating an Ordinance under S. 88, Government of India Act. Harries, C. J. in the Full Bench decision of the Calcutta case in this connection observed :

> "Section 88 (2) also provides that an Ordinance promulgated under that section shall have the same force and effect as an Act of the Provincial Legislature assented to by the Governor, and it appears to me that what the Provincial Legislature could do the Governor can do by Ordinance in a proper case. The Provincial Legislature could undoubtedly amend the existing Provincial law and that being so the Governor can do so by Ordinance if circumstances exist justifying the promulgation of such Ordinance.
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> * * * *
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> It was then contended that even assuming the Governor could amend existing Provincial Legislation by Ordinance, he could not give retrospective effect to the Ordinance. It was argued that cl. (2) of S. 1 was clearly retrospective and so also was S. 3. By cl. (2) of S. 1 it is enacted that certain provisions in S. 2 which amended S. 16 (1) of the Security Act are to be deemed to have taken effect on and from the date of the commencement of the Security Act, as if on that date the Ordinance promulgated had been in force.
>
> In my view if a Governor can legislate in proper circumstances and such legislation is to have the same effect as if passed by the legislature then it appears to me that the Governor is entitled to give retrospective effect to an Ordinance which he promulgates. It has been held by the Federal Court in the case of the *United Provinces* v. *Mt. Atiqa Begum*, 1940 F. C. R. 110 : (A. I. R. (28) 1941 F. C. 16), that the right to legislate retrospectively is inherent in the right to legislate. That being so, if the Governor has a right to legislate and such legislation has the effect of legislation by the Provincial Legislature then it appears to me that inherent in that right is a right to legislate retrospectively if such course were necessary. This was the view of a Full Bench of the Bombay High Court in *Prabhakar Kondaji* v. *Emperor*, A. I. R. (31) 1944 Bom. 119 : (45 Cr. L. J. 604) and it has been accepted by the Privy Council in *Kumar Singh* v. *Emperor*, 73 I. A. 199 : (A. I. R. (33) 1946 P. C. 169 : 47 Cr. L. J. 933)."

I respectfully agree with the opinion of his Lordship.

[12] A further argument was raised by Mr. Ghosh that the amending Ordinance V [5] of 1949 could not have a retrospective effect, that is to say, could not apply to cases where orders of detention had been passed before the date of the amending Ordinance. It has always been understood that no statute shall be construed so as to have a retrospective operation, unless its language is such as plainly to require such a construction, and that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary. This was the view which Lindlay, L. J. expressed in *Lauri* v. *Renad*, (1892) 3 Ch. 402 : (61 L. J. Ch. 580). There may, however, be exceptions to this general rule. In Edn. 4 of Craies on Statute Law at p. 341 it has been stated : "Where a statute is passed for the purpose of supplying an obvious omission in a former statute or, as Parke J. said in *R.* v. *Durslay*, (1832) 3B & Ad. 469 : (1 L. J. M. C. 37), "to 'explain' a former statute," the subsequent statute has relation back to the time when the prior Act was passed." Craies also state that where an Act is in its nature declaratory the presumption against construing it restrospectively is inapplicable. In my opinion, the amending Ordinance should be read as one to which the presumption against construing it restrospectively is inapplicable.

[13] Mr. Ghosh also argued that the provisions of Ss. 23 and 24 of the Ordinance rendered the Ordinance *ultra vires*. This has been fully considered by their Lordships of the Federal Court in the case of *Lakhi Narayan Das* v. *The Province of Bihar*, A. I. R. (37) 1950 F. C. 59, so recently decided, in which such a contention has been negatived, and I am bound to follow the decision of their Lordships.

[14] It was next urged that the expression "as soon as may be" in sub-s. (1) of S. 4 of the Ordinance means not more than 15 days from the date of the order of detention. It is impossible to construe the provisions of sub-s. (1) of S. 4 of the Ordinance in such a way. Reliance, however, was placed on certain observations of their Lordships in the Full Bench decision of this Court in *Murat Patwa's case*, 26 Pat. 628 : (A.I.R. (35) 1948 Pat. 135; 49 Cr. L. J. 132). Their Lordships observed :

> "What in this context is the effect of the words 'as soon as may be?' We may ask ourselves—as soon as may be—what? In this respect, the Legislature in providing that, once the grounds have been served, the person affected shall be afforded the earliest practical opportu-

> nity of making a representation, *has provided as express indication of its intention because it cannot have intended that there should be any greater degree of delay in communicating the grounds to the person affected than in affording him an opportunity of making his representation. Any contrary inference would lead to an absurdity.*"

While their Lordships no doubt so observed they clearly stated later on in the judgment that:

> "Beyond saying that it should ordinarily be possible to communicate the grounds to a detenu within a comparatively short period of time and that after the lapse of such a period the onus will shift to the authority in question to show that the grounds were served as soon as was reasonable, we think it better not to indicate any particular period as being sufficient to shift the onus of proof. The circumstances will obviously differ to a substantial extent. What is reasonable in one set of circumstances may be quite unreasonable in another."

It is quite obvious that in *Murat Patwa's case*, 26 Pat. 628 : (A.I.R. (35) 1948 Pat. 135; 49 Cr.L J. 132 (F.B.)), there is no decision to this effect that the words "as soon as may be" mean that the grounds of detention should be served in all cases within 15 days from the date of the order of detention.

[15] Mr. Ghosh also urged that the detention was *mala fide* in that there was an inordinate delay, after the recommendation of the Advisory Council, in passing final orders under sub-s. (5) of S. 4 of the Ordinance. He further urged that due care and diligence was not exercised by the detaining authority, and, consequently, the detention was *mala fide*. These are matters which really should be more properly considered when the case of each detenu is dealt with. If the detention is a *mala fide* one, then no doubt, having regard to the decisions of the Courts in this country, and the observations of their Lordships in *Liversidge's case*, (1942 A. C. 206 : 110 L. J. K. B. 724), the detention can be declared illegal by a Court of law. A *mala fide* detention, however, would not make the Ordinance *ultra vires*.

[16] Having given due consideration to the submissions made by Mr. Ghosh, so far as I was capable of understanding them, I have come to the conclusion that none of them can reasonably establish the proposition that the Ordinance was *ultra vires*.

[17] Coming now to the specific case of Tabarak Khan, I have already set out at the commencement of this judgment the various dates regarding the order of detention, the grounds of detention, and their service. Mr. Ghosh pointed out that there had been a delay of 58 days since the order of detention and the service of the grounds of detention. This was non-compliance with the mandatory provisions of sub-s. (1) of S. 4 of the Ordinance in that the grounds of detention were not served as soon as may be after the order of detention. On behalf of the Government, affidavits have been filed to show that Tabarak Khan was released from jail on 3rd June 1949, by virtue of an order of this Court. That release, I take it, was due to Bihar Ordinance, II [2] of 1949 having been declared *ultra vires* by this Court. A fresh order of detention was made by the Provincial Government on 27th June 1949, under Ordinance IV [4] of 1949. It was not until 3rd August 1949, that Tabarak Khan was arrested and brought to Dhanbad sub-jail. The Additional Deputy Commissioner of Dhanbad having come to know of his arrest sent to the Assistant Jailor, S. A. Martin the order of detention made, under S. 2 (1) (a) of the Ordinance which was received by him on 9th August 1949 and he served the order on the detenu on that very day. On 10th August 1949, Martin communicated the service of the order to the Political Department, Special Branch of Bihar. He received the grounds of detention dated 22nd August 1949, on 24th August 1949, and served them upon the detenu the same day. In my opinion, there has not been such a delay in serving the grounds of detention upon Tabarak Khan as to make his detention illegal. It was no use drawing up the grounds of detention against Tabarak Khan until the Provincial Government had intimation that he had been arrested and detained.

[18] Mr. Ghosh frankly conceded that he had no submissions to make on the grounds of detention and the particulars contained therein. I have looked into the particulars stated in the grounds of detention against Tabarak Khan, and I can find nothing which would justify my saying that there has been non-compliance with the provisions of sub-s. (1) of S. 4 of the Ordinance.

[19] Mr. Ghosh further submitted that the detention was *mala fide*. No facts, however, have been stated in the petition, nor is there any affidavit to prove that the detention is *mala fide*. Mr. Ghosh urged that the detention must be deemed to be *mala fide* as there was nothing to show that the case of Tabarak Khan had been placed before the Advisory Council within three months of the order of detention as required by sub-s. (2) of S. 4 of the Ordinance. He pointed out that the Provincial Government is bound to place the case of a detenu before the Advisory Council within three months of the order of detention, and the Advisory Council was bound, under sub-s. (4), to submit, within three weeks of its receiving the material and further information as called for, its report to the Provincial Government. He then referred to S. 3 of the Ordinance, pointing out that an order of detention made under cl. (a) of sub-s. (1) of S. 2 shall be in force for a period not exceeding six months

from the date on which it is confirmed or modified under sub-s. (5) of S. 4. Under sub-s. (5) if the Provincial Government delayed in passing final orders after considering the report of the Advisory Council, it could continue to detain a detenu indefinitely and that when it did pass final orders confirming the order of detention, then that order of detention would be in force for six months from the date of confirmation under sub-s. (5). With such wide powers, it was the bounden duty of the Provincial Government to pass final orders after considering the report of the Advisory Council within a reasonable time, otherwise its failure to do so would be regarded as *mala fide*, and the detention would be illegal as it would be a *mala fide* detention. Mr. Ghosh however, has not been able to place a single fact to prove that the case of Tabarak Khan has not been placed before the Advisory Council within three months of the order of detention as required by sub-s. (2), nor has he been able to place a single fact to show that the Advisory Council submitted its report and that the Provincial Government did not pass any orders on it under sub-s. (5). In these circumstances, I do not think it is possible for me to hold that the detention of Tabarak Khan is illegal because it is a *mala fide* detention.

[20] The application of Tabarak Khan is accordingly dismissed.

Jamuar J.—I agree.

R.G.D. *Application dismissed.*

A. I. R. (37) 1950 Patna 237 [*C. N. 57.*]

SHEARER J.

In the matter of the Gaya Sugar Mills Ltd. Lakhminarayan Bhadani and others — Petitioners.

Company Act Case No. 21 of 1949, D/-22-12-1949.

(a) Companies Act (1913), S. 162—Winding up—Fraud—Finding of fraud cannot be come to on the basis of affidavits. [Para 3]

Annotation: ('46-Man.) Companies Act, S. 162 N. 7.

(b) Companies Act (1913), Ss. 162, 175 — Provisional liquidator — Appointment of — Provisional liquidator not to be appointed pending order on winding up application on ground of deadlock in management.

An application for the appointment of a provisional liquidator is not ordinarily allowed except on the petition of a creditor who has been unable to obtain payment of his money, or unless the company asks for or agrees to the appointment. The dangers involved in appointing a provisional liquidator and then finding that there is no justification for making a winding up order are obvious. The consequences to the company of the making of a wrong order in such a matter are far more serious than the granting of an injunction which has ultimately to be dissolved. The object in appointing a provisional liquidator is to ensure that there will be a fair distribution of the assets of the company and that one creditor will not be permitted to benefit at the expense of the others. A public company cannot be wound up on the ground of a deadlock in the management and pending the making of a winding up order a provisional liquidator cannot be appointed with full power to carry on the business. (1877) 6 Ch. D. 112, *Rel. on.*; (1916) 2 Ch. D. 426, *Disting.* [Paras 3, 4]

(c) Companies Act (1913), S. 175 — Provisional liquidator—Appointment of — Grounds — Substratum of company gone owing to abandonment of certain project—No sufficient ground.

The ground that, as a particular project has been abandoned or indefinitely postponed, the substratum of the company has gone or largely gone may, perhaps, be a ground for making a winding up order, but it cannot possibly be a ground for appointing a provisional liquidator. [Para 4]

Annotation: ('46-Man.) Companies Act, S. 175 N. 1.

L. K. Jha, Advocate-General, Nitai Chandra Ghosh, Balbhadra Prasad Singh and P. K. Bose —for Petitioners.

P. R. Das, U. N. Sinha and R. J. Bahadur, K. N. Varma and P. K. Sen—for the Company.

Order.—This is an application by three share holders in a limited company, known as the Gaya Sugar Mills Limited, for a winding-up order and, pending the making of such an order, for the appointment of a provisional liquidator. For the present, I am concerned only with the latter application, which is opposed by the company. The Gaya Sugar Mills Limited was originally a private company but was incorporated as a public company in 1934, the capital being 7 lakhs. This capital was increased to 12 lakhs, and then to 40 lakhs, and finally, in 1944, to 1 crore. The reason for this was that the company embarked on an ambitious scheme to construct a large and up-to-date sugar factory and also a card board factory at Warisaliganj. The original factory is situated at Guraru, which appears to be some distance from Warisaliganj. Warisaliganj was selected as a better site as it is situated in the centre of an area in which good sugarcane can be grown. Land was purchased and buildings were erected at Warisaliganj and orders were placed for new machinery. It is said that delivery was actually taken of machinery worth approximately 25 lakhs. It was hoped that the project would be completed in time to enable the manufacture of sugar to be begun during the crushing season of 1947-48. This hope was, however, falsified. Machinery valued at 8 lakhs arrived at Calcutta, but the directors were either unable to pay for it, or, being unable to find the capital necessary for completing and working the new mill, decided to cut their losses and not take delivery of it. The orders which had been placed for the card-board factory were countermanded, and in the spring of 1948 the entire project was abandoned, whether for good or temporarily, until the necessary funds could be raised, does not appear very clearly from the record. It is obvisious that a great deal of money was lost, and it is not surprising that dissensions arose among the directors, of which, under the articles of association, there were seven. These culminated in an incident which took place at a meeting of the directors on 10th July 1949.

[2] It appears that a few days earlier, on 4th July 1949, the managing director, Lala Gurusharan Lal, and his son, Arjun Prasad, obtained payment of a sum of Rs. 60,000, or thereabouts, due to the company by the East Indian Railway Company. Lala Gurusharan Lal and his son were, at the meeting, taxed with using this money for their own purposes. According to the petitioners, Lala Gurusharan Lal thereupon undertook in writing either to refund the money to the company on or before 24th July 1949, or resign his office as managing director. This undertaking is said to have been contained in a letter which Lala Gurusharan Lal handed over to another director, Chandmul Rajgarbia. Neither the letter nor any copy of it has been produced. At about this time, or somewhat later, one of the directors, Bhagwati Prasad Khaitan, resigned, and another, Birdhichand Bhalotia, forfeited his office in consequence of his failure to meet certain calls on his shares, according to the petitioners, Lala Gurusharan Lal did not implement the undertaking he had given. Thereupon, the three remaining directors, namely, Onkarnath Jajodia, Sohanlal Jajodia and Chandmul Rajgarhia, or, more probably, a majority of these consisting of the two former, purported to fill up four vacancies on the board. Simultaneously Lala Gurusharan Lal, Arjun Prasad and, probably, I imagine, Chandmul Rajgarhia, purported to fill up the two vacancies, which certainly existed, with persons other than those appointed by the rival group. The result is that two separate boards of directors, as it were, came into existence, each consisting of seven persons, of whom, however, only three persons, namely, Sohanlal Jajodia, Onkarnath Jajodia and Chandmul Rajgarhia belong to each. Conflicting orders were issued by each board, and the Imperial Bank, Gaya, intimated that it could not carry out the mandates of either. Either before or after this Sohnalal Jajodia instituted a suit in the original side of the Calcutta High Court, asking for a declaration that Lala Gurusharan Lal and his son Arjun Prasad had forfeited their offices and also for an injunction restraining Lala Gurusharan Lal from acting as managing director. A temporary injunction was granted, but later, the order was varied so as to enable the defendants in the suit to negotiate for loans. This suit is set down for peremptory hearing on 5th January 1950. Lala Gurusharan Lal, or his faction, continued in possession of the company's premises at Guraru, an attempt was made by Sohanlal Jajodia to dislodge them by means of an application under S. 144, Criminal P. C. This application was, however, unsuccessful. It was immediately after this that the petitioners applied for a winding-up order. The broad ground on which such an order is asked for is stated thus in para. 46 of of the application:

> "The main purpose of the company has become impossible for performance and there are no funds adequate for carring on the business of the company, and the company cannot go on except at a heavy loss."

Certain particulars are then given which the petitioners regard as going to support the ground they put forward. The existing factory at Guraru has a capacity of 800 tons, and it will probably benefit by the expenditure incurred at Warsaliganj on improving the yield and quality of sugarcane. The crushing season begins this month, and the company in its affidavit states that the necessary preparations have been made. In reply to this affidavit it is stated that, if the boilers have been fired, this was done as a piece of camouflage for the purpose of resisting this application and that labourers are not being paid their wages. I am not prepared to accept this statement. At the same time, the prospects of the share-holders, who, have received nothing since 1946, receiving anything in the immediate future is, I think, myself, somewhat remote. On the other hand, it is conceded that a majority of the share-holders are opposed to the business being suspended and the company wound up. All that the learned Advocate-General says is that the majority consists of Lala Gurusharan Lal and his relations and persons who have a blind and unreasoning confidence in him. Nevertheless, that is a circumstance to which I have to have regard.

[3] The learned Advocate-General in the earlier part of his address dwelt at some length on certain dealings by Lala Gurusharan Lal with the assets of the company, which he described as fraudulent. I observe that the trustees of the debenture-holders in a recent report merely described these as indications of "inefficient management including indiscreet use of the company's moneys." It may be—and I am not in any way prejudging the matter—that fraud will eventually be established, and it may be that that would justify the making of a winding up order even if a majority of the share-holders are opposed to it. But a finding of fraud cannot be come to on the basis of affidavits. Moreover, what I am now concerned with is not the making of a winding up order but the application for the appointment of a provisional liquidator. Such an application is not ordinarily allowed except on the petition of a creditor who has been unable to obtain payment of his

money, or unless the company asks for or agrees to the appointment. The dangers involved in appointing a provisional liquidator and then finding that there is no justification for making a winding up order are obvious. The consequences to the company of the making of a wrong order in such a matter are far more serious than the granting of an injunction which has ultimately to be dissolved. The object in appointing a provisional liquidator is to ensure that there will be a fair distribution of the assets of the company and that one creditor will not be permitted to benefit at the expense of the others. This is well illustrated by a decision cited by the learned Advocate-General. In *In re Hammersmith Town Hall Co.*, ((1877) 6 Ch. D. 112). In that case an application had been presented by certain creditors of the company for a winding-up order. The managing director had been adjudged a bankrupt. Several creditors were pressing unsuccessfully for payment, and a meeting of the share-holders to discuss the situation of the company had been convened for 26th June Also—and this is of importance—an agreement had been entered into for the sale by the company of certain property belonging to it, and this sale was to be completed by 28th June. On 25th June a provisional liquidator was appointed "to take possession of and protect the assets of the company." When citing this decision the learned Advocate-General pointed out that the Government of Bihar had instituted a certain proceeding to recover a sum of more or less 1½ lakhs due from the company on account of sugarcane cess and that the Punjab National Bank had threatened to sell certain stores on which it had a charge in order to realise a sum of 3 lakhs due to it on overdraft. Six weeks or so have elapsed since this threat was issued and no further action has been taken by the Bank. The value of the stores is more than twice the amount due to the Bank. In neither of these matters has a stage been reached in which it is possible to say that the company is unable to pay its debts. Moreover, the application does not purport to be under cl. (v) but under cl. (vi) of S. 162 of the Act.

[4] The learned Advocate-General reiterated the point that a deadlock had occurred in the management of the company and that its continuance was especially detrimental to the share-holders as the business of crushing sugarcane and manufacturing sugar is a seasonal business, which can only be carried on for five or six months at this time of the year. I doubt if the decision *In re Yenidje Tobacco Co. Ltd.*, (1916) 2 Ch. D. 426 : (86 L. J. Ch. 1), which was cited in this connection by Mr. Jha, is an authority even for the proposition that a public company of the kind with which we are now concerned can be wound up on the ground of a deadlock in the management. It is certainly no authority for the proposition that pending the making of a winding-up order a provisional liquidator can be appointed with full powers to carry on the business. It would be unusual, to say the least of it, to confer such powers on a provisional liquidator. Even assuming that, owing to the deadlock, sugar cannot be manufactured immediately, or almost immediately—and as I have already said the evidence is rather the other way—the deadlock is or ought to be resolved when the Calcutta High Court gives judgment, which it may be expected to do very early in the coming year. If it is not so resolved, then it is open to the share-holders to convene an extra-ordinary general meeting and appoint additional directors, vide *Barron* v. *Pottar*, (1914) 1 Ch. 895 : (83 L. J. Ch. 646). As to the other ground put forward by the petitioners, namely, that, as the Warisaliganj project has been abandoned or indefinitely postponed, and in consequence the substratum of the company has gone or largely gone, that may perhaps, be a ground for making a winding up order, but it cannot possibly be a ground for appointing a provisional liquidator. In my opinion, this application, so far as the matter of the appointment of a provisional liquidator is concerned, fails and must accordingly be dismissed with costs.

D.H. *Application dismissed.*

A. I. R. (37) 1950 Patna 239 *[C. N. 58.]*

MEREDITH AND RAMASWAMI JJ.

Abdul Satter and another — *Appellants* v. *Mt. Hamidan* — *Respondent.*

A. F. A. D. No. 349 of 1949, D/- 27-10-1949.

Court-fees Act (1870), S. 12 (2) — Deficiency of court-fee in lower Court — Power of Court of appeal to stay hearing until deficit is paid—Proper course to be followed stated — Civil P. C. (1908), O. 41, R. 11.

Where a plaint as well as the memorandum of appeal filed by a plaintiff are found insufficiently stamped, the proper course to be followed by the Appellate Court is to direct that the appeal be registered on the appellant supplying the deficit court-fees as regards his memorandum of appeal, and after the appeal has been registered and before it has been dealt with under O. 41, R. 11, Civil P. C., to place the case for orders under S. 12, sub-s. (ii), Court-fees Act, as regards the deficit court-fees on the plaint in the lower Court. It is clear that procedure contemplated is that as soon as the appeal comes before the appellate Court it should stay the hearing until the deficit is paid, and if it is not paid within the time fixed, dismiss the appeal. The party cannot object to paying the deficit in the lower Court until after the appeal has been heard under O. 41, R. 11, Civil P. C. : A.I.R. (14) 1927 Cal. 775, *Rel. on*; *Observations of Dawson Miller J. to the contrary in*

A. I. R. (8) 1921 Pat. 88 (F. B.), *held obiter* ; A. I. R. (7) 1920 Pat. 827, *Ref.* ; A. I. R. (20) 1933 Pat. 234, A. I. R. (32) 1945 Pat. 81 and A. I. R. (24) 1937 Pat. 550, *Disting.* [Paras 10 & 11]

Annotation: ('49-Com.) Court-fees Act, S. 12, N. 15.

S. Anwar Ahmed — for Appellants.

Government Advocate — for the Crown.

Judgment.— When this second appeal came before us for hearing under O. 41, R. 11, Civil P. C., we discovered that there was a deficit court-fee due from the appellant in respect of the Courts below. We, therefore, under the provisions of S. 12 (ii), Court-fees Act, read with S. 10 (ii), postponed the hearing and gave the appellant time to make up the deficit, with an order that the appeal would stand dismissed if he did not comply.

[2] Subsequently, the appellant appeared before us and suggested that this order was not in accordance with the practice of the Court, and that, moreover, though he had accepted the stamp report with regard to the deficit so far as this Court was concerned and had paid it, he still wished to contest the stamp report with regard to the Courts below, which was a matter for the Bench, and not for the Taxing Officer.

[3] Though, in the circumstances, not having appeared when the previous order was passed, the appellant was not entitled to any further hearing, we decided to give him an opportunity to support his contentions. His learned Advocate immediately conceded to-day that he could not successfully challenge the stamp report and that the deficit reported was in fact due from the appellant. He nevertheless objected to paying the amount until after the appeal had been heard under O. 41, R. 11, and said this was the usual practice.

[4] Quite obviously, the only motive that can be behind this contention is that the appellant hopes that, in the event of the appeal being dismissed under O. 41, R. 11, he will be able to evade paying the amount which, he admits, is due from him.

[5] If there has been a practice of this Court to postpone making an order for realisation of such deficits until the final hearing of the appeal, it is, if we may say so, a very bad practice, and the sooner it is changed the better. We, in our own experience, have seen many cases where, having disposed of the appeal, the Court has attempted in vain to realise deficit court-fees in respect of the lower Courts, but has failed to do so, with consequent loss to the revenue.

[6] It is not only a question of adopting a better practice, but, so far as we can see, the order we have passed is more in accordance with the provisions of the Court-fees Act, and is, moreover, supported by authority. Section 12 (ii), Court-fees Act, says that whenever a suit, in which there is a question of court-fees payable, comes before a Court of appeal, reference or revision, if such Court considers that the said question has been wrongly decided to the detriment of the revenue, it shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided, and the provisions of S. 10, paragraph (ii) are to be applied.

[7] This casts a duty upon us to realise the deficit whenever a suit comes before us in appeal in which a deficit is found to be due, and S. 10 (ii), which is to be applied, says "in such case the suit shall be stayed until the additional fee is paid". If the additional fee is not paid within such time as the Court may fix, the suit shall be dismissed. In reference to S. 12 (ii) we must here read "appeal" for "suit", and it is clear that the procedure contemplated is that as soon as the appeal comes before us, we should stay the hearing until the deficit is paid, and, if it is not paid within the time fixed, dismiss the appeal.

[8] The word "admission" occurs nowhere in these provisions. Obviously, we are to take action as soon as the appeal comes before us, that is to say, after it has been formally registered under O. 41, R. 9, Civil P. C.

[9] It is obviously bad practice to hear the appeal under O. 41, R. 11, in the first instance, and it is also not in accord with the provisions of S. 10 (ii), for the Court actually hears the appeal under O. 41, R. 11. True, if notice is issued, it is not a final hearing, but it is a final hearing if the appeal comes to be dismissed under O. 41, R. 11, and, after such dismissal, it has been held by this Court that the Court has no power to realise the deficit. This has been laid down by a Division Bench in *Rajdeo Narain Singh* v. *Ramdil Singh*, 5 P. L. J. 508 : (A. I. R. (7) 1920 Pat. 827), where their Lordships said :

> "When an appeal has been dismissed by the High Court under O. 41, Rule 11, Civil P. C., 1908, the Court has no power to recover from the respondent, who was appellant in the Court below, a deficiency in the court-fee due on the memorandum of appeal filed by him in that Court."

[10] We asked the appellant to cite any decisions in support of his contention that we were not entitled to realise the deficit until after the appeal had been "admitted" under O. 41, R. 11. He cited the Full Bench decision in *Hitendra Singh* v. *Rameshwar Singh*, 6 P. L. J. 293 : (A. I. R. (8) 1921 Pat. 88 F. B.). That was a case where the question was whether a deficit court-fee due in respect of the Court below should be realised before printing the paper book or at the time of final hearing, and the answer of the Full Bench was that the

matter should be dealt with at the earliest possible moment after the deficit is discovered. But the appellant seeks to rely on a casual observation of Sir Dawson-Miller C. J., who said:

> "I further think that in all cases where the question of recovering the deficit in the lower Court arises on appeal the appeal should first be admitted before the point is decided, so that no question may arise as to the Court's jurisdiction."

This point was not before the Full Bench, and there is no endorsement by the other two Judges of the observation. We are further of the opinion that this observation was made with regard to the formal registration of the appeal under O. 41, R. 9, which is referred to as "admission", and we do not think his Lordship had in mind the hearing of the appeal under O. 41, R. 11. The word "admit" is expressly used in O. 41, R. 9, it does not occur at all in O. 41, R. 11.

[11] Mr. Anwar Ahmed for the appellant has cited three other rulings, and three only. They are *Sidheswari Prasad* v. *Ram Kunwar Rai*, 12 Pat. 694 : (A. I. R. (20) 1933 Pat. 234), *Bishwanath Singh* v. *Kishore Singh*, A. I. R. (32) 1945 Pat. 81 : (23 Pat. 749) and *Baijnath Prasad* v. *Umeshwar Singh*, A. I. R. (24) 1937 Pat. 550 : (16 Pat. 600 S. B.). It is unnecessary to deal with them because they are all completely irrelevant. On the other hand, the Stamp Reporter has referred us to a case directly in point, namely, *Bidhu Bhusan* v. *Kala Chand*, 106 I. C. 335 : (A. I. R. (14) 1927 Cal. 775). This was a Division Bench case of the Calcutta High Court, and that Bench held as follows : where a plaint as well as the memorandum of appeal filed by a plaintiff are found insufficiently stamped, the proper course to be followed by the Appellate Court is to direct that the appeal be registered on the appellant supplying the deficit court-fees as regards his memorandum of appeal, and after the appeal has been registered and before it has been dealt with under O. 41, R. 11, Civil P. C., to place the case for orders under S. 12, sub-s (ii), Court-fees Act as regards the deficit court-fees on the plaint in the lower Court.

[12] As a further concession to the appellant, we now allow him three weeks to pay the deficit admittedly due, failing which this appeal will stand dismissed without further reference to a Bench. Under S. 10 (ii) the hearing under O. 41, R. 11, is postponed until this matter has been settled, and, if the deficit be not paid within the time allowed, the appeal will not have to be heard under O. 41, R. 11, at all as it will stand dismissed.

V.B.B. *Order accordingly.*

A. I. R. (37) 1950 Patna 241 [*C. N. 59.*]

REUBEN AND DAS JJ.

Keshvadeo Bagla — Appellant v. *Ram Prasad Singh and others — Respondents.*

A. F. O. O. Nos. 266 and 355 of 1946, D/- 23-12-1949 from order of Sub-J., Darbhanga, D/- 2-9-1946.

(a) Civil P. C. (1908), O. 40, R. 4; O. 43, R. 1 (s) — Receiver failing to pay amount due from him — Order of Court directing amount to be paid out of deposit standing to credit of Receiver — Order held, in substance and effect, one under O. 40, R. 4 — Appeal, therefore, held lay under O. 43, R. 1 (s) from such order. [Para 3]

Annotation: ('44-Com.) Civil P. C., O. 40 R. 4 N. 5; O. 43 R. 1, N. 10.

(b) Civil P. C. (1908), O. 40, Rr. 1 and 3 — Submission of accounts — Checking of — Board of Receivers appointed in respect of certain property — One of members of the Board appointed as Chairman — Court appointing him as pleader commissioner to check accounts submitted by one of the members of the Board — It was held wrong in principle to ask the Chairman to check the accounts for which he was responsible as Chariman of the Board of receivers — Accounts held should be checked by registered and qualified auditor. [Paras 5, 7]

Annotation: ('44-Com.) Civil P. C., O. 40 R. 1 N. 37, 47; O. 40 R. 3 N. 3.

Prem Lall and Rajeshwar Pd. Singh — for Appellant.

B. B. Saran, A. B. N. Sinha, Rameshwar Misra and Umeshchandra Prasad Sinha — for Respondents.

Das J. — These are two appeals by the plaintiff from two orders of the learned Subordinate Judge of Darbhanga, passed on the accounts submitted by the present appellant as receiver for one period and by a Board of Receivers, of which the appellant was a member, for another period. By the orders complained against, the appellant was directed to deposit certain sums of money as due from him and these sums of money were then paid out of the security money, which the appellant had deposited when he was appointed receiver, in one case, and in the other out of a sum of Rs. 1378-2-0 standing to the credit of the appellant.

[2] The short facts are the following. There was a cinema house at Darbhanga belonging to two parties, one represented by Babu Krishna Prasad Singh (called defendants first party) and the other represented by Babu Ram Prasad Singh (called defendants second party). One Ganga Prasad Singh had two sons, Mahamaya Prasad Singh and Saraswati Prasad Singh. Mahamaya Prasad Singh had a son called Maksudan whose son is Babu Krishna Prasad Singh. Saraswati Prasad Singh had two sons of whom Babu Ram Prasad Singh is one. It was stated that on 31st August 1939, the appellant took a lease of the cinema house for five years.

On 14th April 1944, there was an agreement between the defendants first party and the present appellant by which the defendants first party contracted to sell their half share in the property to the appellant for a consideration of Rs. 10,000. This agreement led to a suit for specific performance (Title Suit No. 86 of 1944). The suit was decreed by the first Court, but dismissed on appeal. It is stated that an appeal to the Federal Court is pending. On the same day, that is, 14th April 1944, there was another agreement between the defendants second party and the appellant by which it was stated that the defendants second party agreed to lease their half share to the appellant till the 30th August 1951. This gave rise to another title suit (Title Suit No. 44 of 1946) for specific performance which the appellant lost throughout. Title Suit No. 86 of 1944, to which I have already made a reference, was instituted on 31st August 1944. The present appellant was appointed receiver in that suit on 16th April 1945. The suit was decreed on 26th February 1946. On 25th March 1946, First Appeal No. 76 of 1946 was instituted in this Court. The appellant continued to be the sole receiver from 16th April 1945 to 28th January 1946. From 29th January 1946 to 6th May 1946 there was a Board of Receivers consisting of the present appellant, one Jamuna Prasad Singh and Maulavi Halim Raza. Maulavi Halim Raza was the Chairman of the Board of Receivers, and it appears that he was the person appointed as pleader Commissioner to check the accounts which the appellant had filed for the period of his sole receivership. Therefore, the two periods with which we are concerned in these two appeals are, (a) the first period between 16th April 1945 and 28th January 1946 during which the appellant was the sole receiver, and (b) the second period from 29th January 1946 to 6th May 1946, during which there was a Board of Receivers of which the present appellant was a member. Miscellaneous Appeal No. 266 of 1946 relates to the first period for which a sum of Rs. 6934-10-0 has been paid to the defendants second party out of the security money of the appellant, on the ground that the profits made for this period were Rs. 13,248-12-3, half of which was payable to the defendants second party. The accounts for this period were checked by Maulavi Halim Raza. An objection was filed by the present appellant which was dismissed by the order of the learned Subordinate Judge dated 29th June 1946. For the second period the learned Subordinate Judge held the appellant liable to the extent of Rs. 453 and odd annas, and this sum was also paid out of another deposit standing to the credit of the present appellant. Miscellaneous Appeal No. 355 of 1946 relates to this second period, the accounts of which were also checked, strangely enough, by Maulvai Halim Raza who was himself the chairman of the Board of Receivers.

[3] Before I go on to the merits of the two appeals, it is necessary to dispose of a preliminary objection raised on behalf of the respondents. It is contended that no appeals lie against the two orders complained of. Under O. 43 R. 1, cl. (s), Civil P. C., an appeal lies from an order under R. 1 or R. 4 of O. 40. Rule 4 of O. 40 states *inter alia* that where a receiver fails to pay the amount due from him as the Court directs, the Court may direct his property to be attached and may sell such property and may apply the proceeds to make good any amount found to be due from him. In the cases before us, the appellant was not merely directed to pay the amounts due from him, but the amounts were paid out of deposits standing to the credit of the appellant. In substance and effect, the orders passed by the learned Subordinate Judge were orders attaching the property of the appellant and paying the amounts from that property. In this view of the matter, I think that the preliminary objection as to the maintainability of the appeals must be overruled.

[4] As to the merits, the main objection taken on behalf of the appellant in Miscellaneous Appeal No. 355 of 1946 is that it was wrong in principle to ask Maulvi Halim Raza to check the accounts which he himself had submitted and for which he was responsible as chairman of the Board of Receivers. In Miscellaneous Appeal No. 266 of 1946, it is contended that the learned Subordinate Judge accepted the report of Maulvai Halim Raza on the accounts submitted by the appellant, though the report of Halim Raza itself showed that he cut down some of the expenses incurred by the receiver on arbitrary grounds. Having heard learned counsel for the parties, we are satisfied that the contentions raised on behalf of the appellant are correct and that there has really been no proper checking of the accounts. For the first period between the 16th April 1945 and 28th January 1946, the appellant had shown in his account establishment charges to the extent of Rs. 500 and odd per month. According to the defendants, the charges were Rs. 210 only. The Commissioner allowed Rs. 366 per month not on any principle but merely by guess. In his report dated 11th March 1946, Maulvi Halim Raza said as follows :

> "I had, therefore, to rely upon the paysheet and Attendance Register produced by the representative of the defendant second party. The demand of the receiver is Rs. 539 per month and the paper of the defendant second party shows about Rs. 210 per month.

Taking into consideration the hard time and the necessity of the number of staff I have allowed Rs. 366 per month."

This is an instance of how the pleader commissioner checked the accounts. Learned counsel for the appellant points out that during the second period of receivership when the same pleader commissioner was the chairman of the Board of Receivers, establishment charges were more than Rs. 500 per month.

[5] For the second period, it was, in my opinion, wrong in principle to ask Halim Raza to check his own accounts. Learned counsel for the appellant has submitted that Halim Raza submitted different reports on different occasions, and that the reports were not consistent with one another. It is pointed out that the revised adjustment account filed by Halim Raza on 15th August 1946, differs in material particulars from an earlier report submitted by the said pleader commissioner. There was also a suggestion by the appellant that the accounts which were with the defendants second party had been tampered with. In the view which we have taken of these two appeals, it is unnecessary to go into these contentions at this stage.

[6] We are of opinion that the accounts have not been properly checked and the case is one in which the accounts submitted for both the periods must be checked by a registered auditor who has experience in the checking of such accounts. Learned counsel for both parties have agreed to this course.

[7] For the reasons given above I would allow these two appeals and set aside the orders of the learned Subordinate Judge. The liability, if any, of the present appellant for the two periods in question must be determined afresh after the accounts for both the periods have been checked by a registered auditor, qualified to check accounts of this nature. The learned Subordinate Judge will select such an auditor, and the costs of the exmination of the accounts will be borne by the appellant and the defendants second party half and half. There will be no order for costs of the hearing of the two appeals in this Court, and the parties must bear their own costs. Subsequent costs incurred will be dealt with by the learned Subordinate Judge when he passes final orders after considering the report of the registered auditor.

Reuben J.—I agree.

G.M.J. *Appeals allowed.*

A. I. R. (37) 1950 Patna 243 [*C. N. 60.*]

MEREDITH AG. C. J. AND SARJOO PRASAD J.

Mohan Lahiri and another— Petitioners v. *The King.*

Criminal Revn. Nos. 1328 and 1452 of 1949, D/- 13-1-1950, against order, S. J., Purulia and J. C., Chota Nagpur, D/- 27-8-1949 and 23-8-1949, respectively.

(a) Arms Act (1878), S. 29 — 'Proceedings' — Meaning—Grant of bail before sanction.

The word "proceedings" in S. 29, means legal proceedings in Court and not searches or arrests or investigations made by the police in exercise of the powers conferred upon them by the Criminal Procedure Code or any other law. [Para 6]

In a sense proceedings for bail may be judicial proceedings where a Magistrate applies his judicial mind to the question of whether bail should be granted. But that would be a separate judicial proceeding, quite apart from the actual prosecution for an offence under the Arms Act, and, therefore, the mere consideration of the question of bail in the initial stage when the accused is sent up in custody cannot amount to the initiation of proceedings in respect of which sanction is required by S. 29 of the Act. [Para 11]

Annotation: ('46-Man.) Arms Act, S. 29, N. 2, Pt. 4.

(b) Arms Act (1878), S. 30—Search — Legality—Effect on guilt.

A conviction for an offence under the Arms Act may be perfectly sound notwithstanding that the evidence upon which it is based may have been procured as the result of an illegal search of the accused's house: A. I. R. (12) 1925 All 434, *Rel. on.* [Para 12]

Annotation : ('46-Man.) Arms Act, S. 30 N. 1.

(c) Arms Act (1878), S. 19 (f) — Possession of head of family—Mens rea.

Where the accused, a man of fifty, was found to be living in a house along with his adult son and a nephew and there was no finding that he was personally and consciously in possession of the weapons found in the house but was held responsible for their possession as he was admittedly the karta of the family :

Held, that his conviction was bad as the principle of responsibility was not enough in such cases and no mens rea on his part was established: A. I. R. (31) 1944 Lah. 339 (F. B.) and A. I. R. (34) 1947 Pat. 236, *Rel. on.* [Para 13]

Annotation : ('46-Man.) Arms Act, S. 19, N. 11.

Bhabananda Mukherji (in No. 1328) and Bhabananda Mukherji, Sambhu S. Singh and A. K. Chatterji (in No. 1452)—for Petitioners.

Government Advocate—for the Crown.

Meredith Ag. C. J. — These two rules have been issued upon the application of two persons who have been convicted under S. 19 (f), Arms Act. Petitioner 1 Mohan Lahiri has been found to have been in possession of an unlicensed revolver, cartridges and two toy pistols, and has been sentenced to one year's rigorous imprisonment and a fine of Rs. 200. The other petitioner Tulsi Sao has been convicted for the possession of an unlicensed revolver and cartridges with which he was said to have threatened the police, and has been sentenced to two years' rigorous imprisonment.

[2] The principal point taken on behalf of both petitioners is that the proceedings are null

and void by reason of the fact that the sanction of the District Magistrate was not obtained in sufficient time. In the case of Mohan Lahiri, he was arrested after search of his house on 12th July 1948. On 26th July a Magistrate admitted him to bail. On 25th August sanction for prosecution was given by the District Magistrate, and on 17th September the police submitted charge-sheet.

[3] In the case of Tulsi Sao, the search and arrest took place on 30th August 1948. The sanction was obtained on 14th November 1948, and the charge-sheet was submitted and cognizance taken by the Magistrate on 25th November.

[4] Section 29, Arms Act, provides that where an offence punishable under S. 19, cl. (f), has been committed, no proceedings shall be instituted against any person in respect of such offence without the previous sanction of the Magistrate of the District, or in a presidency town, of the Commissioner of Police. There can be no gainsaying the fact that proceedings taken in the absence of a sanction required by law are a complete nullity. It is not a question of a technical defect which can be remedied by a belated sanction—see *Basdeo Agarwalla* v. *Emperor*, A. I. R. (32) 1945 F. C. 16: (46 Cr. L. J. 510). But the real question is what is meant by the "institution of proceedings" in S. 29. Is the word "proceedings" used in a very wide sense so as to include an investigation before the police, as argued for the petitioners, or is it used in the narrower sense of judicial proceedings before a Court?

[5] Taking the common sense view, it is difficult to hold that the law could have contemplated that no proceedings of any sort, even an enquiry by the police, could be taken unless a previous sanction had been obtained; for, how is the District Magistrate to determine whether to accord sanction or not unless he has some *prima facie* materials before him? And how are those materials to be obtained unless some enquiry be held? Moreover, what are the police to do if they find a man in possession of arms for which he cannot produce a licence? Are they to stay their hands and do nothing until they have run off and obtained sanction from the District Magistrate? That would be an impossible position. And it is indeed conceded by Mr. Mukherji for the petitioners that in such a case the police could arrest, and taking the man into custody could not be regarded as the institution of proceedings within the meaning of S. 29. But he attempts to make a distinction between the actual arrest and the police investigation.

[6] These practical considerations seem to suggest that the words must have been used in the sense of judicial proceedings, and the only case of this Court directly in point takes that view. I refer to *Emperor* v. *Ghulam Nabi*, 6 Pat. 768: (A. I. R. (15) 1928 Pat. 146: 29 Cr. L. J. 301). In that case a Division Bench laid down that the word "proceedings" in S. 29, Arms Act meant legal proceedings in Court and not searches or arrests or investigations made by the police in exercise of the powers conferred upon them by the Criminal Procedure Code or any other law. This case being directly in point, it is binding upon us. If there was any case of this Court, also directly in point, where the contrary view was taken, the only course would be to refer the matter to a Full Bench. But no such case has been cited. Reliance has been placed on *Girja Suri* v. *Emperor*, A. I. R. (33) 1946 Pat. 160: (47 Cr. L. J. 927). But though there may be certain observations in that decision which seem to support the contentions for the petitioners, it was a case where the sanction was not obtained until after the charge-sheet had been submitted and cognizance had been taken. Thus, this was a case where, in any view, the sanction had not been given in time, and the proceedings were null and void, as was held by the Bench in that case.

[7] It is sought to draw an anology between S. 29, Arms Act and S. 211, Penal Code, and decisions have been cited, for example, *Emperor* v. *Johri*, A. I. R. (18) 1931 ALL. 269: (33 Cr. L. J. 256), in which it was held that when a man lodges a false charge before the police he initiates criminal proceedings. But analogies are dangerous things, and what might be true of S. 211 is not necessarily correct in the case of S. 29, Arms Act. This analogy has been considered and rejected in *Ismail Khan* v. *Emperor*, A. I. R. (14) 1927 Cal. 721: (28 Cr. L. J. 817). In that case a Division Bench held that entering a case in the case book and making out a charge is not institution of proceedings under S. 29. The proceedings really start when the accused is placed before the Court. The word "proceedings" in S. 29 does not mean that no action can be taken by any officer, police or otherwise, in the matter without the previous sanction of the Commissioner of Police. In that case a man had been arrested in possession of arms, and their Lordships said:

> "The meaning which is sought to be attached to the word 'proceeding' is that no action can be taken by any officer, police or otherwise, in the matter without a previous sanction of the Commissioner of Police. It is difficult to see what the arresting inspector was expected to do in the circumstances of this case; but it is suggested that he might, if the offence was a cognizable one, have taken the accused into custody and, without entering a charge in the diary book, asked for the sanction of the Commissioner of Police and on receipt of it made the necessary entries in the station books. We feel no hesitation in saying that this argument is far

fetched and that it has never been the intention of the legislature to lay down such an awkward procedure and make the prosecution open to the charge that no entry equivalent to a first information was made immediately after the arrest."

[8] In reference to S. 211 they said :

> "In support of the view urged on behalf of the appellant reliance has been placed on the Full Bench decision of this Court in the case of *Karim Buksh* v. *Queen-Empress*, 17 Cal. 574. There it was held that the lodging of a false information with the police of a cognizable offence is instituting a criminal proceeding within the meaning of S. 211, Penal Code. Wilson J., who delivered the judgment of the Full Bench, took particular care to say that the meaning which he gave to the words 'institution of criminal proceedings' in S. 211, Penal Code must be limited to the scope of that section. No analogy can be drawn by putting S. 211, Penal Code, alongside S. 29, Arms Act, which deals with totally different matters."

I agree with these observations.

[9] Section 29 has also been construed in *Emperor* v. *Kutru*, 47 ALL. 575 : (A. I. R. (12) 1925 ALL. 434 : 26 Cr. L. J. 1112) where their Lordships, in construing the meaning of the word as used in S. 30, referred to S. 29 and said that the word must be used in the same sense in both sections And in S. 29 it was clearly used with reference to proceedings before a Court.

[10] It has been held by a Full Bench of this Court in *Gopal* v. *Emperor*, 22 Pat. 433 : (A.I.R (30) 1943 Pat. 245 : 45 Cr. L. J. 177), that a judicial proceeding against an accused person only commences after the Magistrate has taken cognizance of a case and made the accused person a party to the proceedings by taking some action against him, such as, a summons. In the case before us, it seems to me clear that judicial proceedings could not be said to have been started until after charge-sheet was submitted and the Magistrate decided to institute a case in Court. Therefore, in my judgment, the first contention for the petitioners must fail.

[11] It is further argued with reference to the first petitioner that the Magistrate made an order granting bail on 26th July before the sanction had been obtained, and this means that a judicial proceeding had been instituted since proceedings for bail are judicial proceedings. In a sense, proceedings for bail may be judicial proceedings where a Magistrate applies his judicial mind to the question of whether bail should be granted. *Manikam Mudali* v. *The Queen*, 6 Mad. 63, is an authority to this effect. But if so, that would be a separate judicial proceeding quite apart from the actual prosecution for an offence under the Arms Act, and, therefore, the mere consideration of the question of bail in the initial stage when the accused is sent up in custody could not amount to the initiation of proceedings in the sense of a Court prosecution for the offence in respect of which the sanction is required. In the Full Bench case to which I have just referred, I pointed out at page 482 that in police cases judicial proceedings cannot necessarily be said to have commenced merely because a person is sent up and remanded to custody. The proceedings at that stage are still administrative. There may still be no judicial case against the accused. It is significant that under S. 167 the police may obtain an order for a remand to custody from a person who is not empowered to take cognizance of the case. A remand to custody, if it does not exceed fifteen days, certainly does not mean cognizance has been taken. If it exceeds fifteen days, it may mean that cognizance has been taken, but does not necessarily mean that any judicial proceedings have been commenced against any one, giving him vested rights in any particular mode of trial. At that stage the police may have sent up a man in custody. He may have been remanded to custody pending police investigation, but his prosecution has not started, and does not start, in my judgment, (as I then said) until the Magistrate makes up his mind to act upon a charge-sheet, and takes some overt action to implement his decision. Such an order may be an order to produce the accused from custody on a particular date to stand his trial.

[12] A third legal point has been urged, namely that, having regard to the provisions of S. 30, Arms Act, the search was illegally held. It is unnecessary to consider whether it was legally held or not because, quite obviously, that has no bearing on the question of the petitioners' guilt : *see Emperor* v. *Kutru*, 47 ALL. 575 : (A. I. R. (12) 1925 ALL. 434 : 26 Cr. L. J. 1112), wherein it was pointed out that a conviction for an offence under the Indian Arms Act may be perfectly sound notwithstanding that the evidence upon which it is based may have been procured as the result of an illegal search of the accused's house. There is nothing in this point.

[13] In the application of Mohan Lahiri a point has been taken upon the merits. It is pointed out that the petitioner is a man of fifty with an adult son and a nephew living in his house. A defence witness gave evidence to that effect, and he does not appear to have been disbelieved. On the other hand, there is no finding that the petitioner was personally and consciously in possession of the weapons. He has been convicted merely on the view that being admittedly the *karta* of the family, he must be held responsible for the possession of the unlicensed weapons. That principle of responsibility, however, is not enough in cases under the Arms Act. The position has been clearly laid down by a Full Bench in *Emperor* v. *Santa Singh*, A. I. R. (31) 1944

Lah. 339 : (46 Cr.L.J. 1.) Their Lordships said :

> "The words 'possession and control' in S. 19 (f) mean something more than mere constructive or legal possession and control. Possession and control required to constitute offences under the aforesaid section must mean conscious possession and actual control, and as under this section mere possession of incriminating articles constitutes serious criminal offences, there must be *means rea* or guilty knowledge before a person can be convicted of such possession. Consequently, where incriminating articles are recovered from a place in the occupation or possession of more persons than one and it is not possible to fix the liability of any particular individual, a Court is not bound to hold that the said articles were in possession or under the control of the head of the family."

This principle has been followed in several decisions of this Court, for example, in *Bhekha Ahir* v. *Emperor*, A. I. R. (34) 1947 Pat. 236 : (48 Cr. L. J. 53). In my opinion, therefore, his application should succeed on the merits, and I would set aside his conviction and sentence and acquit him.

[14] In the case of the other petitioner, Tulsi Sao, there is no point on the merits, and, as the points of law fail, I would maintain the conviction and sentence and discharge the rule.

Sarjoo Prasad J.—I agree.

D.R.R. *Order accordingly.*

A. I. R. (37) 1950 Patna 246 [*C. N. 61.*]

DAS AND MAHABIR PRASAD JJ.

Jhalki Prasad Bhagat—Appellant v. *Bachu Lal Bhagat and others—Respondents.*

A. F. A. D. Nos. 882 and 883 of 1947, D/- 25th November 1949, from decision of Ad. S. J., Arrah, D/- 25th January 1947.

Transfer of Property Act (1882), S. 76—Mortgagee in possession of bhaoli holding—Commutation of bhaoli into nakdi rent, if binding on mortgagor.

Where a mortgagee in possession is not authorised to change the incidents of the *bhaoli* holdings so as to enure beyond the period of the mortgage, a commutation of *bhaoli* rent into *nakdi* and the amalgamation of the holdings with other lands during the continuance of the mortgage by him without the consent of the mortgagor will not be binding on the mortgagor after the redemption of the mortgage. In such a case the question whether the commutation was in the ordinary course of management and for the benefit of the estate is irrelevant and the mortgagor would be entitled to sue the raiyat for *bhaoli* rent. [Paras 8 and 9]

Annotation: ('45-Com.) T. P. Act, S. 76, N. 6.

D. N. Varma and C. S. Prasad—for Appellant.
B. B. Saran—for Respondents.

Mahabir Prasad J.—The question involved in these appeals is whether the commutation of bhaoli rent into nakdi during the continuance of a mortgage by a mortgagee in possession without the consent of the mortgagor can be binding upon the mortgagor after the redemption of the mortgage.

[2] The appeals by the plaintiff arise out of suits for the recovery of produce rent of Khata Nos. 145 and 138 for the year 1352 Fasli. The holdings in respect of which the rents have been claimed were admittedly bhaoli when the mortgage of the village in which the holdings lie was effected.

[3] The defendants pleaded that the rents of these holdings were commuted into nakdi by the rehandars and in one of the suits being suit No. 46, the holding was amalgamated with another land with the consent of the rehandar. It was also pleaded by the defendants that the commutation and the amalgamation were with the consent of the proprietor, the plaintiff.

[4] Both the Courts below have concurrently held that the proprietor, that is, the plaintiff-mortgagor was not a consenting party to the commutation or the amalgamation. They have, however, held that the commutation and amalgamation appear to have been made by the rehandars in the ordinary course of the management of the estate. They have further held that the rehandars were authorised to make commutation and agree to amalgamation under the terms of the mortgage bond.

[5] It is contended on behalf of the plaintiff-appellant that the Courts below have misconstrued the rehan bond in that they have held that under its terms the mortgagee in possession was authorised to agree on his behalf to commutation of the rent and amalgamation of holdings and that there being no such authority, the commutation and amalgamation effected by the rehandars are not binding upon him.

[6] The contention raised on behalf of the appellant regarding the erroneous construction of the term in the mortgage bond by the Courts below seems to be well founded. What has been construed by the Courts below as authorising the rehandar to commute rents of the bhaoli holdings into nakdi as also to agree to amalgamation as officially translated is this:

> ..."other kinds of lands with all the rights and incidents appertaining thereto without excepting any right or profit...."

This expression occurs in this context:

> "We the executants, give in usufructuary mortgage in lieu of interest on the said amount of debt, the 8 annas out of 16 annas Mahal Magharia pergana Mahaur, District Shahabad, Sub-Registry Jagdishpur tauzi No. 3838 constituting our milkiat property owned and possessed by us together with jalkar, bankar, reservoir, tank, brick-built and mud-built wells, fruit bearing and non-fruit bearing trees, bamboos clumps, sairs, ground rent of the houses of tenants, zeerat lands and all *other kinds of lands with all the rights and incidents appertaining thereto without excepting any right or profit*, but excluding the raiyati right in 22B. 11K. 18dh. of our Guzasta kasht lands specified above from the agricultural years 1320 to 1328 Fasli to Rambasi Kuer widow of Lala Angrahit Lall deceased."

[7] It is clear that by the passage in question the mortgagor while parting with all his rights in the village for the period of the mortgage excludes his raiyati right which he possesses in 22 bighas 11 kathas 18 dhurs. What he wants to emphasise is that the mortgagee will have all lands other than kasht land, and expressly excludes all the rights and incidents appertaining thereto. It is difficult to see how the passage in question can be construed as conferring an authority on the mortgagee to deal with the lands mortgaged in such a manner as to affect its incidents permanently, that is to say, to so affect the conditions on which the lands were being held as to enure even after the period of the mortgage. The Courts below were certainly wrong in their construction of the passage in question. I have no hesitation to hold that the mortgagors never intended to and did not, authorise the mortgagees in possession to effect changes in the incidents of the holdings in the village mortgaged.

[8] The question which remains to be considered is as to whether in the absence of such authority the commutation and amalgamation effected by the rehandars are binding upon the plaintiff mortgagor. It is clear that the mortgagee in possession cannot by his contract effect alteration in the mortgaged property which may enure beyond the period of the mortgage. He is certainly entitled to make use of the lands comprised in the mortgage profitably to himself. He can certainly give leases to last during the continuance of the mortgage. He can certainly agree to receive rents in cash of the holdings which may be bhaoli during the period that he is in possession as a mortgagee. Any such arrangement arrived at between the mortgagee in possession and the tenants cannot bind the mortgagor. If a lease given by a mortgagee in possession cannot enure beyond the period of mortgage, as held in the case of *Jhagru Mian* v. *Raghunath Singh*, 10 P. L. T. 625: (A. I. R. (16) 1929 Pat 630), commutation of rent as a matter of contract between the mortgagee and the raiyat, cannot be operative as against the mortgagor. The learned Subordinate Judge has observed that the commutation and amalgamation in question appear to have been made by the rehandars in the ordinary course of the management of the estate. Apart from the fact that he has referred to no evidence on which this observation is based, it is obvious that an agreement to commute bhaoli rent into nakdi cannot be held binding on the mortgagor, as something done in the ordinary course of the management of the estate, it may be that in some instances commutation of produce rent into money rent is for the benefit of the landlord, but it must always be left to the landlord to determine whether such commutation is for his benefit. It is clear that a mortgagor will not repudiate commutation of rent effected by a rehandar, if on redemption of the mortgage he finds that it is for his benefit, and the question whether such commutation is binding upon him will not arise. To a suit by a mortgagor for bhaoli rent, it seems, it will be no defence for the raiyat to allege and prove that the commutation effected by the rehandar is for the benefit of the estate, and, therefore, binding upon the mortgagor. The mortgagee is not in a position of a trustee or guardian of a minor so that his acts can be held to be binding upon the mortgagor if such acts be found to be for the benefit of the estate or the advantage of the mortgagor. The consideration, therefore, whether the commutation in question was in the ordinary course of management and for the benefit of the estate is irrelevant.

[9] In view of these considerations, it must be held that the plaintiff is entitled to sue for produce rent of the holdings in question and his claim should be decreed at the rate of 5 maunds paddy per bigha by pucca weight, the sale rate being the Gazette rate prevailing in the year, as held by the learned Additional Subordinate Judge.

[10] The appeals are accordingly allowed. There will be no order as to costs of these appeals.

[11] **Das J.**—I agree and would merely add that in the absence of any evidence it cannot be held that the commutation was an act of prudent management on behalf of the mortgagee in possession. Therefore, the question if such an act would bind the mortgagor does not really arise in these appeals. The mortgagee in possession was not authorised to change the incidents of the tenancy, and his act cannot enure beyond the period of the mortgage.

K.S. *Appeals allowed.*

A. I. R. (37) 1950 Patna 247 *[C. N. 62.]*

SINHA AND REUBEN JJ.

Mt. Bibi Saleha and others — Appellants v. *Md. Zakariya Khan and others — Respondents.*

A. F. A. D. No. 1677 of 1948, D/- 21st December 1949, from decision of A. D. J., Patna, D/- 4th July 1947.

(a) Limitation Act (1908), Art. 91 — Suit for declaration that donee did not acquire title under gift ab initio void.

Where the plaint alleges that the *pardanashin* woman, when she executed the document, did not know that it purported to be a deed of gift and did not intend to execute such a deed and that she had no independent advice, the transaction is *ab initio* void against her and a suit by a person who is not party to the deed for a declaration that the donee did not acquire any title to the property gifted is not governed by Art. 91. [Para 7]

Annotation : ('42-Com.) Limitation Act, Art. 91, N. 3.

(b) Contract Act (1872), S. 16 — Purdanashin woman.

Mere reading of the document to a paradanashin woman is not enough. The Court must be satisfied that it was understood by her. [Para 11]

Annotation : ('46-Man.) Contract Act, S. 16 N. 16.

(c) Evidence Act (1872), Ss. 101 to 103—Pardanashin woman.

Where the Court losing sight of the right of onus thrown upon persons claiming under an instrument executed by a *pardanashin* woman comes to a conclusion that she executed the deed knowingly, largely on circumstantial evidence which is quite consistent with the possibility that the woman did not in fact understand the nature of the deed that she was executing, the finding is vitiated. [Para 15]

Annotation : ('46-Man.) Evidence Act, Ss. 101 to 103 N. 46.

N. N. Sen, Abdul Moin and A. H. Quadri — for Appellants.

N. K. Prasad I, Damodar Prasad and S. G. Asghar Hussain — for Respondents.

Reuben J.—This appeal is directed against a decision of the Additional District Judge of Patna reversing a decree of the Additional Subordinate Judge of Patna. The appellants were defendants 1 to 5 in the suit.

[2] The appeal arises out of a suit brought by one Zakariya, respondent 1, for the declaration of his eight-anna share in holding No. 124 in moballa Bakarganj of Patna City consisting of four blocks of residential houses and seventeen *Katras* (small shop buildings) formerly belonging to one Bibi Amani Jan, and for a declaration that Amiruddin, the husband of defendant 1 and the father of defendants 2 to 5, did not acquire any title to this property under the registered deed of gift dated 2nd of July 1920, executed in his favour by Mt. Amani Jan. There was also a prayer for confirmation of possession and, in the alternative for recovery of possession. Bibi Amani Jan was the sister of Alamgir Khan, the father of plaintiff Zakariya. She had a sister, Mt. Muhamadi Jan, who had three sons, Amiruddin, who has just been mentioned, Zamiruddin (defendant 6) and Bashiruddin, whose widow is defendant 8. Mt. Amani Jan died in 1936. According to the plaintiff, he succeeded to eight annas share in her property, the other eight annas going to Mt. Muhamadi Jan, who transferred two annas share to defendant 8 and the remaining 6 annas share was inherited by Zamiruddin on the death of Muhamadi Jan. The plaintiff's case is that, after the death of Amani Jan's husband Mian Khan in 1917, her affairs were being managed by Amiruddin, and that he fraudulently got the deed of gift executed by her by giving the impression that it was a *mukhtarnama* in his favour. The validity of the deed of gift was also attacked on the ground that Mt. Amani Jan remained in possession of the property till her death, and that there was no delivery of possession to the donee as required for the validity of a gift under the Muhammadan law.

[3] The defence naturally was that the deed of gift was executed knowingly by Amani Jan, and that, as Amami Jan was treating Amiruddin as her son and he was living with her, there was no delivery of possession by actually vacating the premises, but effect was given to the gift by allowing Amiruddin to get himself registered in the municipal papers as the owner of the house. Also, subsequently, Amiruddin executed a *hin hevati mokarari* deed in favour of Mt. Amani Jan, who continued to occupy the property in this capacity.

[4] The Subordinate Judge dismissed the suit on the finding that Amanijan knowingly executed the gift and that effect was given to the deed sufficient to make it valid under the Muhammadan law. In the year 1936, after the death of Amiruddin, his heirs sued to realise rents from the tenants of the *katras*. In these suits, on the objection of the tenants that Amani Jan was their real landlord Amani Jan was impleaded and filed a written statement repudiating the deed of gift. The Subordinate Judge held on these facts that, as Amani Jan certainly came to know of the effect of this deed of gift in the year 1936, and as she took no steps to get the deed set aside, the present suit is barred under Art. 91 of the schedule to the Limitation Act.

[5] In appeal the Additional District Judge reversed the decision and decreed the suit on the finding that the defendants had failed to show that Amani Jan executed the deed of gift, "knowing it to be such and after the contents thereof had been read and fully explained to her," and further that it had not been established that effect was given to the deed of gift by transfer of possession or by any overt act indicating an intention to transfer possession to Amiruddin.

[6] The decision of the Additional District Judge is challenged on five grounds: (1) that the question of limitation was not considered by him, (2) that he misdirected himself regarding the requirements of the Muhammadan law as to the validity of gifts, (3) that his decision is marred by vital errors of record, (4) that he failed to consider material documentary evidence and (5) that, while reversing the findings of the Subordinate Judge, he did not consider the reasons relied upon by the Subordinate Judge for those findings.

[7] In order to determine the applicability of Art. 91 of the schedule to the Limitation Act, it is necessary to see exactly what the case of the plaintiff is. It is now well established that this article applies to suits in which it is sought to cancel or set aside an instrument which is

voidable, and has no application where the instrument which is challenged is void *ab initio.* The relevant pleadings are in paras. 14 and 15 of the plaint, which I reproduce below :

> "That the plaintiff respectfully begs to submit that the said Amiruddin Khan, the ancestor of defendants 1 to 6 was a very cunning, litigious and foresighted person. He had capacity to understand legal matters. He took much undue advantage of his being a near relation of the said Mt. Amani Jan, deceased, and of the confidence she had in him and also of being the manager of the said Musammat and also of her physical and mental weakness and of her being a lady, secretly brought into existence a *tamliknama*, dated 2nd July 1920, in his own name and secretly making wrong statement before the said Musammat that it was necessary for her to execute a mukhtarnama for the management (of her property) and defrauding her and giving no information to her of the real state of affairs. . . .
>
> That the said deed is by no means valid and legal. The said deed was not read over and explained to the said Mt. Amani Jan nor did she receive any advice with respect to the same. The said Musammat was simpleton and an illiterate *pardanashin* lady. She had no capacity to understand transaction and she did not understand the effect of the transaction of the gift and *mukarrari* with life interest etc, nor had she any capacity to understand the same. She did not ask any body to sign for her on the document nor did she ask any one to attest the same as witness nor did she purchase the stamp paper nor she got it purchased by others nor did she ask any one to fair copy the document on the stamp paper nor did any relation of the said Musammat sign and attest the said deed as a witness although the near relations of the said Musammat viz. Ahmad Ali Khan, Mukarram Ali Khan, Ismail Khan, Nazir Hasan Khan, Bashir Khan and Abdul Karim Khan, own brothers of Mian Khan, deceased, were alive at that time and some of them are alive at this time also. Amiruddin Khan quite falsely defrauded Mt. Amani Jan and fraudulently asked the said Musammat to execute a Mukhtarnama in his favour as it was necessary and without it the work suffered. Amiruddin Khan brought into existence the said *tamliknama* by practising fraud and by making wrong statement."

According to this pleading, the case is that Bibi Amani Jan, when she executed the document, did not know that it purported to be a deed of gift and did not intend to execute such a deed, and that therefore, her mind did not go with the deed and it was not, in fact, her deed. It is a clear pleading that the deed was void *ab initio* and the relief claimed is expressly confined to a declaration to this effect. It is as follows :

> "That it may be determined by the Court that Mt. Bibi Amani Jan did not execute a *tamliknama* in favour of Amiruddin Khan in respect of the property in suit, that Amiruddin Khan did not acquire any title thereto, and that the principal defendants have not acquired any title to the same by virtue of inheritance of Amiruddin Khan."

[8] In support of his contention that Art. 91 applies to the suit, the learned counsel for the appellants has referred to several decisions of the Privy Council and one of this Court. Some support is afforded by *Gyan Prakash* v. *Mt. Dukhan Kuar,* A. I. R. (25) 1938 Pat. 69 : (173 I. C. 479), where the impugned deed of relinquishment was said to have been executed under the impression that it was a deed handing over the management of the property. It was held in that case that the deed was voidable and not void *ab initio* and the suit was barred under Art. 91. The full facts of the case do not appear from the report, and, in view of the several decisions of high authority bearing on the point, I do not consider it necessary to make any attempt by consulting the original records of the case to ascertain these facts. *Atmaram Maneklal* v. *Bai Hira,* 75 I. A. 108 : (A. I. R. (35) 1948 P. C. 111) and *Janki Kunwar* v. *Ajit Singh,* 14 I. A. 148 . (15 Cal. 58 P. C.), relied upon by the learned counsel, are cases where the deed in question was found to be a voidable deed. In the former, the findings of the Court were that the respondent signed the document while under the appellants' influence and protection and without independnt advice when she was suffering great distress and was unfit to understand how adversely her rights were affected by it, and that in fact she did not understand its meaning and legal consequences. The distinction between this case and the one before us appears clearly from the following passage, which I cite from *Hem Chandra* v. *Suradhani Debya,* A. I. R. (27) 1940 P. C. 134 : (I. L. R. (1940) Kar. P. C. 271) :

> "Though there may not be 'a clear understanding of each detail of a matter which may be greatly involved in technicalities' — to use Lord Buckmaster's words—there may still be an intelligent comprehension of the bargain on the part of the lady. In such a case the bargain is good and is good as a whole. But if a feature of the transaction affecting in a high degree the expediency of her entering into it is not understood by the lady, the bargain cannot be divided into parts or otherwise reformed by the Courts as to uphold certain portions of it while rejecting others. Her answer to a suit upon the deed is not that she has an equitable defence to the enforcement of a certain stipulation but that it is not her deed. The protection extended to a person in her situation is protection against being held bound by a transaction which never had her free and intelligent consent."

Here, not merely is it the case that Bibi Amani Jan did not understand an important feature of the transaction, but that she was unaware of the nature of the transaction itself. The transaction, therefore, was *ab initio* void as against her. In *Janki Kunwar's case,* (14 I. A. 148 : 15 Cal. 58 P. C.), the deed in question was impugned on the ground of mental imcompetence, unconscionable bargain and undue influence, and it was found that all the facts relied upon were known to the executant from the date of the deed and he was not shown to be incapable of having that knowledge and of allowing it to operate upon his mind. The case is obviously entirely different from the one before us.

[9] With reference to the finding of the Additional District Judge that Amani Jan had no independent advice, it is urged that the absence of independent advice merely makes the transaction voidable. In support the cases of *Gyan Prakash* v. *Mt. Dukhan Kuar*, (A. I. R. (25) 1938 Pat. 69 : 173 I. C. 479) and *Atmaram Maneklal* v. *Bai Hira*, (75 I. A. 108 : A. I. R. (35) 1948 P. C. 111), are cited. I have already made my comments on these decisions, and would only cite the following passage from *Kalyan Mal* v. *Ahmad Uddin Khan*, A. I. R. (21) 1934 P. C. 208 : (151 I. C. 45), showing the nature of protection which the Courts give to a *pardanashin* woman :

> "The mere fact that the woman lives in seclusion or sits behind a *pardah* does not necessarily show that she is weak-minded, ignorant or incapable of understanding her affairs. Any general proposition ascribing to her such incapcity would be at variance with actual facts. It is, however, clear that the Courts, in their anxiety to protect *pardanashin* ladies, have repeatedly affirmed the doctrine that a person, who is interested in upholding a transaction with pardanashin woman, has to prove, not only that the deed was executed by her, but also that it was explained to, and was really understood by her."

Here, the Additional District Judge has found that the lady had no independent advice, and, taking all the circumstances into account was not satisfied that she understood the nature of the document which she was executing. In the circumstances, she could not be bound by the document and it is void *ab initio* against her.

[10] This brings me to the second point. Our attention has been drawn to *Mt. Naurozi* v. *Najaf Ali*, A. I. R. (26) 1939 Pat. 321 : (184 I. C. 508) and various passages in Amir Ali's and Roland Wilson's books on Muhammadan Law as authorities that, where the donor and the donee are closely related and the donee is living with the donor, a physical departure of the donor from the premises affected is not necessary in order to complete a gift. This is exactly the position as it was understood by the learned Additional District Judge. He observed at page 48 of the paper book :

> "Exception has, however, been made for cases in which the donor and donee both reside in the same property and have close affinity of blood relationship. All the same, even in a case like this some 'overt act by the donor indicating a fair intention on his or her part to transfer possession and to divest himself or herself of all control over the subject-matter of the gift' is essential for completion of a deed of gift."

And proceeded to consider whether the facts of the case before him brought it within this exception. He found on a consideration of the evidence that the allegation that Amiruddin lived with Bibi Amani Jan was not made out and that, in fact, he lived in another house. As regards the transaction of *mokarari*, he found it to be entirely fictitious and an act of Amiruddin alone without the knowledge of Amani Jan. Amani Jan, he pointed out, was by then an old lady and Amiruddin, as her sole manager, could easily get his name mutated in the Municipal registers and prepare papers by way of rent receipts and so on, indicating that Amani Jan was holding the property as *mokararidar* under him. The finding being one of fact, it is not competent for us to go into the merits of the matter.

[11] Our attention has been drawn to three items as being serious errors of record. First of all, it is said, the Additional District Judge is wrong in stating at page 43 of the paper-book that defendants' witness No. 5 does not say any thing about the document having been read out by the scribe to Amani Jan. We have been taken through the relevant portions of the evidence of the witness. There is no direct statement to the effect that the scribe read the document to Amani Jan, and it was open to the learned Additional Disirict Judge to put his own interpretation on the evidence. I am not prepared to say that the interpretation which he put upon it was incorrect. Besides, as is clear from the passage which I have cited from *Kalyan Mal's case*, (A. I. R. (21) 1934 P. C. 208 : 151 I. C. 45) the mere reading of the document is not sufficient; the Court must be satisfied that it was understood by her, and no attempt has been made in the evidence to prove this. All that is stated is that the document was read to her. It does not appear that she was a woman of special intelligence or education. The mere reading of the document, therefore, could not be sufficient. For instance, the mere reading of the document was held to be insufficient in *Hem Chandra* v. *Suradhani Debya*, (A. I. R. (27) 1940 P. C. 134 : I. L. R. (1940) Kar. P. C. 271), although, in that particular case, both the Courts in India had held that the lady in question had considerable capacity for business.

[12] Secondly, it is pointed out that, with reference to Money Suit No. 12 of 1936 instituted by the heirs of Amiruddin for recovery of rent from the tenants of the *katras* in the suit property, the Additional District Judge was under a misapprehension that the tenants pleaded that Amani Jan was the owner of the property, whereas, in fact, they set her up as the *mokararidar* in possession and, therefore, entitled to realize the rents as against the plaintiffs in that case who were claiming to be the owners of the property. The point is not of much importance as the defence taken by these tenants has no evidentiary value on the question as to whether the transactions of gift and *mokarari* were genuine and were given effect to. None of the tenants whose written statement this purports to be

appears to have been examined as a witness. It is further clear from a perusal of the judgment of the Additional District Judge that the nature of the pleading was recited in describing the course of events, and that no reliance was placed on it by the Additional District Judge for coming to a decision on the point at issue before him.

[13] Thirdly, it is urged that the Additional District Judge wrongly described the rent receipts Exs. C (65) to C (85) granted on behalf of Amanijan as *mokararidar* to the tenants holding the *katras* as having been granted by Amiruddin, whereas, in fact, Exs. C (83) to C (85) were granted by one Nokram Ali after the death of Amiruddin. Here, again, the mistake is not one of any consequence. The receipts in question were granted in the years 1934 and 1935 long after the two transactions, namely, the gift and the *mokarari*, the genuineness of which we are concerned with. The fact that, in granting these receipts, printed forms describing Amani Jan as *mokararidar* were used does not necessarily prove that she was in fact, a *mokararidar*. On the plaintiff's case, in her capacity as owner of the property, she was entitled to the rent and the person granting the receipts may not have noticed, or attached importance to, the misdescription in the printed form. As I have already said, these receipts were granted long after the transactions in question and have very little bearing on the genuineness of those transactions.

[14] This brings me to the fourth point, non-consideration of material documentary evidence. It is pointed out that there was much documentary evidence on record to show that effect was given to the gift in favour of Amiruddin Khan, that Amiruddin Khan got himself registered in the municipal papers, that there are papers to show that the municipal dues were paid in his name, and further that there are rent receipts purporting to have been granted on behalf of Amani Jan as *mokararidar* to the tenants of the *katras* and by Amiruddin Khan to Amani Jan as *mokararidar* [Exs. C (58) to C (64)]. Stress is particularly laid on the fact that the Additional District Judge does not refer in his judgment to Exs. C (58) to C (64). I do not think that, in view of the finding which was arrived at by the Additional District Judge, the omission to refer expressly to Exs. C (58) to C (64) is of any importance. He has found that, after the death of her husband, Amani Jan's affairs were completely in the hands of Amiruddin Khan. Regarding the payment of municipal dues, he has found that, although the payment was made in his name, the money was actually obtained from Amani Jan, so that she was left with the impression that the money was being paid in her name. As regards the receipts to the tenants of the *katras*, he has said that Amiruddin

> "could very easily get the receipts printed in the name of Amani Jan as his *mokararidar* and grant them to tenants without the knowledge of the illiterate old woman Amani Jan."

Surely, in these circumstances, the failure of the Additional District Judge to give a similar explanation in respect of the rent receipts Exs. C (58) to C (64) is of no consequence.

[15] Finally, there is the objection that the reasons relied upon by the Subordinate Judge for his findings have not been considered. The main question for decision before the Subordinate Judge was whether Amani Jan executed the deed of gift knowing it to be such and intending to execute it as such. He commenced by correctly laying down the onus of proof, that it is not sufficient to show that the document was read out to the executant, but it must be proved that she understood its nature and effect, that it is incumbent on the Court when dealing with the disposition of property by a *pardanashin* woman to be satisfied that the transaction was explained to her, and so on. But, in considering the point, he seems to have lost sight of the weight of onus thrown upon persons who claim under an instrument executed by a *pardanashin* woman. On a perusal of his decision, it is clear that he has come to his conclusion largely on circumstantial evidence which is quite consistent with the possibility that Amani Jan did not, in fact, understand the nature of the deed that she was executing. He considers, first of all, the age of Amani Jan and concludes that she was about forty four years old, and not sixty three as was suggested on behalf of the plaintiff. Next, he says that Amani Jan was "by no means a (*sic*) novice in execution of registered documents." Thirdly, he points out that the person who signed on her behalf was her *khalera* cousin (mother's sister's son) and he also acted as one of the identifiers before the Sub-Registrar. He takes into account that the other identifiers before the Sub-Registrar and attesting witnesses are one of them the son of a neighbour, another a tenant in the suit property and the other two persons who lived a short distance away. Also, another identifying witness is the brother of the *pir* of Amani Jan's mother. Only one of these persons is alive. He has not been examined as witness. Although he had asserted at the commencement of his judgment that the onus of proof was on the defendants, he accepted without question the explanation of defendant 6 that this person is in collusion with the plaintiff and considers it to be a matter for remark that the plaintiff had not the courage to examine this man. It is on

such considerations that the Subordinate Judge felt himself justified in accepting as proving the fact at issue the direct evidence given by defendant 6 and two other witnesses whose names do not appear on the document as having been present at the time of its execution. The evidence of these witnesses has been considered by the learned Additional District Judge and he has further pointed out certain important considerations on which he has based his findings against the defendants. These considerations were entirely lost sight of by the Subordinate Judge, and, to my mind, they form a sufficient answer to the weak reasoning of the Subordinate Judge and a specific reference to the reasoning of the Subordinate Judge was not necessary. Besides this, I have already referred to the remarks of the Privy Council in *Kalyan Mal's case*, (A. I. R. (21) 1934 P. C. 208 : 151 I. C. 45) as to whether the mere reading of a document to a *pardanashin* woman is sufficient, even where she is a woman of special intelligence and education. Here the evidence, even if it is entirely accepted does not go beyond the mere reading of the document. The finding of the learned Additional District Judge, therefore, appears to be entirely justified.

[16] For the reasons which I have given above, I consider that this appeal has no merit and must be dismissed with costs.

Sinha J.—I agree.

D.H. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 252 [*C. N. 63.*]

AGARWALA C. J.

Parsadi Dusadh — Appellant v. *Md. Afaq and others—Respondents.*

A. F. A. D. No. 664 of 1948, D/- 20th December 1949, from decision of Sub-Judge, Patna, D/- 14th April 1948.

Civil P. C. (1908), S. 100 — Finding of fact — Inference of status of tenant from entries in settlement record.

An inference as to the status of a tenant drawn from entries in the record of rights is an inference of fact and even if there be an error in interpreting a portion of the record, there is no error of law which makes the finding assailable in second appeal. [Para 3]

Annotation : ('41-Com.) Civil P. C., Ss. 100 and 101 N. 29 Pt. 2 and N. 35.

Ram Anugrah Prasad—for Appellant.
M. Rahman—for Respondents.

Judgment.—This appeal is by the defendant against a decision of the Subordinate Judge of Patna, reversing a decision of the Munsif of Barh. The appeal arises out of a suit for recovery of khata No. 70 of tauzi No. 8588 of village Akbarpore. The plaintiffs alleged that this khata was granted to two brothers, Etwari and Tukan in consideration of their rendering services of gorait to the plaintiffs. They further alleged that on Tukan's death without issue, the grantor resumed his half of the tenure, but later made a regrant to Etwari. At a partition between the maliks in 1926, 74 acres of khata 70 fell to the patti of the plaintiffs. They alleged that Etwari stopped rendering services in 1352, and consequently they have come to resume possession.

[2] The defence was that the land in question did not constitute a service tenure but was a grant made by the British Government to the defendant for past services.

[3] The first Court dismissed the suit. On appeal the appellate Court held that although the plaintiffs had not been able to prove the original grant to Etwari and Tukan or the subsequent grant to Etwari, the evidence did establish that the land was granted to the two brothers in consideration of their rendering goraiti services. This conclusion was in the main based on the entry in the record of rights in 1910 in which this land was recorded as a jagir goraiti of Etwari and Tukan. Such an entry of course is not conclusive that this merely was a case of land being granted in consideration of rendition of services if the entry by itself might have been construed otherwise. But as was pointed out by Mukherjee J in *Narendra Chandra* v. *Rajendra Chandra*, 45 C. W. N. 654 : (A. I. R. (28) 1941 Cal 506), an inference as to the status of a tenant drawn from entries in the record of rights is an inference of fact and even if there be an error in interpreting a portion of the record, there is no error of law which makes the finding assailable in second appeal. The appellants contend that the onus in this case lay on the plaintiffs. That is not disputed, but the production of the record of rights discharged the onus to the extent of showing that this land constitutes a goraiti jagir, that is to say, it was a grant in connection with the rendering of the service of a gorait and not for services of a public nature, a gorait being a zamindar's servant who acts as an intermediary between the zamindar and the tenants in certain matters. A reference was also made to the decision in *Bhagi Malik* v. *Satyabadi*, 17 Pat. 315 : (A. I. R. (25) 1938 Pat. 507). All that was held in this case was that a zamindar is not ordinarity entitled to resume chaukidari lands. It is quite obvious from the entry in the record of rights to which a presumption of correctness attaches that the land in question in this appeal is not the land granted for rendering chaukidari service at all. That rule has, therefore, no application

[4] The strongest point raised by the appellant was a question of limitation. It appears that in the partition proceedings in 1926 the defendant put forward the contention that the

land in question had been granted to him for past services by the British Government. It is, therefore, argued that this amounted to a denial of any claim which the plaintiffs might assert to be entitled to resume the land. If the question of limitation had to be decided only with reference to the position taken up by the defendant in 1926, there would be much to be said for the question of limitation which he now raises. But the plaintiffs asserted that up to 1352 the defendants had been rendering goraiti service to them. Their evidence has been accepted as true by the Court of appeal below, and it does receive considerable support from entries in receipts showing that Etwari and Tukan used to collect rent from the tenants on behalf of the landlord. One of those receipts is subsequent to the determination of the partition proceedings Although, therefore, it does not carry the plaintiffs as far as 1352 up to which date they assert that the defendants rendered services as goraits it does show that even after they had claimed the whole of the land for past services under a grant made by the British Government, they were still rendering the ordinary normal services of gorait to the zamindar. In these circumstances, I am not prepared to differ from the Court of appeal below either on the question of limitation or with regard to the construction that has been put upon the entry in the record of rights.

[5] The appeal is accordingly dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 253 [*C. N. 64.*]

REUBEN AND DAS JJ.

Shital Prasad Singh and others — Appellants v. Surendra Nath Chatterji and others — Respondents.

A. F. O. O. No. 130 of 1947, D/-19-12-1949, from order of Sub Judge, Bhagalpur, D/-15-2-1947.

(a) Civil P C. (1908), O. 3, R. 4 —Advocate deriving his authority under vakalatnama — Power to compromise suit.

Where the Advocate derives his authority under a *vakalatnama*, his powers depend upon the instrument which empowers him. [Para 4]

His endorsement on the compromise petition must indicate that he filed it in exercise of authority to compound on behalf of his clients. Signing merely as filing the petition is not enough. [Para 4]

Annotation: ('44 Com.) Civil P. C., O. 3, R. 4, N. 7.

(b) Civil P C. (1908), S. 47 — Execution — Proceedings for revival —Judgment-debtors aware of proceedings — Want of notice if vitiates order for revival.

Where proceedings for reviving the execution case did not show that any of the judgment-debtors was unaware of the proceedings, an objection that notices were not served on some of the judgment-debtors before reviving the execution case is more or less of a technical nature and the order for revival cannot be interfered with on that ground. [Para 5]

Annotation: ('44-Com.) Civil P. C., S. 47, N. 71a.

(c) Civil P. C. (1908), O. 21, Rr. 2 and 15 — Execution—Compromise with one of decree-holders —Effect.

Where in execution proceedings, the judgment-debtors enter into negotiations for compromise with one of the decree-holders, who has no authority to represent the other decree-holders, the judgment-debtors act at their own risk and if there is any loss it must fall on them and not on the innocent decree-holders. [Para 6]

Annotation : ('44-Com.) Civil P. C., O. 21, R. 15, N. 8.

Ragho Saran Lall—for Appellants.
S. *Mustafi*—for Respondents.

Reuben J. — This is an appeal by four judgment-debtors against an order of the Subordinate Judge of Bhagalpur dated 15th February 1947, reviving an execution case in which, on 3rd April 1945, he had recorded an order of dismissal on full satisfaction.

[2] It arises in the following circumstances. The decree under execution was a mortgage decree obtained in the year 1938 by four brothers Jitendra Nath Chatterji, Surendra Nath Chatterji, Nripendra Nath Chatterji and Brajendra Nath Chatterji against as many as twenty six judgment-debtors. The execution was taken out for the realisation of Rs. 14,000 and odd as the decretal amount. On 3rd April 1945, a satisfaction petition was filed in the Court of the Subordinate Judge purporting to be on behalf of all the decree-holders but signed by only one of them Surendra Nath Chatterji. It also bore the signature of Mr. B. K. Neogi, Advocate, who had represented the decree-holders in the suit. By this petition, it was stated that the parties had agreed to settle the matter at Rs. 12,000 remitting the remaining decretal amount, that out of this amount Rs. 2,400 was already deposited in Court and the balance Rs. 9,600 was being paid in cash to the decree holders that day. Three days later, on 6th April 1945, a petition was filed by Amarendra Nath Chatterji and others representing Brajendra Nath Chatterji deceased, asserting that they were not parties to the compromise, and that the petition of satisfaction has been filed in fraud of them. A similar petition was filed on the 10th by Nripendra Nath Chatterjee and the representatives of Jitendra Nath Chatterji deceased. They sought the setting aside of the order of (dismissal and ?) revival of the execution case. This has been allowed. Hence, the present appeal.

[3] Mr. Ragho Saran Lal for the appellants urges, first of all, that it is not open to the decree-holders-applicants to question the compromise because, by their subsequent conduct, they have acquiesced in it. He relies upon the fact that, at a later stage, they have applied for

their shares of the money said to have been taken by Surendra Nath Chatterjee from the judgment-debtors. The circumstances in which this happened are clear from the papers to which we have been referred. On 23rd May 1945, Jitendra Nath Chatterjee and Nripendra Nath Chatterji applied to the Court for the prosecution of Surendra Nath Chatterji and others under Ss. 196, 206 and 209, Penal Code, in connection with the filing of the petition of satisfaction. This petition was dismissed by the Subordinate Judge, who was of the opinion that no criminal offence was made out. Before him Surendra Nath Chatterji expressed his willingness to deposit the shares of the other decree-holders out of the amount of Rs. 9600 received by him, and in accordance with this, the Subordinate Judge, on 18th February 1946, directed him to make the deposit. It was only after this order was passed that the other decree holders, from time to time, applied to the Subordinate Judge for directing deposit of their shares. There was at no stage any acceptance by them of the alleged compromise. Under the decree, they were certainly entitled to share in the amount realised by Surendra Nath Chatterji. All that they asked for was their shares, but they did not give up their rights to proceed against the judgment-debtors for the balance.

[4] Mr. Ragho Saran Lall next relies on the provisions of O. 3, R. 4, Civil P. C. He concedes that, as regards two of the original judgment-debtors (judgment-creditors?), namely, Jitendra Nath Chatterji and Brajendra Nath Chatterji, who were dead at the time of the filing of the satisfaction petition, it cannot be urged that they were represented by Mr. Neogi. He contends, however, that Mr. Neogi represented the brother Nripendra Nath Chatterji and to that extent it should be held that the compromise is binding. There are two difficulties in the way of this contention. Firstly, the *vakalatnama* under which Mr. Neogi derived his authority is not before us and no attempt has been made to show that his authority extended to the compounding of the case on behalf of his clients. Our attention has been drawn to *Sourendra Nath* v. *Tarubala Dasi*, 34 C. W. N. 453 : (A. I. R. (17) 1930 P. C. 158), as an authority that the power to compromise was within the general powers of Mr. Neogi as an Advocate. The observations of their Lordships to this effect have regard to the powers of Advocates appearing without a *vakalatnama*. They made it clear that different considerations apply where the Advocate derives his authority under a *vakalatnama*; in such a case, his powers depend upon the instrument which empowers him. Secondly, it appears from the petition of satisfaction itself that Mr. Neogi signed merely as filing the petition. There is nothing in his endorsement to indicate that he filed it in exercise of authority to compound on behalf of his clients.

[5] The third point raised is that notices were not served on several judgment-debtors before reviving the execution case. In the circumstances of this case, this objection appears to be more or less of a technical nature. There is no doubt that, as regards the service of notice, there has been an irregularity. The petitions for revival were filed soon after the execution case was dismissed on full satisfaction. Instead of issuing notices in the ordinary course, the Subordinate Judge directed that they be put up in the presence of the parties, and the order-sheet shows that, from time to time the judgment-debtors or the lawyers of the judgment-debtors appeared in the case. The case was adjourned from date to date till February 1947 when it was finally disposed of. During all this time, there was no objection on the part of any of the judgment-debtors that notices had not been served on them all, or that any of the judgment-debtors was unaware of the proceeding. In particular, as regards the appellants before us, there is no suggestion even now that they did not know of the proceedings, and that the order of the Subordinate Judge was passed behind their back. The objection is entirely rested on Orders Nos. 86, 87 and 89 of the Subordinate Judge, which show that he directed the issue of notices to some of the judgment-debtors, who are residents of Banka Sub-division, but, as *talbana* was filed only in respect of some of them, notices did not issue upon them all. The last order, however, is to the effect that notices need not issue on the remaining judgment-debtors because of a petition by the decree holder to the effect that notices were not necessary so far as those judgment-debtors were concerned. We have nothing before us to show who those judgment-debtors were and whether they were necessary parties to this proceeding. In these circumstances, I do not think there is any reason for interfering with the order passed by the Subordinate Judge.

[6] Finally, objection is taken to the form in which the order of the Subordinaee Judge has been passed. The Subordinate Judge directed that execution should proceed for twelve annas share out of the balance of the decretal dues after excluding Rs. 9,600 said to have been paid to the decree-holder Surendra Nath and further that it should issue for such amount of the other decree-holders' share of that sum as was not deposited by Surendra Nath in Court. In other words, the Subordinate Judge directed that credit should be given to the judgment-debtors for such portion of that amount of Rs. 9,600 as

Surendra Nath might deposit for payment to the other decree-holders and, for the balance, execution should issue against the judgment-debtors. The learned counsel objects that there is no finding of fraud against the judgment-debtors, and it is not equitable that they should be penalised for the fraud of one of the decree-holders. Accepting the contention that there was no fraud on the part of the judgment debtors, we have two innocent parties to decide between. On the one hand, the remaining decree-holders are not blameworthy in any way. On the other hand, the judgment-debtors have entered into negotiations with one of the decree-holders, who had no authority to represent the other decree-holders, and with a lawyer who had represented the decree-holders in the original suit, but who admittedly did not do so in the execution proceedings, the different sets of decree-holders having engaged other lawyers in the execution proceedings. In acting as they did, the judgment-debtors acted at their own risk and if there is any loss, it must fall on them and not on the innocent decree-holders. The general impression that one gets from a persual of the order-sheet which shows that the hearing of this miscellanous matter extended over nearly two years in the course of which several attempts were made to induce Surendra Nath Chatterji to deposit the shares of the other decree-holders, is that the Subordinate Judge did all he could to save the judgment-debtors from suffering as a result of the mistake committed by them. I do not think the order finally passed by him is open to any objection.

[7] On the above grounds, I consider that the appeal has no merit and must be dismissed with costs.

Das J. — I agree.

V.B.B. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 255 [*C. N. 65.*]

DAS AND MAHABIR PRASAD JJ.

Anath Nath Bose—Appellant v. *Manmatha Nath Basu and others—Respondents.*

A. F. O. D. No. 477 of 1946, D/-13-12-1949, from decision of Addl. Sub-J, Gaya, D/- 5-8-1946.

Contract Act (1872), S. 69 — Evidence Act (1872), S. 115 — Contribution — Suit for — Plaintiff taking advantage of excess payment by defendant—Estoppel.

Certain mokarari and zamindari properties were partitioned between *A* and *B* on the basis of gross income in proportion of 2 to 1. *A* who was entitled to two-third share was given a little more than two thirds of zamindari property and one-third mokarari property. *B* who was entitled to one-third share received a little more than two thirds of mokarari property and one-third of zamindari. Under a decree for mokarari rent, *A* claiming that he was liable to pay only one-third share of the rent paid the whole amount under protest and sued *B* for contribution alleging that *B* being in possession of two-thirds of mokarari property had agreed to pay rent to that extent. *B* denied the agreement which was not established. *B* raised the plea of estoppel on the ground that *B* though in possession of only one-third share of zamindari property had paid revenue and cess in respect of it in excess of his share of the liability without any objection or payment on the part of *A*:

Held that, in the circumstances, *A* by his conduct of allowing *B* to pay revenue and cess in respect of zamindary properties in excess of the amount of such demands attributable to the assets of such properties in his possession and having thus let *B* to act to his disadvantage was estopped from claiming a refund of the amount paid by him by way of mukarari rent in excess of the amount attributable to the assets of the mukarari property in his possession as it is an established principle that one who seeks equity must do equity. *A* had, therefore, no right to claim contribution either in law or equity. [Paras 14, 16]

Annotation: ('46-Man.) Contract Act, S. 69, N. 14; ('46-Man.) Evidence Act, S. 115, N. 3 (c), 5.

Lalnarain Sinha, R. P. Katriar, Rajkishore Prasad and Bindeshwari Prasad Sinha— for Appellant.

B. C. De, S. N. Banerji and Amarnath Banerji — for Respondents.

Mahabir Prasad J. — This appeal is by defendant 1 who is aggrieved by the decree passed against him for Rs. 5,750 besides interest by way of re-imbursement of the amount paid by the plaintiffs which, according to them was payable by the defendant.

[2] The facts are these. The plaintiffs and defendant 1 are successors-in-interest of one Rai Pashupati Nath Bose, since deceased, who had acquired permanent mukarari rights in villages mentioned in Schs. A and B of the plaint. The total mukarari rent payable for the tenure is Rs. 15,512-13-11 per year to the superior landlord. Out of this amount, Rs. 12,462-12-0 is paid to the landlord and the balance is paid as revenue and cess to the Government, Late Rai Pashupati Nath was possessed of considerable estate comprising house and other properties in Calcutta, and zamindary and mokarari properties in Bihar. The tenure, the rent of which is in question, is a part of that estate. In the year 1931 a suit for partition of the estate between the plaintiffs and the defendant was instituted on the Original Side of the Calcutta High Court. The suit was referred to arbitration of one R. C. Deb, solicitor who happened to be a relation of the parties. During the pendency of the suit and the proceedings before the arbitrator, a receiver was appointed who held possession of the properties under partition. The arbitrator made three interim awards: (1) dated 23rd February 1932; (2) dated 30th August 1933, dividing house and other properties in Calcutta; and (3) dated 8th April 1936, dividing the zamindary and mokarari properties in Bihar.

By the preliminary decree passed by the Calcutta High Court, the plaintiffs were held entitled to two-thirds and the defendant to one-third of the estate of Rai Pashupati Nath. The arbitrator was required to make the allotments accordingly. It appears that for purposes of partition, properties were valued by agreement between the parties which valuation was on the basis of gross income of the properties in question as mentioned in a document dated 26th March 1934, marked as Ex. 1 before a Commissioner. This is an agreement between the parties regarding partition scheme and contains a statement of valuation of all the mauzas forming the estate of late Rai Pashupati Nath in the district of Gaya. Exhibit 1 mentions separately the villages forming the zamindary and mukarrari properties allotted to the plaintiffs and the defendants. Valuation of each village is noted against it. There is nothing in Ex. 1 to indicate as to how the outgoings in respect of these properties were to be made. It appears that after the allotments were made by the arbitrator, the receiver, who was in possession of the estate, had three separate accounts opened. In one of them he dealt with the income from the properties alloted to the plaintiffs, in the other with the the income allotted to the defendant, and in the third one with the funds collected as arrears of the period before the allotment by way of joint fund belonging to the parties. Out of this third account, he used to discharge the liabilities of the estate, and if this joint fund fell short of the requirements, he used to draw in proportion of two-thirds and one-third from the separate accounts kept for the properties allotted to the plaintiffs and the defendants. There is no difference between the parties in regard to the facts stated up to this stage.

[3] On 2nd May 1938, the receiver was discharged and the parties got possession of the properties allotted to them.

[4] The plaintiffs allege that at the time of partition, although the liability for payment of the mukarrari rent was not specifically distributed between the parties, it was understood that the plaintiffs and the defendants would be responsible for the payment of the rent due to the proprietors in proportion of the assets of mukarrari tenure held by them in severalty.

[5] It appears that the total gross income of the mukarrari properties as fixed by the arbitrator by agreement between the parties is Rs. 35,211. Similary, the total gross income of the zamindary property is Rs. 1 56,648. Out of the gross income of mukarrari properties, as stated above the plaintiffs were allotted, to the amount of Rs. 12,327, and out of gross income of zamindary properties to the amount of Rs. 1,15,579 making a total of Rs. 1,27,906, as representing their two-thirds share of the estate of Rai Pashupati Nath in Bihar. The defendant on the other hand, was allotted Rs. 22 884 out of the gross income of mukarrari properties and Rs. 41,069 out of the gross income of zamindary properties making a total of Rs. 63,953 as against his one-third share of the estate.

[6] The case of the defendant is, as alleged in para. 9 of the written statement, that the parties agreed to the partition of the joint zamindary and mukarrari properties, according to the valuation of different villages on the footing of the gross annual income in consideration of their mutually agreeing that the entire outgoings in respect of the zamindary and mukarrari properties would after partition be met and discharged by the defendant to the extent of a one-third share and by the plaintiffs to the extent of the remaining two-thirds. According to the defendant, therefore, the annual total liability of the mukarrari property to the extent of Rs. 18,539 and the annual total liability of zamindary property to the extent of Rs. 27,872 had to be added together making a total of Rs. 46,412 and odd to be paid in proportion of two-thirds and one third shares by the plaintiffs and the defendant; in other words, although, according to the allotments made, the defendant was in possession of two-thirds of the mukarrari properties, and the plaintiffs were in possession of the mukarrari properties only to the extent of one-third, and the plaintiffs, on the other hand, were in possession of more than two-thirds of the zamindary property and the defendant was in possession of less than one-third of that property, the liability for the payment of outstandings in respect of the two kinds of properties were to be in proportion of their shares of two-thirds and one-third of the estate. Two-third liability of the mukarrari property to be paid by the plaintiffs as alleged by the defendant was Rs. 12,359-12-8, and that in respect of the zamindary property payable by him was Rs. 18,581-9-4, making a total of Rs. 30,941-6-0. The liability of the mukarrari property payable by the defendant was Rs 6,179-14-4 being the one-third of the total liability of the mukarrari property and Rs. 9,290-12-5 in respect of his one-third share of the zamindary property, making a total of Rs. 15,741-10-9, although defendant 1 was allotted less than one-third of the zamindary property, the balance being made up by allotment to him of the mukarrari property in excess of his one-third share.

[7] It appears that even after the parties had taken possession of the properties allotted to them, the entire outgoings of the estate were treated as one unit out of which one-third was paid by the defendant and two thirds by the

plaintiff irrespective of the possession of the properties in zamindary and mukarrari properties. The system under which the receiver, while in possession of the estate, used to make payments of the outstandings in proportion to the respective shares of the parties was continued.

[8] According to the plaintiff, as already stated, the understanding arrived at between the parties was that the plaintiffs and the defendant would be responsible for the payment of the mukarrari liabilities due to the landlords in proportion of the estates of mukarrari tenure held by them in severalty; in other words, the defendant being in possession of the mukarrari properties to the extent of two-thirds were liable to pay Rs. 12,359-12-8. As the defendant defaulted in payment of the mukarrari rent in accordance with this understanding, in execution of a decree passed in Rent Suit No. 3 of 1940 against the plaintiffs and the defendant, the entire mukarrari tenure was put up to sale for a sum of Rs. 13,000 odd, and, although the plaintiffs, as alleged by them, were prepared to pay their share of the liability which, according to them, was one-third, the defendant did not come forward to pay his own share of two-thirds and attempted to take possession of the tenure under S. 171, Bihar Tenancy Act. The plaintiffs, as alleged by them paid to the Court in satisfaction of this joint decree against them and the defendant, under protest to the extent of Rs. 10,382-4-9 which was in excess of their share of the liability. The amount paid by them in excess was Rs. 5,136-9-9 which, according to them, was legal and justly payable by the defendant. On these allegations, the present suit was instituted for recovery of Rs. 5,136-4-9 by way of contribution.

[9] The defence to the action is that there was no understanding, as alleged by the plaintiffs, for payment of the outstandings in respect of the mukarrari properties in proportion of the mukarrari tenure held by them in severalty. To the contrary, the basis of allotting the zamindary and mukarrari properties on valuation made with reference to gross annual income of these properties was adopted in view of the agreement which was arrived at between the parties, namely, that the entire outgoings in respect of the zamindary and mukarrari properties, would be met by the parties to the extent of one-third by the defendant and to the extent of two-thirds by the plaintiffs treating the entire outstandings of the estate as one unit. In accordance with this agreement, the defendant alleges that he had paid his quota of one third of the rent of the mukarrari tenure, and the amount paid by the plaintiff in satisfaction of the joint decree in Rent Suit No. 3 of 1940 was their own quota of the total mukarrari, rent, justly and legally payable by them and that the amount of Rs. 5136 9-9 was not paid by the plaintiffs in excess of their share of the liability.

[10] The most important issue, which fell to be decided, was:

> "Was there any agreement between the plaintiffs and defendant 1 that the entire outgoings of both the zamindari and mokarrari properties should be discharged by the plaintiffs and defendant 1 in proportion to 2/3rd and 1/3rd respectively as alleged in para. 9 of the written statement or was there any understanding as mentioned in para 4 of the plaint?"

[11] The learned Additional Subordinate Judge negatived the agreement pleaded by the defendant as also the understanding relied upon by the plaintiffs. He held as follows:

> "Having regard to all the evidence and circumstances discussed above, I hold that there was no agreement or understanding between the plaintiffs and defendant 1 for payment of the entire outgoings including mokarrari rent of the mokarrari properties in proportion to 2/3rd and 1/3rd respectively as stated by defendant 1 in para. 9 of the written statement. I further hold that there was also no specific understanding between the parties as stated by the plaintiffs in para 4."

He, however, decreed the plaintiffs' suit because he held that in the absence of any agreement or understanding in this behalf, the plaintiffs under the law and equity were responsible for payment of the mukarrari dues in proportion of the assets of the mukarrari tenure held by them in severalty, and that they had, therefore, paid the amount claimed by them in excess of the amount of the mukarrari rent for which they were liable.

[12] It is contended on behalf of the appellant by Mr. Lalnarain Sinha that the learned Additional Subordinate Judge erred in not taking into account all the circumstances in the case, and in holding that under the law and equity the plaintiffs were entitled to recover this amount from the defendant. He referred to the evidence of witness No. 2 for the plaintiffs, Kshitish Chandra Bagchi, who is the agent for the plaintiffs, and who attended the proceedings of the partition before the arbitrator on behalf of the plaintiffs. Mr. Lalnarain Sinha submits that on his evidence it is established that the plaintiffs have been paying revenue and cess of the zamindary properties only to the extent of two-thirds although they are in fact in possession of more than two-thirds of the zamindary properties. Even during the period for which the mukarrari rent was realised by execution of the decree in Rent Suit No. 3 of 1940, the plaintiffs had paid only two-thirds of the total revenue and cess payable for the zamindary properties although they were in possession of more than two-thirds of such properties. He submits that irrespective of the fact whether the agreement pleaded by the defendant is proved or not, the plaintiffs are not entitled to claim refund of the amount

alleged to have been paid by them in excess of their share of the liability of the mukarrari tenure on the basis of the extent of possession of the assets of the mukarrari properties unless they make a refund of the amount paid by the defendant by way of revenue and cess in respect of the zamindary property in excess of their share of the liabilities calculated on the basis of their possession of the assets of the zamindary property. The plaintiffs having taken advantage of the payments made by the defendant in respect of the zamindary property and having allowed them to make that payment on the footing that the plaintiffs would make payment of the mukarrari rent in accordance with their share of the total liability of the estate considered as one unit, are estopped from alleging and proving that the plaintiffs and the defendant either by reason of any agreement or under the law or equity are responsible for the payments of the mukarrari dues in proportion of the assets of the mukarrari tenure held by them. The contention merits serious consideration.

[13] It appears that the defendant has brought a suit in the Calcutta High Court against the plaintiffs claiming a declaration that the plaintiffs and the defendant are under an obligation to pay and discharge the entire outgoings of the zamindary and mukarrari properties partitioned between the parties under the award of the arbitrator in the proportion of one-third and two-thirds respectively, and, for a decree for Rs. 12,258-3-0. This suit was instituted on 10th February 1945, after institution of the suit out of which the appeal arises, on 3rd July 1944. The suit in the Calcutta High Court is still pending. The issue whether there was an agreement of the kind pleaded by the defendant or the understanding relied upon by the plaintiffs in respect of the liabilities regarding outstandings of the estate will have to be decided in that suit. It seems that the present case can be disposed of on a shorter ground of estoppel without deciding finally this issue between the parties. This issue may be left to be decided in the suit pending before the Calcutta High Court in a larger context, when all the materials relevant to the decision of this issue will be before the Court.

[14] Reverting to the ground of estoppel urged on behalf of the appellant. It is common ground that the share of the plaintiffs in the whole estate is two-thirds and that of the defendant is one-third as also that the allotments made by the arbitrator proceeded on the basis of an agreed valuation of these properties with reference to their gross income, and, that as a result of this allotment, the plaintiffs are in possession of the zamindari properties in excess of their two-thirds share and the defendant is in possession of the mukarrari properties in excess of his one-third share. It is also common ground that the liabilities in respect of these two kinds of properties—mukarrari and zamindary—used to be paid by the parties in proportion of two-thirds and one third on the basis of the total outstandings being one unit up to the date of the suit. It is clear that it was only in respect of the payment of the decree in Rent Suit No. 3 of 1940 that the dispute in regard to the payment of the mukarrari liabilities on that basis arose between the parties. It is also not denied by the plaintiffs that they have not been paying revenue and cess of the zamindary properties in proportion of the assets of these properties in their possession, that is to say, they have been paying in proportion of two-thirds and one-third of the total liabilities. [After quoting from the deposition of P. W. 2 Kshitish, His Lordship proceeded:] The conclusion seems irresistible that, in the circumstances, the plaintiffs by their conduct of allowing the defendant to pay revenue and cess in respect of zamindary properties in excess of the amount of such demands attributable to the assets of such properties in his possession and having thus let the defendant to act to his disadvantage are estopped from claiming a refund of the amount paid by them by way of mukarrari rent in excess of the amount attributable to the assets of the mukarrari property in their possession. The plaintiffs are, therefore, not entitled to recover in any event the amount claimed by them in the suit.

[15] The situation would have been entirely different if the plaintiffs had intimated to the defendant that he was not to pay the liabilities in respect of the zamindary property in excess of the amount attributable to the assets in his possession, and that they would not pay in respect of the outstandings of the mukarrari property any amount in excess of that attributable to the assets in their possession. The defendant in that event could not escape the responsibility of meeting the liability in respect of the mukarrari property proportionate to the assets in his possession unless he proved the agreement pleaded by him in his defence. While, therefore, it may be possible to hold the defendant liable in future for the portion of the outstandings referable to the assets of the mukarrari in his possession, if the agreement pleaded by him and repudiated by the plaintiffs is not established, the plaintiffs, in the circumstances of the present case, cannot claim contribution in respect of the amount paid by them as mukarrari rent and involved in the suit.

[16] Mr. B. C. De for the respondents pressed the claim for contribution on the ground of equity. It is no doubt true that the right and

duty of contribution is founded on doctrines of equity. In the present case, however, it is not possible to work out the equities between the parties in respect of the liability for the payment of the outstandings, unless the scheme of partition of the whole estate, based as it was on the most unusual method of valuing the properties to be partitioned on their gross income, is examined. It is likely that on such examination the agreement between the parties to value the properties on the basis of their gross income may be found to include, by necessary implication, the agreement in respect of the outstandings as pleaded by the defendant. On the other hand, such examination may reveal circumstances completely negativing such an agreement and justifying the understanding pleaded by the plaintiffs or affording grounds for application of the equitable doctrine of the person in possession of a property being liable for payment of its outstandings. The learned Additional Subordinate Judge erred in applying this principle and decreeing the suit for contribution on the basis of the defendant being responsible for the payment of dues of the mokarrari property in proportion of the assets held by him without examining the scheme of partition under which the plaintiffs and the defendant came to hold in severalty mukarrari and zamindary properties in variation of their shares of two-thirds and one-third. What is more, he seems to have missed that the plaintiffs not having adhered to this proportion so far as the payments in respect of zamindary properties were concerned, were not entitled to press this principle to their advantage in respect of the outstandings of the mokarrari properties. It is an established principle that one who seeks equity must do equity. It is clear that the plaintiffs in the present case having failed to prove the understanding pleaded by them have no right to claim contribution from the defendant either in law or in equity.

[17] In view of these considerations without deciding whether the agreement pleaded by the defendant or the understanding pleaded by the plaintiffs has been established, it is held that the plaintiffs have failed to make good their claim in respect of the amount covered by the suit.

[18] The appeal is accordingly allowed, and the suit of the plaintiffs is dismissed. In the circumstances, there will be no order as to costs. The parties must bear their own costs throughout.

Das J.— I agree.

D.R.R. *Appeal allowed.*

A. I. R. (37) 1950 Patna 259 *[C. N. 66.]*

DAS AND SARJOO PRASAD JJ.

Sunirmal Dutta — Petitioner v. *Province of Bihar — Opposite Party.*

Criminal Misc. No. 885 of 1949, D/- 24th January 1950.

(a) Public Safety—Bihar Maintenance of Public Order (No. 2) Ordinance (IV [4] of 1949), S. 4 — Failure to submit report by Advisory Council — Bihar Maintenance of Publice Order Act (III [3] of 1950), S. 26.

Where there was a proper reference to the Advisory Council on 24th September 1949 but no further information was called for by the Council and no report was submitted by the Advisory Council to the Provincial Government at all there are no proceedings pending which could be saved and continued under S. 26, Bihar Maintenance of Public Order Act (III [3] of 1950). There being a failure to comply with the mandatory provisions of sub-ss.(4) and (5) of S. 4 of the Ordinance the detention of the detenu is illegal. [Paras 19 and 20]

(b) Public Safety—Bihar Maintenance of Public Order (No. 2) Ordinance (IV [4] of 1949), S. 4 (1) proviso — Proviso is valid. [Para 3]

(c) Public Safety — Bihar Maintenance of Public Order Act (III [3] of 1950), Ss. 5, 26 — Reference to Advisory Council constituted under Bihar Maintenance of Public Order (No. 2) Ordinance of 1949.

If a member of the Advisory Council constituted under the Ordinance of 1949 was not qualified to be a member under the Act, the Advisory Council on the operation of the Act, *ipso facto* stood dissolved; nevertheless the reference made to the then existing Council under the law as it was and the steps taken by the Advisory Council would be deemed to have been made under the Act. [Para 21]

B. C. Ghosh and D. K. Sinha — for Petitioner.
Government-Advocate — for Opposite Party.

Sarjoo Prasad J. — This application under s. 491, Criminal P. C. relates to an order of detention passed against the applicant by the province of Bihar purporting to be under s. 2(1) (a), Bihar Maintenance of Public Order (No. 2) Ordinance, 1949, (For the sake of brevity, we shall hereafter call this Ordinance as the Ordinance of 1949). The order of detention in this case was passed on 2nd July 1949, and a copy of the order was served on the applicant on 5th July 1949, on 25th July 1949 a copy of the grounds on which the detention order was made which purports to be dated 22nd July 1949, was served on the applicant. It is not quite clear from the records as to when a representation was made by the applicant against the order in question; but we are informed that such a representation was made and the matter was referred to the advisory Council constituted under sub-s. (3) of s. 4 of the Ordinance of 1949 on 24th September 1949, and the records were received by the Chairman of the said Advisory Council on 25th September 1949. Thus far the facts are admitted. At one stage it was suggested by the learned Government-Advocate appearing for the Crown that the Advisory Council had called for further information from the Provincial Government in connection with the representation made by the detenu. We, therefore, directed that an affidavit should be filed on behalf of the Crown giving full particulars and the date on which the materials were called for, and the date on which the materials and further information were received by the Advisory Council. We accordingly adjourned the hearing of this application to enable the learned Government Advocate to file the affidavit required. The learned Government Advocate, however, finally submitted that he was unable to file any such affidavit. The result is that we have assumed for the purposes of this case in the absence of any definite information on the point, that the Advisory Council after the reference had been made to it did not call for any further information from the Provincial Government or receive any such further materials or information from the Provincial Government, and the case will now have to be decided upon the facts as we have stated above.

[2] Mr. Ghosh appearing for the petitioner in so far as I have been able to understand his argument, has raised two points in support of his claim that the detention of the petitioner is illegal. He says firstly ; (1) that the grounds for detention are vague and indefinite, and (2) that there being no compliance with the mandatory provisions of the Bihar Act III of 1950 (The Bihar Maintenance of Public Order Act, 1949) hereinafter called the Act of 1950.

[3] It would be convenient to deal with his arguments seriatim. I propose, therefore, to take up his first argument based upon the vagueness or insufficiency of the grounds of detention communicated to the petitioner. We have had the advantage of examining the grounds, and we are not satisfied that there is any substance in the complaint of the petitioner. We consider that the grounds stated are specific and definite. It is true that they do not disclose the source from which informations are derived, but, in my opinion, it is not obligatory on the Provincial Government to disclose the source of their information. It was open to the petitioner, if he felt any difficulty in making his representation on account of any supposed vagueness to ask for further particulars. It is not suggested that the petitioner in this case ever did ask for such particulars and was refused. That being so, there is evidently no merit in this objection. Even if there had been any insufficiency or vagueness in view of the proviso to sub-s. (1) of S. 4 of the Ordinance of 1949, it is not open to us to hold that the order of detention is illegel, unlawful or improper on this account The proviso has since been held by their Lordships of the Federal Court to be valid (See *Lakshmi Narain Das* v. *The Province of Bihar*, the decision being, of 28th November 1949 : (A. I. R. (37) 1950 F. C. 59.) The matter was again examined by a Division Bench of this Court in *Tabarak Khan* v. *Province of Bihar*, Cri. Misc. No. 784 of 1949, decided on 23rd December 1949, (A. I. R. (37) 1950 Pat. 228) where again it was held that the proviso was valid. In any case the clarity or inadequacy of the grounds is largely a matter for consideration by the Advisory Council and the Ordinance itself provides a machinery to scrutinise the basis of the grounds of detention. There is no doubt that if that machinery of the Advisory Council functions properly, many of the grievances which are ventilated in Court will find their adequate consideration at the hands of the Advisory Council. I, therefore, see no substance in the contention urged on behalf of the petitioner. If the grounds of detention are correct, and we have no reason to think otherwise, they disclose that the conduct of the petitioner constitutes a menace to the State and is prejudicial to public safety. The Provincial Government may have, therefore, ample justification for his detention. As, however, we have decided to set the petitioner at liberty for reasons given here below due to unfortunate non-compliance by the authorities with the mandatory provisions of the law as it then stood or as it stands at present, we hope that the petitioner will utilise his liberty for the benefit of and in service of the State and prove himself a worthy and responsible citizen of his country.

[4] The consideration of the second point urged on behalf of the petitioner has presented no small difficulty in so far as it involves interpretation of S. 26 of Act III [3] of 1950. In order to appreciate the point involved and before turning to the provisions of the Act of 1950, it would be useful to refer in this connection to some of the relevant provisions of the Ordinance of 1949.

[5] Section 2 (1) (a) of the Ordinance in question provides that the Provincial Government with a view to preventing a person,

> "from acting in any manner prejudicial to the Public safety and the maintenance of Public Order may make an order directing that he be detained."

[6] Section 4 (1) of the Ordinance provides, *inter alia* that where an order in respect of any person under cl. (a) of sub-s. (1) of S. 2, is made, the authority making the order should, "as soon as may be after the order is made, communicate to the person affected thereby" the

> "grounds on which the order has been made against him and such other particulars as are in the opinion of such authority sufficient to enable him to make, if he wishes, a representation against the order"

which representation may be made by the person concerned *within fifteen days* of the receipt of such communication. There is a proviso to the said sub-s. (1) of S. 4 which states that neither the order nor the detention of the said person thereunder will be invalid or unlawful or improper on the ground of any defect, vagueness or insufficiency of the communication made to such person under this section. I had occasion to refer to the proviso in considering the first point urged for the petitioner. In sub-s. (2) of S. 4 of the Ordinance, it is further provided that after the receipt of the representation, or in case no representation is received after the expiry of the period fixed therefor, the Provincial Government shall *within three months* of the order, place before the Advisory Council constituted under sub-s. (3), the grounds on which the order has been made and the representation, if any, made by the person concerned together with any other relevant material which the Provincial Government may consider necessary. Sub-section (4) of S. 4 then provides that, the

> "Advisory Council shall, after considering the materials placed before it and if necessary after calling for such further information from the Provincial Government or from the person concerned, as it may deem necessary, submit, *within three weeks* of its receiving the materials, and further information, a report to the Provincial Government."

Then under sub-s. (5) of S. 4 of the Ordinance the Provincial Government after considering the report of the Advisory Council, may confirm, modify or cancel the order made under cl. (a) of sub-s (1) of S. 2.

[7] Now, after this order contemplated by sub-s. (5) of S. 4 has been made, S. 3 (1) of the said Ordinance provides that an order made under cl. (a) of sub-s. (1) of S. 2 shall be in force for a period not exceeding six months from the date on which it is confirmed or modified under sub-s. (5) of S. 4 though it would be open to the Provincial Government at any time within the expiry of that period to revoke the order in question.

[8] It is quite clear, therefore, that in this particular case although the proceedings in respect of this detenu had reached up to the stage of making a reference to the Advisory Council as contemplated by sub-s. (2) of S. 4, the Advisory Council has neither called for further information nor submitted its report as contemplated by sub-s. (4) of S. 4 of the Ordinance; and, therefore, no final order has been or could be passed by the Provincial Government which under S. 3 of the Ordinance could take effect for a period not exceeding six months from the date on which it is made as provided by sub-s. (5) of S. 4 of the said Ordinance.

[9] This Ordinance was subsequently replaced by an Act of the Provincial Legislature which is the Bihar Maintenance of Public Order Act, 1949 (Bihar Act III [3] of 1950) most of the relevant provisions of this Act are identically the same as the provisions of the Ordinance of 1949.

[10] Section 2 of the Act is exactly in the same terms as S. 2 of the Ordinance. In other words, this Act also authorises the Provincial Government, if satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to the public safety and the maintenance of the public order, it is necessary to detain him in custody, to direct such detention. Section 4 of the Act is in the same terms as S. 3 of the Ordinance; while S. 5 of the Act contains similar provisions as S. 4 of the Ordinance with this difference that the various provisions as to the period during which the grounds are to be communicated or the representation is to be made, or the matter is to be referred to the advisory Council and the report is to be submitted by the Council have been altered. It is necessary to mention this difference as to the various periods separately, because Mr. Ghosh sought to rest his argument on that basis.

[11] Section 5 of the Act provides *inter alia* that the authority making the order under cl. (a) of sub-s. (1) of S. 2 shall communicate to the person affected by the order the grounds on which the order has been made against him within fifteen days of the date on which the order is served on him. It would appear that in the Ordinance of 1949 there was no such period given, and the only provision was that the grounds had to be communicated as soon as may be *after the order is made*. Again, under the Act of 1950 after communication of the grounds the detenu has been allowed to make a representation within ten days of the receipt of such communication; whereas in the Ordinance of 1949, the period allowed for making such a representation was fifteen days from the receipt of the communication of the grounds. Then again sub-s. (2) of S. 5 of the Act of 1950 provides *inter alia* that after the receipt of the representation by the detenu, the Provincial Government shall within six weeks of the service of the order on the person in respect of whom it is made, place before the Advisory Council constituted under sub-s. (3), the grounds on which the order has been made and the representation made by the person concerned together with any other relevant material which the Provincial Government may consider necessary. This period we shall notice was three months under the Ordinance of 1949. Under sub-s. (4) of S. 5 of the Act of 1950 the Advisory Council shall after considering the materials, placed before it and if necessary, after calling for such further information from the Provincial Government or from the person concerned, submit a report to the Provincial Government

within twelve weeks of the date of the service of the order on the person in respect of whom it is made. The period for submission of a report by the Advisory Council under the Ordinance of 1949 was very much different. It provides for submission of a report, as we have seen above, *within three weeks* of its receiving the materials or further information from the Provincial Government.

[12] These above alterations as to the various time factor are material and significant. The fixation of the period under the Act of 1950 for submission of a report by the Advisory Council within twelve weeks of the date of the service of the order on the person affected is distinctly an improvement upon the provisions of the Ordinance where there was no time fixed within which the Advisory Council could either call for information or the Provincial Government could be compelled to submit such information or materials. No argument has, however, been addressed to us as to the effect of such a vague provision upon the validity or invalidity of the Ordinance of 1949. We, therefore, as at present advised have to confine ourselves to the bearing of these provisions on the submissions made at the Bar.

[13] I have already pointed out that the Ordinance has since been repealed by the Act of of 1950 which came into operation on 4th January 1950 as published in the Bihar Gazette, Extraordinary of that date. The date 4th January 1950 on which the Act of 1950 came into force is very material. The repealing provision in the Act is S. 26 which provides in sub s. (1) that "The Bihar Maintenance of Public Order (No. 2) Ordinance 1949, is hereby repealed." In sub-s. (2) at the same time it adds a saving clause and says :

> "All proceedings commenced, officers appointed or authorised, rules and orders made, sentences passed or acts ordered or done, in exercise of any jurisdiction or power conferred by or under the provisions of the said Ordinance shall be continued and be deemed to have been respectively commenced, appointed or authorised, made passed, ordered or done under this Act and any enactment or document referring to any of the said provisions shall be construed to refer to this Act or to the corressponding provision thereof.

[14] It is the interpretation of this section of the Act which has caused some difficulty. We have seen from the above that S. 26 of the Act of 1950 does not contain only a repealing clause but also a saving clause.

[15] Mr. Ghosh on behalf of the applicant contends that the detention of the applicant is illegal inasmuch as it did not comply with the mandatory provisions of Act III [3] of 1950. He says that the effect of sub-s. (2) of S. 26 of the Act is that the order passed under the Ordinance of 1949, would be deemed to have been passed under this Act of 1950, and inasmuch as there was no compliance with the mandatory provisions of S. 5 of this Act of 1950 in regard to the communication of the grounds or the reference to the Advisory Council within the period allowed by the Act the order of detention cannot be sustained. If this argument of Mr. Ghosh is accepted it would lead to most anomalous consequences. I have already shown above that the various periods for steps to be taken under the Ordinance of 1949 and the Act of 1950 differ. Mr. Ghosh contends that in view of S. 26 of the Act of 1950 in effect the periods given in the Act of 1950 should be substituted for the periods given in the Ordinance of 1949, and then it should be examined from that point of view whether there has been compliance with the law by the authorities concerned. I do not understand how this argument can be justified on any principle, unless Mr. Ghosh thinks that the Act of 1950 is in the nature of the declaratory statute and therefore, retrospective, which on the plain terms of S. 26 it is not. His argument, if pressed to its logical sequence, would come to this that even if the provisions of the Ordinance of 1949 may have been duly complied with before Act III [3] of 1950 came into force and the detention may have been consequently legal, yet when this Act III [3] of 1950 came in operation the detention would be rendered illegal because, according to him, steps were not taken in compliance with the provisions of this Act. It is obvious that the law as it then stood under the Ordinance provided for different time factors, and these changes in regard to time factors were introduced only when Act III [3] of 1950 came into operation. It would be, therefore, impossible to hold that the detention would be illegal because steps were not taken and, as I have said could not be taken for obvious reasons in accordance with Act III [3] of 1950.

[16] The question then is as to what is the real effect of S. 26 of Act III [3] of 1950 which is both a repealing section as well as a saving provision in regard to the prosecution commenced, orders made or acts done under the Ordinance which has since been repealed. It has been contended by the learned Government Advocate for the Crown that the effect of S. 26 is that the order of detention passed under the Ordinance of 1949 would be deemed to have been passed under the Act of 1950 as from the date on which the Act came into force, in other words, from 4th January 1950. This contention, in my opinion, is equally too wide to merit acceptance. The effect of this argument would be that according to the learned Government Advocate the order of detention would be deemed to have been passed on 4th January 1950. This argument in-

volves various difficulties. One obvious difficulty is that if this argument is accepted a final order passed under the Ordinance, as contemplated by sub-s. (1) of S. 3 of the Ordinance which may be about to expire at or about the period when this Act came into force will get *ipso facto* a further extention of about six months from 4th January 1950 and we will have to assume by some sort of legal fiction that on 4th January 1950, the date on which this Act came into operation not only that the original order detaining the detenu had been passed on that date but also the subsequent order as confirmed or modified by the Provincial Government was passed simultaneously on the same date. It is, therefore, impossible for us to accept either of the two contentions advanced by the applicant or on behalf of the Crown.

[17] I have said already that S. 26 of Act III [3] of 1950 is both repealing section as well as a saving section in respect of the previous legislation, i. e., the Ordinance of 1949. It has to be observed that S. 26 of the Act appears to have been copied word for word from S. 24 of the Ordinance ignoring the fact that in S. 5 of the Act which corresponds to S. 4 of the Ordinance various changes had been introduced in regard to the time factors, and, therefore, those changes were obviously inconsistent with the provisions of the repealed Ordinance. At page 295 of Craises on Statute Law, 4th Edition it is stated :

> "The effect of a repeal without any express savings is thus stated by Tindal C. J. in *Kay* v. *Goodwin*, 1830-6 Bing. 576 : (8 L J C P 212) where he says, I take the effect of repealing a statute to be to obliterate it as completely from the records of the Parliament as if it had never been passed; and it must be considered as a law that never existed except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law".

Again at page 298, the passage occurs:

> "Where an Act confirming jurisdiction is repealed by a later Act containing a saving clause to the effect that the repeal shall not affect any jurisdiction created by the repealed Act, that jurisdiction, in the absence of inconsistency between the two Acts, should be treated as continuing not withstanding the repeal. The rule is thus stated by Collins M. R. in *Re. R* (1906) 1 Ch. 730 : (75 L. J. Ch. 421), which turned on the question whether S. 5, Trustee Act, 1850, which applied to property held by a criminal lunatic, was wholly repealed by S. 342, Lunacy Act, 1890, which does not deal directly with criminal lunatics. He said "There were one or two other cases cited which have an important application to the present case, that is to say, cases where you find in an Act a repealing clause followed by a saving clause. There you have to see how far the two enactments can co-exist."

[18] It would thus appear that the repealing as well as the saving provisions in S. 26 have to be read in such a manner as not to create any incompatibility and to give effect to the intentions of the Act and not so as to defeat its purpose. Bearing in mind that principle, it seems to us that whatever proceedings may have been commenced and orders made and Acts done under the Ordinance shall be continued or deemed to have been passed or done under this Act. Therefore, if a final order within the meaning of sub-s. (5) of S. 4 of the Ordinance has been already passed that order will take effect as provided under S. 3 of the Ordinance. If no such final orders have been passed, but only proceedings have been commenced or Acts done and in so far as they have been properly done under the Ordinance, they shall be continued or deemed to have been done under the Act. We find in this particular case that reference had been properly made to the advisory Council on 24th September 1949. If after such a reference the proceedings had been duly pending before the Advisory Council or in other words, the Advisory Council had called for further information from the Provincial Government, and if the Provincial Government had submitted the materials or were contemplating to do so then when Act III [3] of 1950 came into operation i. e. on 4th January 1950, the proceedings would have been validly continued.

[19] It is again necessary to recapitulate the procedure laid down under the Ordinance after reference to the Advisory Council. The first is that the Advisory Council, if necessary, may call for further information from the Provincial Government or from the person concerned. The second stage is that the Provincial Government, if called to supply any further information, may do so, but there is no time limit given in the Ordinance for this purpose. Thirdly, where the Provincial Government or the party concerned has furnished the information required where further information is required, then from receipt of such further information or where no such information has been required, from the receipt of the materials originally, the Advisory Council shall within three months submit its report. Then the last stage is that the Provincial Government may then confirm, modify or cancel the Order after the receipt of the report. Again there is no time limit given within which the Provincial Government is to pass this final order of confirmation. As I have said, if the matter had been duly pending in all these stages, or in any one of them as provided by the Ordinance, then on the operation of the Act on 4th January 1950 those proceedings shall be continued and shall be governed by the provisions of this Act. If there are no proceedings pending, then there is nothing to be continued. It is for this reason that we wanted further materials from the learned Government Advocate to satisfy ourselves if there was any proceeding pending; but on the facts as we now find, the

only thing which has been done so far is that there was a proper reference to the Advisory. Council on 24th September 1949. We take it that there was no further information called for as there is nothing to support that inference. That being so under the Ordinance of 1949 it was necessary for the Advisory Council to submit its report within three weeks from the date on which the Council received the materials originally, that is, on 25th September 1949. Nothing appears to have happened thereafter and it is admitted that no reports have been submitted. The result is that there is no proceedings pending. In dealing with Criminal Miscellaneous Nos. 854 and 870 of 1949 this Bench pointed out as follows:

> "Under sub-s. (4) of S. 4 Public Order Ordinance, the Advisory Council has to submit a report within three weeks of its receiving the materials and further information, if any, be called for, to the Provincial Government. On receipt of such report the Provincial Government confirms, modifies or cancels the original order made. The order so confirmed and modified remains in force for a period not exceeding six months from the date of confirmation or modification. If, therefore, the Advisory Council fails to submit a report, then the result is that the Provincial Government is not in a position to confirm, modify or cancel the order. If the Provincial Government is not in a position to confirm or modify the order, then S. 3 with regard to the duration of the order becomes infructuous. Therefore, it seems to us that the provisions of sub-s. (4) and sub-s. (5) of S. 4, Public Order Ordinance, are not merely directory, but mandatory, they being integral parts of the scheme envisaged by the Public Order Ordinance."

[20] As I have said, we have to take it that though the representation of the petitioner was sent to the Advisory Council there was no report submitted nor did the Provincial Government call for any report or take any other action in respect of the petitioner. Therefore, the irresistible conclusion is that so far as this petitioner is concerned, there has been a failure to comply with the provisions of sub-s. (4) and (5) of S. 4, Public Order Ordinance, 1949. These provisions being mandatory the detention of the petitioner is clearly illegal.

[21] The subsidiary question involved in considering the provisions of the Ordinance of 1949 and Act III [3] of 1950 is about the constitution of the Advisory Council. Under sub-s. (3) of S. 4 of the Ordinance, the Advisory Council constituted was to consist of not less than three persons one of whom was to be its chairman and the chairman and the members of the Council had all to be appointed by the Provincial Government. The Ordinance did not lay down any qualification for the membership of the Advisory Council. The Act, however, provides in sub-s. (3) of S. 5 that the Provincial Government shall constitute an Advisory Council whenever necessary consisting of not less than three members who are or have been or are qualified to be appointed as Judges of a High Court. It may well be, as we have been informed it was in this case, that a member of the Advisory Council constituted under the Ordinance may not be so qualified, and in that case on the operation of the Act i.e., on 4th January 1950 the Advisory Council constituted under the Ordinance *ipso facto* stood dissolved; yet nonetheless the reference made to the then existing Council under the law as it was and the steps taken by Advisory Council in question would be deemed to have been made under the Act. After the operation of the Act the Provincial Government may have to reconstitute an Advisory Council at an early date because the maximum period provided under sub-s. (4) of S. 5 of the Act for the submission of the report by the Advisory Council is within twelve weeks of the date of the service of the order on the person affected. That being so, if this period expires without any report being submitted by the Advisory Council the detention would be illegal inasmuch as the provisions of sub-ss. (4) and (5) of S. 5 of the Act III [3] of 1950 appears to us to be mandatory and integral parts of the scheme of the Act for the very same reasons as the corresponding provisions of the Ordinance of 1949 as already decided by us in Criminal Misc. Nos. 854 and 870 of 1949. That being so, the detention in this case is illegal and the petitioner is entitled to be set at liberty without any delay.

[22] I would accordingly allow this application and direct that the petitioner be released forthwith.

[23] **Das J.** — I agree that the application should be allowed and the petitioner released.

[24] I wish merely to add a few words about the effect of S. 26, Bihar Maintenance of Public Order Act, 1949 (Bihar Act III [3] of 1950). As my learned brother has said, the section repeals the Ordinance of 1949 and contains a saving clause. In England, in Acts passed in or since 1890 certain savings are implied by statute in all cases of express repeal unless a contrary intention appears in the repealing Act: *see* the Interpretation Act, 1889, S. 38 (2). There are similar provisions in the Bihar and Orissa General Clauses Act. These implied savings relate mainly to transactions past and closed, anything duly done or suffered under the enactment repealed etc.

[25] Section 26, Bihar Act III [3] of 1950 refers to some of these implied savings, and then states further that with regard to proceedings commenced under the Ordinance of 1949 they shall be deemed to have been commenced and shall be continued under Bihar Act III [3] of 1950. I think a distinction must be drawn be-

tween transactions past and closed, and pending proceedings. With regard to past and closed transactions, which are saved no new date of commencement is given. That is why the interpretation sought to be placed by the learned counsel for the Crown, was perhaps, too widely stated. For example, a sentence passed under the Ordinance of 1949 does not commence again on 4th January 1950—the date on which Bihar Act, III [3] of 1950 came into force. Section 26 merely saves the sentence from obliteration, but does not give it a fresh commencement. As to pending proceedings that is, proceedings validly commenced and pending on the date of repeal they have to be *continued* under the new Act. Mr. Ghosh canvassed for the other extreme view when he submitted that the new time limits should be applied retrospectively to past acts, which it would be impossible to do. I do not think that that is the meaning of S. 26.

[26] The reason why the petitioner's present detention is not justified in law is this. Section 26 does not revive anything not in force or existing at the time when the repeal takes effect. In the absence of a report by the Advisory Council and a final order by the Provincial Government, the detention of the petitioner became illegal after the expiry of three weeks from 25th September 1949, under the then existing law, that is, the Ordinance of 1949. Therefore, on 4th January 1950, there was neither any valid final order of detention, nor any legally valid pending proceeding against the petitioner which could be saved and continued under S. 26.

D.H. *Application allowed.*

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*A. I. R. (37) 1950 Patna 265 *[C. N. 67.]*

MEREDITH C. J. AND SARJOO PRASAD J.

Brahmeshwar Prasad — Petitioner v. *The State of Bihar and others.*

Criminal Misc. No. 977 of 1949, D/- 14-2-1950.

✠(a) Public Safety—Bihar Maintenance of Public Order Act (III [3] of 1950)—Validity of—Constitution of India, Arts. 13 and 22.

The detention provisions in the Bihar Act III [3] of 1950 are completely inconsistent with the fundamental rights prescribed in Art. 22 (4) and (5) of the Constitution of India and consequently, directly the Constitution came into force on the mid-night of 25th January 1950, these provisions became void under Art. 13 (1) of the Constitution and they could not be revived or rendered valid by any Act of the President purporting to do so under Art. 22 (7) read with Art. 373 of the Constitution; nor could the President do so by any adaptations contemplated by Art. 372 of the Constitution. [Paras 19, 20, 57, 60 and 62,]

The provisions of the impugned Act relating to duration of detention being inextricably mixed up with the provisions of safeguards laid down therein the doctrine of severability cannot apply and therefore the entire Act becomes void. [Para 28]

(b) Public Safety—Bihar Maintenance of Public Order Act (III [3] of 1950), S. 2 (1) (a)—Detention under—Validity—Constitution of India, Arts. 21 and 226—Criminal P. C. (1898), S. 491.

The provisions of the Bihar Act having become void on the coming into force of the Constitution the detention of a person under S. 2 (1) (a) of that Act cannot legally continue after 26th January 1950 by virtue of Art. 21 of the Constitution and the detenu is entitled to be released. [Para 30]

(c) Evidence Act (1872), Ss. 77 and 78—Order of Government—Printed copy—Proof.

A printed copy of an order signed by the President of the Indian Union but not purporting to be published by order of Government is no proof of the order. Such an order if not proved under S. 78 can be proved by production of the original or its certified copy under S. 77 or possibly even by an affidavit of a responsible official. [Para 17]

Annotation: ('46-Man) Evidence Act, S. 78 N. 2.

(d) Constitution of India, Arts. 13 and 22 (7)—Scope.

Article 22 (7) was never intended to be a means of avoiding the operation of Art. 13 (1). It is a provision for action not before, but after the Constitution has come into force, and it was intended for prospective, and not retrospective operation. In other words, it relates not to Art. 13 (1), but to Art. 13 (2). After Parliament or the President has in effect by order modified the provisions of Art. 22 (4), then a law may be made which perhaps otherwise would have been void or *ultra vires* under Art. 13 (2), but no order or law made under Art. 22 (7) can operate upon a law which has already become void under Art. 13 (1). [Paras 20 and 62]

(e) Constitution of India, Arts. 13 (1) and 372 (1)—Interpretation.

The various provisions of the Constitution have to be so read as to make them consistent, if possible, and therefore Art. 372 cannot have been intended to preserve laws or portions of laws which Art. 13 (1) renders void. There is no inconsistency between Art. 13 (1) and Art. 372 (1) if Art. 372 is regarded as applying to only such cases as do not come within the mischief of Art. 13 (1). [Paras 24 and 62]

(f) Constitution of India, Art. 22 (7)—Scope.

Article 22 (7) merely entitles the President to specify circumstances, define classes in which a person may be detained under any pre-existing law for preventive detention, but without those limitations imposed by Art. 22 (4). It does not authorise making a new detention law that can stand by itself. [Para 29]

(g) Public Safety—Bihar Maintenance of Public Order Act (III [3] of 1950), S. 5 (1) Proviso—Proviso being repugnant to Art. 22 (5) of the Constitution has become void from 26th January 1950—Proviso being severable from rest of the section it can be eliminated from consideration in examining legality of detention. *(Obiter.)* [Paras 33 and 64]

(h) Public Safety—Bihar Maintenance of Public Order Act (III [3] of 1950), S. 5 (6)—Sub-section (6) is designed to prevent Court from ascertaining if detention beyond three months is in accordance with report of Advisory Council—It is repugnant to Art. 22 (4) and as such void—It is however severable from rest of Act—*(Obiter.)* [Para 38]

(i) Constitution of India, Arts. 13 and 254—Applicability.

Per *Sarjoo Prasad J.*—Art. 254 can only apply if there is a legislation by Parliament in regard to some of those matters enumerated in List I or in List III of

Sch. VII. Where the repugnancy complained of is against the Constitution of India itself the relevant provision applicable is not Art. 254 but Art. 13 of the Constitution. [Para 58]

(j) Public Safety—Preventive Detention (Extension of Duration) Order, 1950—Validity—Constitution of India, Arts. 373 and 392.

The power to make adaptations in the Constitution itself could be exercised under Art. 392 (3) by the Governor-General of the Dominion of India only before the commencement of the Constitution and not after it. Therefore, the Preventive Detention (Extension of Duration) Order dated 26th January 1950 and purported to be signed by the Governor-General is of no value at all for purposes of adaptation of the Constitution Act; nor can it be of any value for purpose of Art. 373 because, under that Article, it is only the President who can act after the commencement of the Constitution. [Para 63]

Basanta Chandra Ghosh and D. K. Sinha —for Petitioner.

Government Advocate—for the State of Bihar.

Meredith C. J. — This is an application under S. 491, Criminal P. C. and also under Art. 226, Constitution of India, made on behalf of one Brahmeshwar Prasad through and by his brother Rudreshwar Prasad. This detenu was a teacher in the Naugachia High English School. He was arrested on 3rd March 1949 under S. 151, Criminal P. C., and lodged in the Bhagalpur Camp Jail where he has been in custody ever since. On 13th March, there was a detention order under Act V [5] of 1947. That Act having been declared *ultra vires* and having been replaced by an Ordinance, there was a fresh detention order under the Ordinance on 6th June. That Ordinance in turn, was declared *ultra vires* by this Court, and was replaced by Ordinance IV [4] of 1949, under which a fresh order was made and served on 5th July. On 6th December, the present application was preferred. A rule was issued, and 16th January was fixed for hearing. It eventually came up on 18th January, this Court having in the meanwhile held that the provisions in the Ordinance for reference to an Advisory Council and report by that Council, were mandatory, and non-compliance would make the detention illegal. The Government Advocate, however, stated that a fresh detention order had been passed under sub-s. (1) (a) of S. 2, Bihar Maintenance of Public Order Act (Bihar Act III [3] of 1950), which had replaced the Ordinance on 4th January 1950, and he asked for a fresh adjournment to prove that order. He was given an adjournment for seven days, and it has been established that in fact a fresh detention order under Act III [3] of 1950 was passed on 15th January, and was served on 16th.

[2] By the time the matter once more came up for hearing, the New Indian Constitution had come into force, and Mr. Basanta Chandra Ghose on behalf of the petitioner asked that the application should be treated as one also under Art. 226 of the Constitution, and contended that Act III [3] of 1950, at least in so far as it related to detention, had become void on 26th January 1950, as being repugnant to certain of the provisions prescribing fundamental rights in Part III of the Constitution, and consequently the detention, being under a void Act, had since the 26th January become illegal.

[3] Article 13 (1) of the Constitution provides:

> "All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void."

Mr. Ghosh's contention is that there is an inconsistency, and that the inconsistent provisions are not severable from the remaining provisions with regard to detention.

[4] In order to understand his argument, it is necessary to set out briefly the scheme of the Act in relation to detention. Under S. 1 (2), the Act is to remain in force for a period of two years from the date of its commencement. Under S. 2 (1) (a) the Provincial Government, if satisfied with respect to any particular person that, with a view to preventing him from acting in any manner prejudicial to the public safety and the maintenance of public order, it is necessary so to do, may make an Order (a) directing that he be detained, and under S. 2 (5) so long as there is in force in respect of any person such an order as aforesaid directing that he be detained, he shall be liable to be removed to and detained in such place and under such conditions, including conditions as to maintenance, discipline and the punishment of offences and breaches of discipline, as the Provincial Government may from time to time by general or special order specify.

[5] Under S. 5 (3) the Provincial Government shall constitute an Advisory Council, whenever necessary, consisting of not less than three members who are or have been or are qualified to be appointed as Judges of a High Court. Under S. 5 (1) within 15 days of the service of the detention order, the grounds on which the order has been made are to be communicated to the detenu so far as such communication can be made without disclosing facts which the authority considers would be against the public interests to disclose, and such other particulars are to be communicated as in the opinion of the detaining authority are sufficient to enable the detenu to make, if he wishes, a representation against the order.

[6] The detenu may, within 10 days of receipt of the grounds, make a representation, and it is the duty of the authority to inform him of this right and afford him the earliest practicable

opportunity of making this representation. There is, however, a proviso that neither the detention order nor the detention shall be invalid or unlawful or improper on the ground of any defect, vagueness or insufficiency of the communication made to the detenu.

[7] Under S. 5 (2) the Provincial Government shall, within six weeks of the service of the detention order, place before the Advisory Council the grounds on which the order has been made and the representation, if any, together with any other relevant material which the Provincial Government may consider necessary.

[8] Under S. 5 [4] the Advisory Council after considering the materials and, if necessary, after calling for further information is to submit a report to the Provincial Government within 12 weeks of the date of the service of the detention order.

[9] Under sub-s. (5), after considering the report of the Advisory Council the Provincial Government may confirm, modify or cancel the detention order, and under sub-s. (6) all particulars contained in any correspondence between the Government and the Council and the report made by the Council shall be confidential and, notwithstanding anything contained in any law for the time being in force, no Court shall be entitled to require any public servant to produce before it any of the said documents.

[10] It will be noticed that the Government only has to consider the report. It does not have to act in accordance with it. So, even if the Council advises that there are no sufficient grounds for detention, the Government may still confirm the detention order and the Court is also prevented from looking into this matter by examining the report.

[11] Under S. 4 (1), it is provided that the detention order shall be in force for a period not exceeding six months from the date on which it is confirmed or modified under S. 5 (5), though the Government may at any time revoke the order. Then it is further provided that, if in the opinion of the Government it is necessary or expedient to do so, it may at any time before the expiry of six months and after giving an opportunity for a further representation and making a fresh reference to the Advisory Council and considering its report, direct that the order shall continue in force for a further period of six months from the date on which, but for such direction, it would have expired, and thereafter if and so often as it is again extended by further a similar direction made in the same manner.

[12] I have dealt with these provisions in what seems to me a more logical order than that which obtains in the Act. It will be clear that actually there is no express limit of time within which a case has to be referred to the Advisory Council. Government has to make the reference within six weeks of the service of the order it is true, but no period is prescribed within which the service must be made, and the validity of the detention order has not been made to depend upon service, as is clear from S. 2 (5). The same remarks apply to the report of the Advisory Council. This is to be made within 12 weeks from the date of the service of the order, but again there is no provision under which the order has to be served promptly. Thirdly, the Government only has to consider the report of the Council and need not act in accordance therewith, so that, under the Act, detention may legally continue without any report by the Council that it is, in its opinion, justifiable. It is so to continue ordinarily up to six months from the date of confirmation. That is to say, assuming that the confirmation is passed directly upon receipt of the Council's report, it will continue for six months plus 12 weeks from the date of the service of the order. But to this has to be added the indefinite period before service of the order and also the indefinite period which the Government may take under S. 5 (5) to consider the report of the Council before confirming it, and, as no time limit is fixed, the Act leaves it open to the Government to extend the period by sitting indefinitely upon the report of the Advisory Council, and it is impossible for the Court to examine whether there has been any excuse or justification for so doing. Finally, still without any support in the opinion of the Advisory Council, the Government may renew and renew (?) the order for successive periods, so that the detention may be made to continue for the full two years for which the Act is to remain in force.

[13] Mr. Ghosh argues, and, in my opinion, quite correctly argues, that these provisions are completely inconsistent with those contained in Art. 22, cls. (4), (5) and (6) of Part III of the Constitution. Article 22 (4) says :

> "No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless—(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court, has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention : Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-cl. (b) of cl. (7) ; or (b) such person is detained in accordance with the provisions of any law made by Parliament under sub-cls. (a) and (b) of cl. (7)."

[14] That is to say, no law can authorise detention for a period longer than three months ex-

cept subject to condition (a) or condition (b). Condition (b) cannot enter into the picture in the case of a law made before the Constitution comes into force, and, in any event, Act III [3] of 1950 clearly provides for detention up to two years irrespective of any law made by Parliament under sub-cls. (a) and (b) of cl. (7). It also authorises detention up to periods much longer than six months irrespective of whether the Advisory Council has or has not reported within three months that there is sufficient cause for detention, or indeed reported within three months at all. As I have pointed out, if service is delayed, the report of the Council may not be due until after the expiry of three months.

[15] Thus there is no getting away from the fact that the detention provisions in Act III [3] of 1950 are completely inconsistent with the fundamental rights prescribed in Art. 22, cl. (4), and consequently, directly the Constitution came into force these provisions became void under Art. 13 (1). The learned Government Advocate has not denied, and he could not deny, the inconsistency, but has adopted three lines of reply; first, that steps were taken successfully to prevent the Act becoming void ; secondly, that the inconsistent provisions are severable from the main provision for detention, which, therefore, remains valid; and, thirdly, that, irrespective of whether the detention provisions in the Act became void or not, the continued detention of the petitioner is valid under and by reason of an order made by the President under cl. (7) of Art. 22. I shall deal with these conditions in turn.

[16] The learned Government Advocate asked for time to prove that the President had made an order under cl. (7) which removed the inconsistency, and so prevented the provisions from becoming void. We gave sufficient time to produce such an order with the result that what purports to be a printed copy of an order of the President together with a cyclostyled copy of what purports to be a letter from the Joint Secretary to the Government of India to the Chief Secretary to the Government of Bihar has been produced. I reproduce the first in full:

"MINISTRY OF LAW.

New Delhi, the 26th January 1950.

No. C. O. 8. — The following Order made by the President is published for general information :

THE PREVENTIVE DETENTION (Extension of Duration) ORDER, 1950.

In exercise of the powers conferred by sub-cls. (a) and (b) of cl. (7) of Art. 22, of the Constitution of India read with Art. 373 thereof, and of all other powers enabling him in that behalf, the President is pleased to make the following order, namely:—

1. (1) This order may be called the Preventive Detention (Extension of Duration) Order, 1950.

(2) It shall come into force at once.

2. Where in any class of cases or under any circumstances specified in any law providing for preventive detention in force at the commencement of the Constitution of India (hereinafter referred to as 'the Constitution') any person was, immediately before such commencement or is at any time thereafter, in detention in pursuance of an order made under such law, such person may be detained for a period longer than three months under such law without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-cl. (a) of cl. (4) of Art. 22, of the Constitution.

3. The maximum period for which any person, as is referred to in para. 2, may be detained, shall in the case of a person in detention immediately before the commencement of the Constitution, be three months from such commencement, and in the case of a person detained in pursuance of an order made after such commencement, be three months from the date of such order.

Rajendra Prasad,
President."

As will be seen, it is dated 26th January 1950, and it is numbered C. O. 8. But there has also been placed before us the Gazette of India (Extraordinary) of 26th January 1950, containing a precisely similar order also dated 26th January, and also numbered C. O. 8, but purporting to be signed not by Rajendra Prasad, President, but C. Rajagopalachari, Governor-General. The letter to which I have referred is to the effect that through an oversight an incorrect copy of the Ministry's Notification No. C. O. 8 was sent the previous day. The mistake which orginally occurred in the Gazette Extraordinary dated 26th January 1950, containing this order was now being corrected by the Press by the issue of an errata slip. Two correct copies of the order were being sent for the use of the State Government. The copies of the order sent the previous day were to be destroyed.

[17] This letter has not been properly proved, nor has the printed order purporting to be signed by the President. Under S. 78, Evidence Act, Acts, Orders or Notifications of the Executive Governments may be proved by any document purporting to be printed by order of such Government. Therefore, the original Notification in the Gazette of India, of the 26th signed by the Governor-General may be said to be properly proved, but the document signed by the President is not headed "Gazette of India". There is nothing to show if it has ever been printed in the Gazette of India. It purports to be an order of the President, but it does not purport to have been published by order of Government. It might have been printed by any one and it is, therefore, no proof of the order of the President. Such an order, if not proved under S. 78, could be proved of course by the production of the original or by production of a certified copy under S. 77, Evidence Act, or possibly even by an affidavit by a responsible official. But none

of those courses have been adopted. We were asked by the learned Government Advocate to give a further adjournment for a week to produce the necessary proof. But for reasons which will appear we did not think it desirable or necessary to do so, particularly as this case had already been adjourned on several occasions despite the protests of Mr. Ghosh. The position is this. Either the order was originally made and signed by the President, and there was a mere mistake in printing it in the Gazette, or it was orginally mistakenly signed by the Governor General and correctly printed, but on discovery of the mistake it was re-signed by the President and reissued. In the circumstances I will consider both suppositions, and, as, in my opinion upon neither supposition is the Act saved, it makes no difference. (I shall note that after this judgment had been completed, namely, on Monday 13th February, a certified copy of the President's order C. O. 8 has been placed before us).

[18] Article 22(7) is as follows:

> "(7) Parliament may by law prescribe—
>
> (a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-cl. (a) of cl. (4);
>
> (b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and
>
> (c) the procedure to be followed by an Advisory Board in an inquiry under sub-cl. (a) of cl. (4)."

It has to be read with Art. 373, which says that

> "until provision is made by Parliament under cl. (7) of Art. 22, or until the expiration of one year from the commencement of this Constitution, whichever is earlier, the said article shall have effect as if for any reference to Parliament in cls. (4) and (7) thereof there were substituted a reference to the President and for any reference to any law made by Parliament in those clauses there were substituted a reference to an order made by the President."

Therefore, for the words in cl. (7) "Parliament may by law prescribe" we may read "the President may by order prescribe". I will proceed first on the assumption that the President did in fact make the order on the 26th. In my judgment no such order made by him under cl. (7) could in any way prevent an Act becoming void under Art. 13 (1), and this for two reasons. The first and primary reason is that under Art. 13(1), quite clearly, provisions become void, if they become void at all, directly and instantaneously with the Constitution coming into force, whereas an order by the President can only originate and become valid after the Constitution has come into force. There can be no such order of the President except as a consequence of the Constitution having come into force and given him power to make it. That is to say, such order must be logically subsequent to the voidability which the coming into force of the Constitution itself affects. That, in my opinion, follows directly and logically from the laws of cause and effect. But it is in fact not necessary to enter into philosophical questions of the infinite divisibility of time and the nature of simultaneity, because in fact we are here concerned with a time lapse of over ten hours. The Constitution came into force on the midnight of 25th, and the Act, if it became void at all, became void then. But the President did not enter upon his office until he took the oath on 26th at 10-15 A. M.

[19] As to these propositions, there can be no question. Article 394 of the Constitution provides that certain articles, with none of which we are concerned, shall come into force at once, and the remaining provisions shall come into force on 26th January 1950. Article 367 (1) makes the General Clauses Act, 1897, applicable, and the General Clauses Act provides in S. 5 (3) that, where an Act is to come into force on a certain day, it shall come into force at midnight of the preceding day. That is to say, the day begins directly after midnight of the preceding day. Under Art. 60 the President must make and subscribe an oath before entering upon his office. The same thing is apparent from the Constitution (Removal of Difficulties) Order No. I published with notification No. C. O. 1 in the Gazette of India (Extraodinary) of 7th January 1950, which prescribes that such person as the Constituent Assembly shall have elected as President shall, before entering upon his office, make and subscribe the oath or affirmation prescribed in Art. 60. Notification No. F. 35/4/49 Public, published in the Gazette of India (Extraordinary) on 26th January 1950, shows that the Governor-General proclaimed the new Constitution at 10-15 A. M. on 26th January. After that the President took the oath, and took his seat as President of India and assumed the office. Quite clearly the President could make no valid order until after 10-15 A. M. on 26th, whereas those provisions in Act III [3] of 1950 repugnant to the Constitution became void directly after midnight on 25th. It is quite apparent that the subsequent order of the President could not restore an Act which had already become void and ceased to exist. Nor does his order purport to do so.

[20] My own opinion is that Art. 22 (7) was never intended to be a means of avoiding the operation of Art. 13 (1). It is a provision for action not before, but after the Constitution has come into force, and it was intended for prospective, and not retrospective operation ; and this is particularly apparent if we read it in connec-

tion with Art. 22 (4) (b). In other words, it relates not to Art. 13 (1), but to Art. 13 (2), which says:

> "The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall to the extent of the contravention, be void."

After Parliament or the President has in effect by order modified the provisions of Art. 22 (4), then a law may be made which perhaps otherwise would have been void or *ultra vires* under Art. 13 (2), but no order or law made under Art. 22 (7) can operate upon a law which has already become void under Art. 13 (1).

[21] The second reason why the order of the President under Art. 22 (7) cannot save the Act in any view is that even in the light of that order, even taking Art. 22 (4) as modified by that order, there is still a clear repugnancy. Under cl. 3 of the order, the maximum period for which any such person, as is referred to in para 2, may be detained shall, in the case of a person in detention immediately before the commencement of the Constitution, be three months from such commencement, so that Art. 22 (4) (b) as so modified becomes in effect: No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless it also provides that such person shall not be detained for more than three months after the commencement of the Constitution. But Act III [3] of 1950 authorises detention for a much longer period without any such proviso or safeguard.

[22] Now let us examine the position on the assumption that the order under Art. 22 (7) was made not by the President, but by the Governor-General. The first difficulty is that, though signed by the Governor-General, it does not purport to be an order by the Governor-General. The recital is:

> "In exercise of the powers conferred by sub-cls. (a) and (b) of cl. (7) of Art. 22 of the Constitution of India read with Art. 373 thereof and of all other powers enabling him in that behalf, the President is pleased to make the following Order."

Therefore, it is still an order of the President, even though signed by the Governor-General.

[23] Undoubtedly the Governor-General could by a suitable order have removed the whole difficulty. Under Art. 392 (1)

> "the President may, for the purpose of removing any difficulties, particularly in relation to the transition from the provisions of the Government of India Act, 1935, to the provisions of this Constitution, by order direct that this Constitution shall, during such period as may be specified in the order, have effect subject to such adaptations, whether by way of modification, addition or omission, as he may deem to be necessary or expedient."

And under Art. 392 (3)

> "the powers conferred on the President by this article shall, before the commencement of this Constitution, be exercisable by the Governor-General of the Dominion of India."

The Governor-General under these provisions could have, before the commencement of the Constitution, so modified it as to prevent any repugnancy arising under Art. 22 (4) and any voidability under Art. 13 (1). But in that case he would have to make that order in his own name—as his own order and not as an order of the President. In the second place, this is not what he purported to do, and the order, though it contains a reference to cl. (7) of Art. 22 and Art. 373 and all other powers generally, contains no reference to Art. 392, and, thirdly, the Government, having definitely taken the position that there was in fact no order of the Governor-General, but only a clerical error in printing the Gazette, cannot, in the circumstances, rely upon any order of the Governor-General.

[24] There was another way in which it has been suggested the difficulty could have been avoided, namely, by modification by the President of Act III [3] of 1950 under the provisions of Art. 372 (2), so as to bring it into line with the provisions of Art. 22. It is unnecessary to examine this since it is not contended that any such action has been taken by the President. But it may be noted that here the difficulty would still remain that, the Constitution having come into force before the President assumed office, the law had lapsed and become void before the President could pass any order, and the President under Art. 372 (2) can clearly only adapt and modify a law which is still existing and valid, and cannot recreate something which is already gone. We have to read the various provisions of the Constitution so as to make them consistent, if possible, and therefore Art. 372 cannot have been intended to preserve laws or portions of laws which Art. 13 (1) renders void. There is no inconsistency between Art. 13 (1) and Art. 372 (1) if we regard Art. 372 as applying to only such cases as do not come within the mischief of Art. 13 (1) and that this is the correct interpretation is clear from the use of the words "subject to the other provisions of this Constitution" in Art. 372 (1), and the use of the words "in force" in Art. 372 (2).

[25] I now come to the second line of reply of the learned Government Advocate, namely severability.

[26] Put crudely, the argument comes to this. If a law provides for detention of six months, but the Constitution says that no law shall provide for detention for more than three months, then that law is not wholly void, but can be regarded as a good law as regards detention up to three months. The fallaciousness of such an

argument is at once apparent. It would mean, not severing the bad portion of the law from the good and leaving the latter, but substituting a new and different law in place of the old. In fact it would mean legislation by the Court and the abolition of one law and the substitution for it of a new and different law.

[27] In particular, however, the learned Government Advocate says: Let us blot out and remove all the provisions which contain inconsistency—the provisions for duration and the Advisory Council—and there still remains the bare provision in S. 2 (1) (a):

> "The Provincial Government, if satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to the public safety and the maintenance of public order it is necessary so to do, may make an order (a) directing that he be detained."

He suggests that this is severable, and, though it fixes no duration for the detention, it can be interpreted consistently with the Constitution as authorising detention up to three months, and it, therefore remains valid. It does not in terms purport to authorise detention for more than three months, but leaves the period of detention entirely indefinite, and it is, therefore, not inconsistent with Art. 22 (4).

[28] The difficulty, however, is that the other provisions of the Act containing a number of safeguards form an integral part of the legislation. A provision for bare detention for three months without any safeguards at all is something entirely different from what the Legislature actually enacted in Act III [3] of 1950. The Legislature obviously did not intend that a man should be detained even for three months without certain safeguards being taken. For example, as I have pointed out, under S. 5 (4) the Advisory Council is to submit its report within 12 weeks of the date of the service of the order, and the Government is to consider that report. True, no period is fixed for service, but presumably the Legislature intended that the order should be served as soon as the man is detained. Twelve weeks, it is to be noted, is less than three months. Therefore, the Legislature never enacted that a man could be detained for even three months without certain steps being taken within that period as safeguard, so that here again, if we adopt the course suggested by the learned Government Advocate, we are in fact legislating. We are substituting a different law for the impugned law and, be it noted, we are substituting a definitely harsher law. Who is to say that the Legislature would ever have agreed to the enactment of such a law? The rule and test as to severability is, I apprehend, this. If by taking away the bad parts, you in any way modify or alter what is left then the bad parts are not severable. That, however, is what we are asked to do. The Act has to be taken as a whole. The provisions for detention enacted by the Legislature cannot be separated from the safeguards, and the safeguards are inextricably mixed up with the provisions for duration. You cannot tear an Act to pieces, take away the bad pieces, and then build a different structure by putting together the pieces which remain. That is legislation, and it is legislation on lines which the Legislature itself, had it been put to it, might never have approved. I gravely doubt indeed whether the Legislature would ever have consented to pass a bare Act for detention without any specification of duration, without any provisions for safeguarding the rights of the subject. Yet that is just what would remain in the present case if we take away the inconsistent provisions. I am, therefore, clearly of opinion that this is a case where severance is not possible.

[29] There remains the third argument of the learned Government Advocate, namely, that the order of the President validates the detention *proprio vigore*; in short, that the President has himself enacted legislation for detention which can stand by itself. In my opinion, the position has only to be thus clearly stated to refute the argument. The President never purported to do anything of the sort, nor has he any power to do so. Article 22 (7) merely entitles him to specify circumstances and define classes in which a person may be detained under any pre-existing law for preventive detention, but without those limitations, imposed by Art. 22 (4). It does not authorise making a new detention law that can stand by itself. Quite clearly, if, where the President makes the order, there is no detention law in force, the President cannot make one, nor, as I have said, has he purported to do so. He can merely provide for the extension in time of a detention under some subsisting law, and his order is in fact headed "The Preventive Detention (Extension of Duration) Order."

[30] Thus, in my judgment, every line of reply to the contentions of Mr. Ghosh fails, and there is no getting away from the fact that the detention provisions of the Act, and with it the power to detain, lapsed on 26th January. Under Art. 21 of the Constitution, no person shall be deprived of his life or personal liberty except according to procedure established by law, and the detention cannot legally continue for one moment after the lapse of the law.

[31] As this case will almost inevitably go to the Supreme Court, it is advisable to deal briefly with Mr. Ghosh's other and further contentions. He has argued that the order of the President under Art. 22 (7) is a bad order because thereunder the President has delegated his power,

and has not himself specified clearly the circumstances and the classes of cases in which his order is to operate. I do not consider that contention is sound.

[32] Mr. Ghosh further argues that the proviso to S. 5 (1) of Act III [3] of 1950 is inconsistent with the provisions of Art. 22, cl (5). The proviso says that neither the detention order nor the detention shall be invalid or unlawful or improper on the ground of any defect, vagueness or insufficiency of the communication of the grounds and particulars. Article 22 (5) says that when any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order. The only qualification is in cl. (6) that facts need not be disclosed which such authority considers to be against the public interest to disclose. The proviso, however, goes much further. Under the proviso, the detention is still valid even if the grounds communicated are so vague and indefinite as to amount to no ground at all and as to afford no opportunity to make a representation. For, example, under the proviso, the detention would still be valid even if the only ground given is "we do not like your face." Clause (5) of Art. 22 is mandatory, and clearly means that detention in violation of this provision becomes illegal. But the proviso makes the detention in violation of this provision nevertheless legal.

[33] In my opinion, these contentions are correct, and I consider that the proviso, whatever may have been the case before 26th January, became void from 26th January. I also consider, however, that the provisions are clearly severable. Remove the proviso, and the rest of the Act remains unchanged and fully operative. Mr. Ghosh concedes that he can cite no decision in which it has been held that the proviso is an integral part of the Act and is not severable.

[34] If the proviso goes, we are simply taken back to the position as laid down by the Full Bench of this Court in *Nek Mohammad* v. *Province of Bihar*, A. I. R. (36) 1949 Pat. 1 : (50 Cr. L. J. 44 F. B.), namely, that we have to examine the grounds to see that they are sufficiently clear and definite to enable a representation to be made. The grounds were served upon the detenu on 26th January, within 15 days of the order, and they have been placed before us. Mr. Ghosh on the analogy of certain Division Bench decisions of this Court, contends that they are vague and indefinite. I cannot agree with him. They are set out at great length and in great detail partially in a printed document extending over two foolscap pages, and supplemented by a passage in type, relating to this particular detenu. It is first stated that he is an important member of the Communist Party of India, and the document then goes on to state that the Communist Party of India has adopted a highly secret programme of overthrowing through violence, the Government of India, as constituted by law, and that this plan has been put into operation. It is stated that Government have information that Communist cells functioning in Bihar have received secret directives to build up illegally large stocks of firearms and ammunition, to smuggle explosives on a large scale, and to collect implements for breaking jails, and that there is intention to exploit the Services to turn against Government so as to bring about a complete collapse of the Government and the Administration. Then it is said that Government had information regarding the Party's plan to carry out sabotage of important industrial and other installations. It is said that in recent weeks mobs under Communist influence have violently attacked police escorts in attempts, sometimes successful to rescue Communists from custody, and Government has reasons to suspect strongly that the Party has already resorted to murder for defection from and acting against the interest of the party. It is unnecessary to set out in detail the rest of the printed portion. The typed portion goes on to say that Shri Brahmeshwar Prashad has been a very active member of the Communist Controlled Students' Federation, and, although a school teacher, he continued to be one of the active members of the Communist Party, and Government is satisfied that, using his somewhat special position in the village community as a school master, he has been responsible for secretly carrying on propaganda in the area between Naugachia and Bihpur explaining the Party's programme to overthrow Government through violence. Even on his arrest he delivered an inflammatory speech to the students, who had assembled urging them to carry on the activities of the Communist Party of India during his absence.

[35] I am not in the least concerned with whether these allegations, either with regard to the Communist Party generally or with regard to Brahmeshwar Prasad in particular, are true or false. But they are certainly quite clear and definite and sufficient to enable a representation to be made, and indeed Mr. Ghosh tells us that the detenu has already made a detailed representation, and that in itself indicates, to my mind, that the grounds furnished are not vague.

[36] Therefore, I am of opinion that, were the detention otherwise legal, the detenu would not be entitled to release on the ground of any vagueness or insufficiency in the grounds and particulars furnished.

[37] Next, Mr. Ghosh argues that the fresh order against the detenu made under Act III [3] of 1950 on 15th January was not *bona fide* because it was made only because the Government had reasons to believe that this Court was going to declare that the detention was illegal for non-compliance with the mandatory provisions in the Ordinance regarding the Advisory Council. Even upon the assumption that Government did make this fresh order because it was anticipated that the Court was going to declare the detention illegal, that does not make the order *mala fide* or a fraud on the statute. If Government was of opinion that the continued detention of this man was necessary for the maintenance of public order, it was certainly quite natural and proper, as soon as any irregularity was realised in the detention, to take steps to make it proper and regular. What else could Government be expected to do in the circumstances? Such circumstances do not justify the inference that Government is merely attempting to frustrate and override the orders of this Court. They rather suggest that Government's sole object is to secure the detention and custody of a man they, rightly or wrongly, regard as dangerous.

[38] Mr. Ghosh further argues that the provisions of S. 5 (6) of Act III [3] of 1950 are inconsistent with Art. 22 of the Constitution. The effect of Art. 22 (4) is that no one is to be detained for more than three months unless in accordance with a report of the Advisory Council that there is sufficient cause for such detention. That necessarily means that the Court, in order to examine whether a detention is in accordance with this mandatory provision must be enabled to see and examine the report of the Advisory Council. But S. 5 (6) of the Act says that all particulars contained in any correspondence between the Provincial Government and the Advisory Council and the report made by the Advisory Council shall be confidential, and, notwithstanding anything contained in any law for the time being in force, no Court shall be entitled to require any public servant to produce before it any of the said documents. In short, this provision is designed to prevent the Court from ascertaining if detention beyond three months is in accordance with the report of the Advisory Council. As such it appears to be calculated to evade the safeguard laid down as a fundamental right in the Constitution, and there is an inconsistency which renders it void. It is, however, in my opinion, severable, and the rest of the Act could stand unaltered after its excision. This would merely mean that the Court, despite this provision, could call for and examine the report, but it would not make the detention illegal if found to be in accordance with that report.

[39] As, in my view, for the reasons given in the first part of this judgment, the detention of Brahmeshwar Prasad has become illegal since 26th January, I would order his immediate release from custody.

[40] **Sarjoo Prasad J.**—This rule relates to an application filed under S. 491, Criminal P. C., on behalf of the petitioner. The petitioner has been in detention ever since 4th March 1949 under successive orders of detention passed by Government. He filed this application in December 1949 but the application was ordered to be put up for admission after the decision of Criminal Miscellaneous No. 784 of 1949 which has since been disposed of on 23rd December 1949. Eventually this application was admitted and rule issued on 4th January 1950, returnable within ten days. When the application again came up for hearing on 18th January 1950, it was stated by the learned counsel for the Crown that in this case a fresh order of detention has been passed against the petitioner under cl. (a), sub-s. (1) of S. 2, Bihar Maintenance of Public Order Act, 1949 (Bihar Act III [3] of 1950). The petitioner's counsel appeared to have no instruction on the point in regard to this fresh order of detention, and counsel for the Crown wanted time to intimate to the Court if this fresh order of detention had been served on the petitioner or not. He was accordingly allowed time to do so.

[41] The petitioner alleges that his detention is illegal, and that the order of detention passed against him under S. 2 (1) (a) of Ordinance IV [4] of 1949 had spent its force, and in any case the mandatory provisions of the law not having been complied with, it was not open to Government to detain him any further. In view of the fact that a fresh order of detention under Bihar Act III [3] of 1950 had been passed on the petitioner, the question whether or not his detention under the previous order passed under Ordinance IV [4] of 1949 is not of much importance. If the matter had rested there, we would have had to hold that the detention of the petitioner is not illegal because of this fresh order passed under Bihar Act III [3] of 1950. A Bench of this Court, when dealing with a similar question in Criminal Misc. No. 30 of 1950 to which I was also a party, held:

> "The order, *prima facie*, is a regular order under the provisions of the Act, and it is, therefore, neces-

sary for the petitioner to show that what happened previously in some way operates as a bar to prevent the legality of the subsequent detention order."

It was also held in that case that fresh detention orders can be passed as it was clear from the provisions of S. 2 (1) (iii) of the Ordinance and those of S. 4 (i) (iii) of the Act. It is true that in that case a question was raised as to Bihar Act III [3] of 1950 being *ultra vires* in view of the fact that S. 2 (6) to (16) and S. 3 of the Act contain certain provisions dealing with the case of an absconder which were alleged to be repugnant to the procedure laid down in the Criminal Procedure Code. The Court considered irrelevant to answer this question as the provisions referred to therein were entirely separate and severable from the provisions which relate to the validity of the order of detention, and the procedure prescribed for the making of that order. In view of that previous decision we would have been bound to hold that this order of detention passed against the petitioner under Act III [3] of 1950 was a valid order and could not be interfered with by this Court; but by the time the matter again came up for hearing, fresh developments took place.

[42] On the morning of 26th January 1950, "The Constitution of India" came into operation, and when the matter was again put up before us, the advocate for the petitioner filed a fresh affidavit on 31st January 1950, in which he claimed that Act III [3] of 1950 was ultra vires the Bihar Legislature and the provisions of S. 2 (1) (a) read with Ss 4 and 5 of the said Act were inconsistent with the provisions of Part III of the Constitution of India, and, therefore, void. It is obvious that Act III [3] of 1950 could not be challenged as ultra vires on account of its being inconsistent with the provisions of the Constitution of India. What the petitioner actually meant was that Act III [3] of 1950 was void on account of its being inconsistent with the provisions of the Constitution Act.

[43] The argument, therefore, which has been advanced before us proceeds upon the footing that the provisions relating to preventive detention under Act III [3] of 1950 are repugnant to the provisions in Part III of the Constitution of India, and, as such, the Act is void on account of the repugnancy. This argument has raised an important constitutional question, and we have, therefore, to examine the implications of this question in all its bearings.

[44] In the first place, it has to be seen if the provisions of the Bihar Act III [3] of 1950 relating to preventive detention are really in conflict or inconsistent with the provisions relating to fundamental rights in Part III of the Constitution of India; and, in the second place, if those provisions are inconsistent, whether Bihar Act III [3] 1950 is void to the extent of such inconsistency or it is void as a whole because those provisions constitute an integral part of the Act.

[45] I shall briefly refer to the relevant provisions of the Constitution of India in order to appreciate the point which arises in this case.

[46] Article 13 (a) of the Constitution of India says:

> "All laws in force in the territory of India immediatly before the commencement of this Constitution in so far as they are inconsistent with the provisions of this Part, shall to the extent of such inconsistency, be void."

Now Art. 13 (3) (b) defines what is meant by the term "laws in force" mentioned in Art. 13 (1). It says:

> "'laws in force' includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas."

The Bihar Act III [3] of 1950 would evidently, therefore, come within the definition of "laws in force" in the territory of Bihar which is a part of territory of India "immediately before the commencement of this Constitution."

[47] Now, Art. 21 of the Constitution of India says:

> "No person shall be deprived of his life or personal liberty except according to procedure established by law."

Then comes Art. 22 which is perhaps the most relevant article which falls to be scrutinised in this case. Article 22 (1) says:

> "No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice."

The words "as soon as may be" are significant. It enjoins that no person who is arrested shall be detained in custody unless he is informed, as soon as may be, of the grounds for such arrest and detention. I may then refer to sub-cl. 3 (b) of Art. 22 which says:

> "Nothing in cls. (1) and (2) shall apply to any person who is arrested or detained under any law providing for preventive detention."

In other words, this is an exception to the general provisions contained in cls. (1) and (2) of Art. 22. Then Art. 22 (4) proceeds to lay down a procedure for preventive detention which says:

> "No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention."

Then comes a proviso which says:

> "Provided that nothing in the sub-clause shall authorise the detention of any person beyond the maxi-

mum period prescribed by any law made by Parliament under sub-cl (b) of cl. (7) or in those cases where such person is detained in accordance with the provisions of any law made by Pariament under sub-cls. (a) and (b) of cl (7)."

[48] The analysis of this provision shows, in the first place, that it does not authorise the preventive detention of any person for a period longer than three months under any law; but it makes an exception for detention for a longer period in two cases only: (1) The first exception is where an Advisory Board has reported before the expiration of the period of three months that there in its opinion sufficient cause for such detention. The proviso to sub-cl. (a) of cl. (4) of that Article constitutes a further safeguard, namely, that even by this exceptional procedure which arises on the report of an Advisory Board, there shall be no detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-cl. (b) of cl. (7). (2) Then comes the independent sub cl. (b) of cl. (4) of the Article which makes another exception for detention beyond the maximum period of three months: namely, where such person is detained in accordance with the provisions of any law made by Parliament under sub cls. (a) and (b) of cl. (7). Shortly put, therefore, sub-cls. (a) and (b) of cl. (4) provide exceptions for detention beyond the period of three months (i) where an Advisory Board reports to that effect, and (ii) where Parliament has made any law for such detention as contemplated by cl. (7) of that Article.

[49] We next come to another clause of Article 22, and that is clause (5). This clause provides that where a person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against it. But cl. (6) of the Article adds a rider to this clause, namely, that the authority making such an order, as is referred to in cl. (5), shall not be bound to disclose facts with such authority considers to be against public interest to disclose. I shall have to refer to these clauses of Art. 22, namely, cls. (5) and (6) together when I come to consider the corresponding provisions of the Bihar Act, III [3] of 1950.

[50] Then comes cl. 7 of Art. 22 which is another very pertinent clause. I have already said; when dealing with cl. (4) of the Article, that it is referred to in cl. (4) in connection with two important matters. In the first place, even on the report of an Advisory Board, it would not be open to the authorities to detain a person for any period longer than the maximum period prescribed by any law framed by Parliament under sub-cl. (b) of this Article. Sub-clause (b) of this Article, therefore, gives power to Parliament to prescribe by law the maximum period for which any person in any class or classes of cases may be detained under any law providing for preventive detention. In the second place, sub-cl. (b) of cl. (7) gives a sort of a plenary power to Parliament to prescribe by law the circumstances under which and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-cl. (a) of cl. (4).

[51] If, therefore, Parliament proceeds to act under cl. (7) of Art. 22 and prescribes by law that a person may be detained for a period longer than three months in a certain class or classes of cases or under certain circumstances, it may do so notwithstanding the provisions of cl. (4) of Art. 22. This power which is given to Parliament, therefore, is important in two ways. On the one hand, it may provide the maximum period for preventive detention thereby limiting the period provided by any law for that purpose. On the other hand, it gives a power to Parliament to prescribe a longer period for detention than that contemplated by cl. (4) of the Article and irrespective of the procedure laid down in that Article for reference to any Advisory Board. Therefore, it comes to this that even if a law may prescribe for preventive detention a period longer than that contemplated by cl. (4) of Art. 22, and the procedure for reference to an Advisory Board laid down therein, that law for preventive detention may still continue to be good and valid if Parliament acting under cl. (7), Art. 22 prescribes a longer period for detention irrespective of the provisions of sub-cl. (a) of cl. (4) of that Article, subject of course to the limitations prescribed in cl. (7) itself.

[52] Having examined the provisions of Art. 22 which, as I said, are most important provisions of the Constitution of India dealing with the protection against arrest and detention, I shall now proceed to examine the relevant provisions of the impugned Act, namely, the Bihar Act III [3] of 1950.

[53] Under S. 2 (1) (a), Bihar Act, if the Provincial Government is satisfied with a view to preventing a person from acting in any manner prejudicial to the public safety and the maintenance of public order it may make an order directing his detention. Then under S. 5 it is provided that where an order is made under cl. (a) of sub-s. (1) of S. 2 within fifteen days of the date on which the order is served on the person in respect of whom it is made, the autho-

rity making the order shall communicate the grounds on which the order has been made against him and such other particulars as in the opinion of the authority may be sufficient to enable him to make a representation against the order. It is to be noted that there is no period provided in the Act during which the order can be served upon the person concerned. There is a period of limitation provided for making a representation against the order by the detenu which is within fifteen days from the service of the order, but there is no period of limitation provided during which the order has to be served on the detenu. It may be argued on behalf of Government that in the absence of any such period it has to be assumed that the service of the order should be made within a reasonable time. In fact, in this case the order passed under the Act was served almost immediately but that is immaterial when we are examining the provisions of the Act itself. There is obviously a lacuna in the Act in regard to this period. If, therefore, Government were to delay the service of the order (even assuming for certain reasonable administrative difficulties) for over a period of three months, the provisions of the Act enable them to do so; and they can thereby continue to detain the individual without any service of the order for a period longer than three months. This would be in apparent conflict with cl. (4) of Art. 22 of the Constitution of India. The date of service of the order is very material inasmuch as the other procedure laid down in S. 5, Bihar Act only arise after the service of that order. But whether these procedures are followed or not, it cannot be said that the order of detention would be thereby rendered illegal merely because no service has been effected. In fact, in dealing with Criminal Misc. No. 30 of 1950 decided on 24th January 1950, this Court definitely pointed out that the validity of the detention depends on the existence of the order and not on the service thereof. This then is the first point of inconsistency between the Bihar Act and the Constitution of India.

[54] It is next pointed out that the proviso to sub-s. (1) of S. 5, Bihar Act is also in conflict with cls. (5) and (6) of Art. 22. The proviso says that

> "neither the said order nor the detention of the said person thereunder shall be invalid or unlawful or improper on the ground of any defect, vagueness or insufficiency of the communication made to such person under this section."

Section 5, however, prescribes that the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order. It is contended, in the first place, that cl. (5) of Art. 22 enjoins upon the authority to communicate the grounds of detention, but it does not authorise him to take shelter under any vagueness or insufficiency in the communication of the grounds. What is required by the Act is that the grounds should be communicated as they are. Of course, it empowers the authority not to disclose facts which he considers improper to disclose in public interest. The proviso in question, on the contrary, gives a very large power to the authorities and says that even if the communication of the grounds are vague and insufficient or defective, the detention shall not be rendered invalid or unlawful on that account. I shall have occasion to examine this ground of repugnancy in a separate place because the question would still remain whether the repugnancy of the proviso would affect the other provisions of the Act relating to preventive detention, or whether it is merely severable from those provisions of the Act which could subsist in spite of this repugnancy.

[55] I may then refer to some of the other sub-sections of S. 5, which deal with the procedure for reference to the Advisory Council. I should mention here another little point which has also arisen for consideration. Under the Constitution Act, it is only said in cl. (5) of Art. 22 that the authority making the order of detention shall afford the person concerned the earliest opportunity for making a representation against the order. The earliest opportunity may be ten days or may be beyond ten days from the date of service, of the communication of grounds to the person detained. To put it differently, the Constitution Act does not create any disability or place any limitation on the detenu to make a representation within ten days of the communication of the grounds of detention, whereas the Act in sub-s. (1) of S 5 does create such a disability and a limitation, so that if the detenu fails to make a representation within that period his representation may be thrown out altogether as time-barred. Sub-s. (2) of S. 5. Bihar Act, again provides for reference to an Advisory Council the grounds on which an order of detention has been made and the representation, if any, made by the person together with other relevant materials. Then it proceeds to say that the Advisory Council shall if necessary after calling for such further information from Government or from the person concerned submit a report to the Provincial Government again within twelve weeks of the date of the service of the order on the person concerned. I have already pointed out that in all these cases we find that the time starts running from the date

of service of the order, but there is a lacuna in the Act as to the period during which this service is to be made. This twelve weeks may well be within a period of three months or it may be much beyond the period of three months, but cl. (4) of Art. 22, Constitution Act says that there shall be no detention beyond a period of three months unless within that period an Advisory Board has reported that in its opinion there is sufficient cause for such detention. Here again there appears to be a repugnancy between the Act and the Constitution of India. But this is not all.

[56] As we proceed to examine sub-ss. (5) and (6) of S. 5, Bihar Act, we find that there are further grounds of repugnancy. Sub-section (5) says:

> "After considering the report of the Advisory Council, the Provincial Government may confirm, modify, or cancel the order made under cl. (a) of sub-s. (1) of S. 2."

Now, again it is quite clear from the provisions that the Provincial Government is not bound to respect the report of the Advisory Council. It may or may not accept the report at all. But this is not what is contemplated by cl. 4 (a) of Art. 22 of the Constitution. In that clause the authority detaining the person concerned is bound by the report of the Advisory Board. If the Advisory Board thinks that any further detention is undesirable, the authority detaining is bound to release. If, on the other hand, the Advisory Board thinks that a longer detention is justified, the authority detaining has to act upon that opinion of the Advisory Board. Again the difficulty arises as to the time-lag. Under S. 5 of the Act although the Advisory Council is bound to submit its report within twelve weeks from the date of the order, there is no period fixed within which the Provincial Government is to pass its final order. They can wait even upon the submission of the report of the Advisory Council for an indefinite period and thereby prolong the detention of a person. In dealing with Cri. Misc. No. 885 of 1949 decided on 24th January 1950, *Sunirmal* v. *Province of Bihar*, A. I. R. (37) 1950 Pat. 259, I referred to this anomaly when examining the corresponding provisions of both the Public Order Ordinance (No. 2) IV [4] of 1949 as well as the Act of 1950. Thus it is to be noticed that there is no limitation in Act III [3] of 1950 either for service of the order or for the passing of the final order as contemplated by S. 4 of the Act after the submission of the report of the Advisory Council. This again is material because it is only when such a final order has been passed by Government that under S. 4 of the Act this order shall remain in force for a period not extending six months from the date on which it is passed; though, of course, it is open to Government to revoke the order within that period or even to extend it as provided therein.

[57] Then again sub-s. (6) of S. 5 provides:

> "All particulars contained in any correspondence between the Provincial Government and the Advisory Council and the report made by the Advisory Council shall be confidential and no Court shall be entitled to require any public servant to produce before it any of the said documents."

This provision evidently would be in clear conflict with cl. 4 (a) of Art. 22 under which it would be open to a Court of law to see whether an extension beyond the period of three months is justified in view of the opinion of an Advisory Board justifying such detention. For all these reasons, it has been contended and, in my opinion, rightly contended that Act III [3] of 1950 is repugnant to the Constitution of India, and, as such, it is void.

[58] Another point which has been argued before us can be formulated in this way. Article 246 of the Constitution Act provides for the subject-matter of the laws to be made by Parliament and by the Legislatures of States. It says that the matters enumerated in List I in the Sch. VII of the Constitution are matters over which Parliament has got exclusive power to legislate. Then it also provides that the Legislature of any State specified in Part A or Part B of Sch. 1 also have power to make laws with respect to any of the matters enumerated in List III in the Sch. VII referred to as the "Concurrent List", whereas the Legislature of a State specified in Part A or Part B of Sch. 1, has exclusive power to make laws for such State or any part thereof with respect to any of the matters in List II of the Schedule referred to as the "State List". Now List I, therefore, is the "Union List", and in the "Union List" our attention is drawn to item 9 which provides for preventive detention for reasons connected with "Defence, Foreign Affairs, or the security of India". Then List III which is the "Concurrent List" shows item 3 enumerating

> "Preventive detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community etc."

It is, therefore, argued that on the Concurrent List it is open to a State as also to Parliament to frame laws for preventive detention though under item 9 of List I it would be open exclusively to Parliament to legislate in regard to preventive detention for reasons connected with Defence, Foreign Affairs, or the security of India. It is true that preventive detention for reasons connected with Defence, Foreign Affairs or the security of India are exclusively within the purview of Parliament and constitute its exclusive field of legislation but where preventive detentions are for reasons connected with the security of a State and maintenance of public order, power has been given under the Concurrent List, as already shown above, to the States concerned to legislate in regard to this matter. Therefore, from that point of view, it could not be said that Act III [3] of 1950 which deals with preventive detention for maintenance of public order would be illegal or *ultra vires*. Our attention has been drawn to Art. 254, Constitution Act, where it is provided that

> "If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of cl. (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law shall prevail and the law made by the Legislature of the State shall to the extent of the repugnancy, be void."

It is contended on the basis of this section also that the Bihar Act III [3] of 1950 being repugnant to the Constitution of India is void to the extent of its repugnancy. This may raise another question as to the pith and substance of the legislation impugned. Section 254, however, has really no application to the case in hand. Section 254, can only apply, if there is a legislation by Parliament in regard to some of those matters enumerated in List I or in List III of Sch. 7. Here the repugnancy complained of is against the Constitution of India itself. Therefore, the relevant provision applicable is not Art. 254 of the Constitution but Art. 13 of the Constitution to which reference has already been made; and if it can be held, as it has been held above, that the provisions of Act III [3] of 1950 are repugnant to the Constitution of India, then those provisions to the extent of their repugnancy would be void on the plain terms of Art. 13 (1) of the Constitution.

[59] The question then arises whether the entire provisions relating to preventive detention under Act III [3] of 1950 are void on account of the repugnancy or only some of the provisions of the Act are void. If we can find that the offending provisions are not separable, then it has to be declared that the entire provision relating to preventive detention under the Bihar Act III [3] of 1950 is void on account of its repugnancy. If, on the other hand, they are separable, then there is no reason why only those provisions should not be declared to be void and other provisions of the Act held to be valid.

[60] In deciding Criminal Misc. No. 854 of 1949 and Criminal Misc. 870 of 1949 my brother Das and myself held that the provisions of sub-ss. (4) and (5) of S. 4, Public Order Ordinance are not merely directory but mandatory, they being integral parts of the scheme envisaged by the Public Order Ordinance. This S. 4, Public Order (No. 2) Ordinance IV [4] of 1949 almost exactly corresponds to S. 5 of the Act. Therefore, in connection with another application of a similar nature Cri. Misc. No 885 of 1949 decided on 24th January 1950 *Sunirmal* v. *Province of Bihar*, (A. I. R. (37) 1950 Pat. 259) I again pointed out that

> "the provisions of sub-ss. (4) and (5) of S. 5 of Act III [3] of 1950 appear to us to be mandatory and integral parts of the scheme of the Act for the very same reasons as the corresponding provisions of the Ordinance of 1949 as already decided by us in Cri. Misc. Nos. 854 and 870 of 1949."

I, therefore, hold that the provisions of the Bihar Act III [3] of 1950 relating to preventive detention are void as being repugnant to or inconsistent with Art. 22 (4) and (5) of the Constitution of India.

[61] At an earlier stage of this judgment, I have pointed out that under Art. 22 (7), Constitution Act, Parliament has the power to legislate so as to prescribe the maximum period for which a person may be detained under any law providing for preventive detention, or it may provide by legislation for detention for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-cl. (a) of cl. (4) of Art. 22. This power which is vested in Parliament by virtue of cl. (7) of Art. 22 can be also exercised by the President of the Indian Union until the expiration of one year from the commencement of this Constitution or until provision is made by Parliament under cl. (7) of Art. 22. In other words, so long as Parliament itself does not do it, the powers exercisable by Parliament under Art. 22 (7) could be exercised by the President of the Indian Union. The Constitution Act under Art. 372 also provides that

> "all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority".

In cl. (2) of the same Article the Constitution provides for adaptation of the provisions of any law in force in the territory of India in order to bring them in accord with the provisions of this Constitution, and it says that the President may by order direct such adaptations and modifications of such law whether by way of repeal or amendment as may be necessary or expedient in order to fulfil the purpose of adaptation. It further provides that the law shall as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and the said adaptations or modifications shall not be questioned in any Court of law. This power of the President to direct adaptations of the provisions of any law in force in the territory of India can be exercised subject to the limitation provided in cl. (3) of Art. 372. Now, sub-cl. (2) of Art. 372 pre-supposes that although the provisions of a law in force in the territory of India may not be in complete accord with the provisions of the Constitution Act, yet, the President by virtue of adaptation orders may bring them in consonance with the provisions of the Constitution Act, and thereby render those laws effective. A question may arise whether by such adaptation the President could cure any repugnancy or inconsistency in a law in force in the territory of India immediately before the commencement of the Constitution. The answer evidently seems to be in the affirmative. The power exercisable under Art. 372 can be exercised by the President only after the commencement of the Constitution. Under Art. 394 of the Constitution, barring some of the provisions mentioned therein, all the remaining provisions of the Constitution Act came into force on 26th January 1950, in fact immediately after midnight of 25th January. The President of the Union could not enter upon his office or discharge his functions as such until he had taken his oath of office as required by S. 60, Constitution Act. This oath of office was taken by the President after the commencement of the Constitution sometime at about 10-15 A. M. on 26th morning. That being so, the President could act under Art. 372 only after the commencement of the Constitution. It does not appear, however, that there was any adaptation order passed by the President in relation to Act III [3] of 1950 so as to modify these provisions or to repeal or amend it in order to make it consistent or in accord with the provisions of the Constitution of India.

[62] Even if the President had purported to do so, the problem still remains whether he could thereby revive the provisions of an Act which became void on account of repugnancy as soon as the Constitution came into operation. I have shown above that the President was not competent to act until he had taken his oath of office, and there was a difference of about ten hours between the commencement of the Constitution and the assumption of the office by the President. The considerations which apply to the interpretation and application of Art. 372 cannot apply to the interpretation and application of Art. 13 of the Constitution. Article 372 comes under Part XXI of the Constitution of India dealing with temporary and transitional provisions. It definitely saves the operation of all laws which were in force before the commencement of this Constitution, and it provides that those laws shall continue to be in force. Those laws shall not be, therefore, void but any inconsistency in such laws may be cured by adaptations as provided under cl. (2) of Art. 372. The provisions of Part III of the Constitution Act which deal with fundamental rights stand on an entirely different footing. There Art. 13 is a special provision which acts and operates upon all laws which purport to interfere with fundamental rights of people, and it says very definitely that all laws in force in the territory of India immediately before the commencement of this Constitution in so far as they are inconsistent with the provisions of Part III shall to the extent of such repugnancy be void. Therefore, Art. 372 and the powers of adaptation laid down therein would apply to all other legislations which are not affected by Art 13, Constitution Act and which do not interfere with the fundamental rights of individual as laid down in Part III, of the Constitution. Therefore, if there is any enactment the provisions of which offend against the provisions of Art. 22, Constitution Act by operation of Art. 13, those provisions shall become void. At one stage I was inclined to think that the clause under any law providing for preventive detention, as used in cl. 7 (a) and (b) of Art. 22 would cover both class of cases, namely, laws which were in existence before the commencement of the Constitution and laws which came into operation after the commencement of the Constitution. But the difficulty in adopting the former interpretation would be in the application of Art. 13, Constitution Act. Article 13 would render void the provisions of any law which are inconsistent with Part III of the Constitution as soon as the Constitution commenced to operate. Now, the Parliament or the President could not be expected to act according to the procedure envisaged under Art. 22 (7) until after the Constitution commenced. Therefore, by any such act or legislation of Parliament or that of the President the law which had already become void *ex proprio vigore* Art. 13 of the Constitution could not be restored to life and rendered valid. I have since had the advantage of reading the judgment prepared by my Lord the Chief Justice and I agree that the phrase "any law providing for preventive detention" must be taken to relate to prospective laws, that is, laws which came into operation after the commencement of the Constitution and which would fall under Art. 13 (2), Constitution Act. That being so, the provisions relating to preventive detention in Act III [3] of 1950 having already become void as soon as the Constitution commenced, they could not be revived by any act of the President purporting to do so under Art. 22 (7) read with Art. 373 of the Constitution; nor, in my opinion, could he do so by any

adaptations contemplated by Art. 372, Constitution Act.

[63] In course of arguments it was intimated to us by the learned Government Advocate appearing for the State of Bihar that the President of the Indian Union had under some notification of the Indian Union purported to prescribe law under Art. 22 (7) read with Art. 373, Constitution Act. The hearing of the application was accordingly adjourned to another date to enable the learned Government-Advocate to produce the order in question. As I have said, the power under Art. 373 is exercisable by the President until the expiration of one year from the commencement of the Constitution, or until provision is made by Parliament under Art. 22 (7). A notification was subsequently produced before us on behalf of the State of Bihar purporting to be signed by the President of the Indian Union. The notification is dated 26th January 1950. The notification purports to be in the exercise of powers conferred by sub-cl. (a) and (b) of cl. (7) of Art. 22 of the Constitution of India read with Art. 373 thereof and of all other powers enabling the President to act in that behalf. The President under the said notification had made the following order, namely :

> "1. (1) This order may be called the Preventive Detention (Extension of Duration) Order 1950.
>
> (2) It shall come into force at once,
>
> 2. Where in any class of cases or under any circumstances specified in any law providing for preventive detention in force at the commencement of the Constitution of India (hereinafter referred to as 'the Constitution') any person was, immediately before such commencement, or is at any time thereafter, in detention in pursuance of an order made under such law, such person may be detained for a period longer than three months under such law without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-cl. (a) of cl. (4) of Art. 22 of the Constitution.
>
> 3. The maximum period for which any such person, as is referred to in para. 2 may be detained, shall, in the case of a person in detention immediately before the commencement of the Constitution, be three months from such commencement, and in the case of a person detained in pursuance of an order made after such commencement, be three months from the date of such order."

Mr. Ghosh appearing for the petitioner contends that there is nothing to indicate that the notification produced has been published under the authority of Government, neither the original has been produced nor has it been shown that it is a part of the publication in the Gazette of India. For these reasons he contends that the Court should not take any notice of the aforesaid notification produced by the learned Government Advocate. In reply he refers to another notification bearing the same number and the same date as the one produced by the learned Government Advocate. But this notification is said to be an extract of the Gazette of India dated 26th January 1950. The terms of the notification are also exactly similar to the one produced by the learned Government Advocate with this difference that the notification which must be held to be authentic, being an extract from the Gazette of India, Extraordinary, is signed by "C. Rajagopalachari, Governor-General." Mr. Ghosh contends that the notification in question is not signed by the President but signed by the Governor-General. Now, under Art. 392 (1), Constitution Act, the President may for the purpose of removing any difficulties, particularly in relation to the transition from the provisions of the Government of India Act, 1935, to the provisions of this Constitution, by order direct that this Constitution shall, during such period as may be specified in the order, have effect subject to such adaptations, whether by way of modification, addition or omission, as he may deem to be necessary or expedient. Under cl. (3) of Art. 392 the powers conferred on the President by this Article, that is, the power to make adaptations in this Constitution itself by way of modification, addition or omission, for the purpose of removing any difficulties in course of transition may be exercised by the Governor-General of the Dominion of India. But this power can be exercised by the Governor-General of the Dominion of India only before the commencement of this Constitution. He cannot exercise this power of adaptation after the commencement of this Constitution. Therefore, the notification produced by Mr. Ghosh which purports to be signed by the Governor-General and is dated 26th January 1950, could not be of any value at all for purposes of adaptation of the Constitution Act; nor could it be of any value for the purpose of Art. 373 because under Art. 373 it is only the President who could act after the commencement of this Constitution. The learned Government Advocate, however, says that the notification produced by Mr. Ghosh is incorrect being due to some error in printing. He has not, however, produced any affidavit in support of this contention. He has not produced the original notification on which he relies for the purpose of showing that it was the President who acted under Art. 373 of the Constitution; nor has he produced any authenticated copy thereof ; nor has he shown that the order on which he relies has been published in the Gazette of India, ordinary or extraordinary. There is, therefore, no material before us on which we can hold that the President has purported to act under Art. 373, Constitution Act, and that the notification produced by Mr. Ghosh is incorrect. After the preparation of this judgment the learned Government Advocate produced before us a certified copy of the notification dated 26th January 1950 signed by the President of the Indian Union. But, as I have already said, this is immaterial and does not affect the legal position which I have discussed above, and by this notification the President could not revive the provisions of a law which due to their inconsistency in Constitution of India as given in Part III of the Constitution had already become void. I am, therefore, constrained to hold that in any view of the matter the detention of the petitioner is illegal.

[64] In view of what I have held, it is unnecessary for me to dilate upon the question whether the proviso to sub-s. (1) of S. 5, Bihar Act III [3] of 1950, even if void on account of repugnancy is severable from the other provisions of the Act. Mr. Ghosh appearing for the petitioner submits that it is not. He would have us hold that it is an integral part of the scheme of the Act relating to preventive detention. I am afraid I cannot accept this contention of the petitioner. It is quite obvious that this proviso is severable and if I had not otherwise come to the conclusion that the entire provisions of the Act relating to preventive detention are repugnant to the Constitution of India, I would have held that the proviso could be eliminated from consideration in examining the legality or otherwise of the detention of the petitioner. In that event, it was sufficient for us to see whether or not the communication of the grounds to the petitioner was such as to enable him to make a representation against the order of detention. It is not open to us to examine the correctness or otherwise of the grounds of detention. Even on the authority of the decision in the case of *Nek Mohammad* v. *Province of Bihar*, A. I. R. (36) 1949 Pat. 1 : (50 Cr. L. J. 44 F. B.), all that this Court is entitled to say is that, if no particulars are given or particulars are given in such a way as to make it impossible for the detenu to make a representation against the order, then there is a failure to comply with the mandatory provisions of the section, and the detenu is deprived, to use the words of the section, "the earliest opportunity of making a representation." This does not mean that it is open to this Court to examine the correctness or otherwise of the grounds of detention which is really the function of Government or the Advisory Council or Advisory Board constituted for the purpose.

[65] Mr. Ghosh for the petitioner has relied upon a number of decisions of this Court in this connection. It must be said that some of the decisions have gone to the extent of criticising the propriety of the grounds of detention communicated to the petitioner ; but these decisions are at best merely illustrative. So far as the grounds furnished to the petitioner are concerned, we have examined them carefully and I do not think that there is any vagueness or indefiniteness about the grounds alleged. That being so, I would have been reluctant to hold that the detention of the petitioner is illegal on this account. But in view of the reasons advanced above, I must hold that the detention of the petitioner is illegal and he should be set at liberty forthwith.

K.S. *Detenu released.*

A. I. R. (37) 1950 Patna 281 *[C. N. 68.]*

AGARWALA C. J.

Ramjatan Bhagat and others—Petitioners v. *Babu Net Lal Sah and others — Opposite Party.*

Civil Revn. No. 288 of 1949, D/- 8-12-1949, against order of Munsif, Banka, D/- 12-3-1949.

Civil P. C. (1908), O. 1, R. 10; O. 22, R. 4— Redemption suit — Death of one of defendants — Application for addition of legal representative after limitation—Continuation of suit by addition —T. P. Act (1882), S. 60, Proviso.

A right to redeem a mortgage continues until it has been extinguished by an act of parties or by a decree of a Court. Where, during the pendency of a suit for redemption, one of the defendants dies and an application for the addition of his legal representative is made after the period of limitation prescribed therefor and the right to redeem is not extinguished, it is in the interest of the parties that the suit should be allowed to proceed with representative added as a party rather than driving the plaintiff to institute a fresh suit against the surviving defendants and the legal representative of the deceased defendant. [Para 2]

Annotation: ('44-Com.) Civil P. C., O. 1 R. 10 N. 11; O. 22 R. 4 N. 7 and 8.

S. C. Misra—for Petitioners.

S. K. Sarkar and S. N. Prasad—for Opposite Party.

Order.—This is an application by the defendant, and arises out of a suit against two persons for redemption of a mortgage. During the pendency of the suit, one of the defendant-mortgagees died. No steps were taken within the relevant period of limitation to bring the heirs of the deceased defendant on to the record, with the result that the Court ordered that the suit had abated as against the deceased, and that it should proceed as against the remaining defendant. Later, the plaintiff applied under O. 1, R. 10, Civil P. C. to add as a party to the litigation the widow and heir of the deceased defendant on the ground that she was a necessary party to the litigation, and that, without her being on the record, the rights of the parties could not be fully adjudicated. The defendant objected alleging that the suit had abated as against both defendants and that the application under O. 1, R. 10 should be treated as an application to set aside the abatement. The Court took the view that there was no ground on which the abatement could be set aside, but that this was a case in which it was right and proper that the application under O. 1 R. 10 should be allowed. It is against that order that the defendant has moved this Court.

[2] It is contended on his behalf that a mortgage being one and indivisible, in a suit for redemption all the mortgagees are necessary parties, and that, if they are not all on the record, or that, if one of them dies and his heirs are not brought on to the record, the suit abates as a whole. For the opposite party, it is contended that the right to redeem continues to exist until it has been extinguished by an act of the parties or by a decree of a Court, and that, as there has been no decree in the present case extinguishing the rights of the parties, or any act of the parties having that result, the mortgagors are entitled to maintain a fresh suit to enforce the mortgage, and, in those circumstances, it is in the interest of the parties that this suit should be allowed to proceed with the widow of the deceased defendant added as a party. For this proposition, reliance is placed on the decision in *Joti Lal* v. *Sheodhayan Prashad*, A. I. R. (23) 1936 Pat. 420 : (15 Pat. 607). To this the defendant-petitioner replies that an order of the Court deciding that a redemption suit has abated in fact extinguished the right to redeem, and that, in this case, there being no appeal from the decision of the Court on the refusal to substitute the heir of the deceased defendant, the order has become final. There is nowhere in the order of the Court a decision that the suit has abated as a whole. All that the Court below has decided is that the suit has abated against the deceased defendant. The order cannot, therefore, be treated or construed as an order declaring that the right of redemption of the mortgagees has been extinguished. That being so, the plaintiff-mortgagors would be entitled to institute a fresh suit for redemption impleading the surviving defendants of this suit and the widow and heir of the deceased defendant, and as no question of limitation would arise in such a suit, it would merely amount to driving the parties to an additional litigation not to allow the present suit to continue with the addition of the widow of the deceased defendant. In these circumstances, I would reject the contention that has been advanced on behalf of the defendant and discharge this rule with costs. Hearing fee three gold mohurs.

G.M.J. *Rule discharged.*

A. I. R. (37) 1950 Patna 282 [*C. N. 69.*]

SINHA AND REUBEN JJ.

Abdul Gafoor Butcher — *Judgment-debtor — Appellant* v. *Mohammad Rasul Nizamuddin — Decree-holder — Respondent.*

A. F. A. O. No. 52 of 1948, D/- 23rd December 1949, from order of A. D. J., Manbhum, D/- 17th January 1948.

Civil P. C. (1908), O. 23, R. 3 — Compromise decree — Construction — Execution.

Where a compromise decree in a money suit entitled the decree-holder to realise the decretal amount out of a deposit standing at the credit of the judgment-debtor in a bank and attached by the Court under O. 38, R. 5 of the Code but there was nothing to restrict him to this remedy and when the letter from the Court directing payment out of the attached deposit reached the bank, the bank had closed its doors and no reply was received from the bank :

Held that it was open to the decree-holder to proceed against other property of the judgment-debtor : [Paras 4 and 6]

Held further that the maxim *res perit domino* governed the case and, therefore, the ownership of the deposit remained in the judgment-debtor who must bear the loss in the absence of any equity in his favour. [Paras 7, 9 and 11]

Annotation : ('44-Com.) Civil P. C., O. 23, R. 3, N. 27 and 33.

B. C. De and A. N. Chatterji—for Appellant.
K. C. Sanyal and Shamsul Hoda—for Respondent.

Reuben J.—This is an appeal by a judgment-debtor against an order of the District Judge of Manbhum Singhbhum confirming an order of the Subordinate Judge, Dhanbad, dismissing an application under S. 47, Civil P. C. It arises in the following circumstances :

[2] The decree under execution was passed on 13th November 1946, on a compromise in a money suit. The decretal dues were settled at Rs. 2,443, and the decree-holder agreed to realise this sum out of a deposit standing at the credit of the judgment-debtors in the Hazradi Bank Dhanbad, and attached by the Court under O. 38, R. 5, Civil P. C. The decree was signed on 18th November 1946, and the decree-holder applied for execution on 21st November 1946. By the time the letter from the Court reached the bank directing payment out of the attached deposit the Bank had closed its doors, and no reply was received from the bank. The objection under S. 47 that the decree-holder cannot proceed against any property of the judgment-debtors except the deposit in question has been rejected by the Courts below. Hence, this appeal.

[3] Learned counsel for the appellant argues that the question is, which of two innocent parties should suffer. His client, he says, did all he could to make the bank deposit available to the decree-holder ; all that was necessary was a letter from the Court to the Bank to sanction payment to the decree-holder and his client is not to blame if the letter did not issue in

time. If anything, it was the decree-holder who was to blame, for the judgment-debtor has succeeded in getting from the bank the balance of the deposit after leaving a sufficient amount to meet the decretal dues. He urges that under the compromise it is not open to the decree-holder to proceed against any other property of the judgment-debtors.

[4] Before considering the first point it is necessary to decide if it is open to the decree-holder to proceed against other property of the judgment-debtors.

[5] The compromise is in the following terms:

> "1. That the plaintiff will get a decree for the sum of Rs. 2443 inclusive of costs.
>
> 2. That out of the amount attached and credited in the name of the defendants the plaintiff will be at liberty to withdraw the said sum of Rs. 2443. (Two thousand four hundred and forty three rupees.) and the defendants will get the balance. Manager Hazradi Bank may be directed to pay Rs. 2443 to the plaintiff and the rest may be paid to the defendants.
>
> 3 The intimation may accordingly be sent to the manager Hazradi Bank (Dhanbad Branch) . . . . "

and the decree is exactly in accordance with these terms.

[6] This entitled the decree-holder to take payment from the said deposit, but there is nothing to restrict him to this remedy. The correct view to be taken in these circumstances is very forcibly put by Beaumont C. J., in the following words with which I respectfully agree :

> "In arranging consent decree of the nature in question it is usually the creditor, and not the debtor, who is master of the situation, and I can see no justification for holding that by taking a charge upon specific property, the primary object of which as I have pointed out, is to secure him against other creditors, the creditor abandons his right to proceed against other property of the debtor. Such an abandonment should not be presumed in the absence of language making clear the intention to abandon." (*Gurappa Gurushidappa* v. *Amarangji Vanichand*, A. I. R. (28) 1941 Bom. 90 at p. 92 : I. L. R. (1941) Bom. 299 F.B).

I think the Courts below have correctly decided this point.

[7] Coming to the other point, it seems to me that the rule that governs the case is what Blackburn J., called the "old civil law maxim *res perit domino*—*Martineau* v. *Kitching*, (1872) 7 Q. B. 436 : (41 L J Q B. 227), *vide* also *The Parchim*, (1918) A. C. 157 at p. 168 : (87 L. J. P. 18), subject to an equity in favour of the owner if the loss is caused by the default of the other party (*Sweeting* v. *Turner*, (1871) 7 Q B. 310 : 41 L. J. Q. B. 58). This principle is embodied in S. 84, Negotiable Instruments Act, 1881 and S. 26, Sale of Goods Act, 1930 : *Vide* also *Ramzan & Co* v *Shariff Mohammad*, A. I. R. (11) 1924 Bom. 520 : (76 I. C. 578).

[8] The question, therefore, is "In whom is the ownership of the deposit vested?" There can be no doubt on this point. Under the decree the decree-holder merely got the right to payment of Rs. 2,443 out of the deposit and was not entitled to withdraw the sum till the necessary authority had issued from the Court to the bank, and the bank closed its doors before the Court's letter reached it. Even when a cheque is issued by a debtor in favour of the creditor, and the creditor is thereby empowered to go to the bank and demand payment forthwith the deposit remains the property of the debtor. Still more would it remain the deposit of the judgment-debtors in this case. Here, there was at most a charge on the deposit created by the decree, and even a charge does not amount to a transfer of interest *Mt. Indrani* v *Maharaj Narain*, A. I. R (24) 1937 Oudh 217 : (13 Luck. 101 F.B.).

[9] So the ownership of the deposit remained in the judgment debtors and the loss must be borne by them unless there is some equity in their favour. The onus of proving that there was such an equity was on them. In this case, no attempt has been made to discharge that onus. In fact, no equity was pleaded in the application under S. 47, the only plea being that under the terms of the compromise the decree-holder's sole remedy was against the deposit. It was only at the stage of the appeal in the District Court that it was pleaded that the appellant was prevented by the compromise from withdrawing the decretal amount and has withdrawn the balance of the deposit. No evidence is tendered in support of the alleged withdrawal, and a perusal of the order sheet of the execution case throws doubt on this plea.

[10] I have mentioned that the execution case was filed on 21st November 1946. The decree-holder prayed that a letter be sent to the manager of the bank requesting him to remit the money, and asked that if the money did not come, the decretal dues be realised by attachment. and sale of other property of the judgment-debtors. No list of such other properties was filed and no question of attaching such other property arose then or could arise till after the attempt to get the deposited money had failed. For some reason the Subordinate Judge delayed in issuing the letter. He asked for a copy of the order by which the deposit had been attached, an order passed by himself and presumably readily available to him, as it is unlikely that the record of the suit had left his office for deposit in the record room. Matters were thus delayed till 17th December 1946, when the judgment-debtor appeared and asked for time to file an objection. It is difficult to see why he should want to object. As I have said the question of attaching any other property would only arise after the attempt to get the deposit money had failed, and the judgment-debtor should have been

anxious that the letter should issue as soon as possible to the bank. The objection was filed on 3rd January 1947, and the necessity for issuing the letter was lost sight of till the objection was dismissed on 16th April 1947. Then at last the matter was thought of, and it was directed that the letter be sent. Once more the decree-holder was asked to supply information for the purpose. There is a note dated "7.5" in the margin stating that a letter had been issued but, apparently, this is a false entry for the next order dated 19th May 1947, is to the effect that no letter has been sent. A fresh direction was then made and the letter was issued, apparently without the information asked for being supplied by the decree-holder. One wonders why the information was asked for and so much precious time wasted when, in the end, it was possible to do without the information. On 3rd June 1947, the letter came back undelivered as the bank had closed its doors. During all this time, the record shows that no letter was issued to the bank, and I have not been able to find any trace of any communication reaching the bank in the rest of the order sheet which extends up to 27th February 1948. If this is so, how is it that the judgment-debtors have got the balance of the amount due to them? The deposit had been attached by the Court, and it is unlikely that any payment would be made out of it without orders from the Court. To come back to the point I am considering, viz., whether there is any equity against the decree-holder in favour of the judgment-debtors, can it be said that he was responsible for the delay in issuing the letter? Even if some blame attaches to him for not supplying information which was subsequently found to be unnecessary, can the loss be attributed to the delay? We do not know when the bank closed its doors. It may have done so before the decree was passed, in which case no amount of delay on the part of the decree-holder could have made a difference.

[11] In view of the above circumstances, I think the loss must be borne by the judgment-debtors.

[12] This appeal has no merit and must be dismissed with costs.

Sinha J.—I agree.

V.R.B. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 284 [*C. N. 70.*]

REUBEN AND DAS JJ.

Raja Ram Singh — Appellant v. *Kanhaya Rai and others—Respondents.*

A. F. A. D. No. 744 of 1948 and Civil Revn. No. 700 of 1947, D/-18-1-1950, from decision of 2nd A. Sub-J., Arrah, D/-16-3-1948.

(a) Provincial Small Cause Courts Act (1887), S. 27—Setting aside decree on ground of fraud.

Where a decree passed by a Small Cause Court is sought to be set aside on the ground of fraudulent suppression of summons and fraud is not proved, the decree cannot be set aside merely on the finding that the summonses were not properly served. [Para 5]

Annotation: ('46-Man.) Pro. S. C. C. Act, S. 27, N. 1.

(b) Provincial Small Cause Courts Act (1887), Sch. II, Art. 8 — Transfer of Property Act (1882), S. 105 — Rent — Share of fruit on mango trees.

Ancestors of *A* planted certain mango trees in the *gairmazrua* land of the landlord *B*, merely as trespassers, but there was agreement between *B* and the ancestors of *A* by which half the share in the trees and the fruit thereof was to be taken by *B* and the other half by the ancestors. *B* settled the land with *C* recognizing *C* as his tenant. *C*, by a registered sale deed transferred his rights to *D* who, by a suit in the Small Cause Court claimed half the share in the fruit trees on the land from *A*. The question was whether the share in fruit amounted to 'rent' within Art. 8 of Sch. II, Provincial Small Cause Courts Act and whether *D* could claim the share:

Held, (i) that the word 'rent' was not defined by the Provincial Small Cause Courts Act but the share in fruit was not a payment for the use and occupation of any land and hence was not rent within the meaning of the Bihar Tenancy Act; nor was it rent within the meaning of S. 105, T. P. Act as the share was payable under an agreement between the parties which did not amount to a lease. The suit for the share was therefore not a suit for rent within Art. 8 and hence was cognizable by the Small Cause Court: *Case law discussed.* [Paras 6, 7]

(ii) that on settlement of the land with *C*, the rights of the landlord *B* in the trees passed to *C* who had validly transferred them to *D*. *D* was, therefore, entitled to the half share of fruit of the trees: 24 W. R. 330 and A. I. R. (17) 1930 Pat. 382, *Rel. on.* [Para 8]

Annotation: ('46-Man.) Pro. S. C. C. Act, Sch. II, Art. 8, N. 2; ('45-Com.) T. P. Act, S. 105, N. 59, Pts. 3, 5.

A. B. Saran, K. N. Chaturvedi and L. N. Sinha—for Appellant.

K. Ray, B. K. Sharma and Asghar Hussain—for Respondents.

Das J. — This second appeal has been heard along with the application in revision, and this judgment will govern them both. These two cases were originally placed before Meredith J. (as he then was), who directed that they be placed before a Division Bench for disposal. The second appeal arises out of Title Suit No. 180 of 1946, and the revision out of S. C. C. Suit No. 145 of 1946 (hereinafter to be referred to as title suit and S. S. C. suit respectively.)

[2] The two principal questions which arise for decision are (1) whether a suit for a half share in the fruits of fourteen mango trees standing on plot No. 6575 of holding No. 85 recorded as *gairmazrua* malik, against a person who is recorded in the record-of-rights as being

in possession of half share in the trees, is cognizable by the Court of Small Causes; and (2) whether the right to the half share in the fruits passed to the present appellant, who was defendant first party in the title suit and plaintiff in the S. C. C. suit, by reason of the transfer made by one Bharat Narain with whom the land on which the trees stand was settled by the then landlord, Mahanand Sahaya, whose interest has since been transferred to the defendants third party in the title suit.

[3] The material facts are the following. Mahanand Sahaya was the sixteen annas landlord of the land in question. The plaintiffs in the title suit, respondents before us, alleged that sometime before survey fourteen mango trees were planted by the ancestor of themselves and the defendants second party. The landlord used to appropriate half the fruits of the trees, and the other half was appropriated by themselves and the defendants second party. Mahanand Sahaya settled the land of Plot No. 6575 and some other lands on cash rental with Bharat Narain, and recognised him as his tenant. Bharat Narain sold his interest in the land with the trees to the defendants first party (the appellant) by means of a registered sale deed, dated 14th April 1936. The latter filed a Small Cause Court Suit No. 63/56 of 1943 against the plaintiffs and the defendants second party claiming half share of the fruits. This suit was first decreed *ex parte*. There was an application under O. 9, R. 13, Civil P. C. by defendants 3 and 4 (defendants second party in the Title Suit). The *ex parte* decree was set aside. A contested decree was then passed in favour of the present appellant. The plaintiffs respondents alleged that the decree was obtained by fraudulently suppressing summons and they brought the title suit for two declarations and an order of injunction. The declarations they asked for were, (1) that the decree obtained in the Small Cause Court suit was a nullity and in any view, not binding on them, and (2) that the present appellant was not the landlord and, therefore, not entitled to get half share of the fruits from them. Several issues were joined between the parties, of which Issues 4, 5 and 6 were the most important. Issue No. 4 related to the question if the claim in the title suit was barred by *res judicata*. Issue No. 5 raised the question if the decree passed in the Small Cause Court suit was valid and binding. Issue No. 6 related to the question if the present appellant had any right to the half share in the fruits. The learned Munsif, who dealt with the suit in the first instance, held against the appellant on all the questions. He held that the appellant had no right to get half share of the fruits, that the suit was not barred by *res judicata* and that no summons was served on the plaintiffs respondents in the Small Cause Court suit. It is to be observed, however, that the learned Munsif did not find any fraud in connection with the Small Cause Court suit. He merely held that no summons was served on the plaintiffs-respondents. On the findings mentioned above, the learned Munsif passed a decree in favour of the plaintiffs-respondents. An appeal was then made which was heard by the learned Second Additional Subordinate Judge who affirmed the findings of the learned Munsif and dismissed the appeal. Then, the present second appeal has been filed in this Court from the decision of the Courts below.

[4] The application in revision arises out of the Small Cause Court suit filed by the appellant of the second appeal in which he claimed half share of the fruits for a subsequent period, namely 1352 and 1353 faslis. This suit was dealt with by the same Munsif who decided the title suit. On the decision in the title suit, the learned Munsif, as Small Cause Court Judge, held that the present petitioner was not entitled to half share in the fruits, and the suit was not, therefore, maintainable. On that view he dismissed the suit. The application in revision is directed against that order of dismissal. The appellant in the second appeal is the petitioner in the civil revision. For the sake of convenience, I shall call him the appellant throughout the judgment.

[5] There is one matter which, I think, can be disposed of at the very out set. If the Small Cause Court had jurisdiction to take cognizance of the suit for the recovery of half share of the fruits of the fourteen mango trees, then the decree passed by the Small Cause Court in Small Cause Court Suit No. 56 of 1943 must be held to be binding on the plaintiffs-respondents. No fraud having been found by any of the two Courts below in connection with the earlier Small Cause Court suit, the decree passed therein cannot be set aside merely on a finding that summonses were not properly served. A separate suit on that ground only would be barred under the provisions of O. 9, R. 13, Civil P. C. This aspect of the matter appears to have been lost sight of by the Courts below. Therefore, the two principal questions which fall for decision in these two cases are those which I have stated at the beginning of this judgment.

[6] It would, I think, be convenient to take up first the question if the Small Cause Court has jurisdiction to take cognizance of a suit for the recovery of half share in the fruits of the fourteen mango trees. We have been referred to Arts. 8, 13 and 35 of Sch. 2, Provincial

Small Cause Courts Act. The main argument, however, relates to Art. 8. Section 15 (1) of the Act states that a Court of Small Causes shall not take cognizance of the suits specified in Sch. 2, as suits excepted from the cognizance of a Court of Small Causes. Sub-section (2) of S. 15 states that subject to the exceptions specified in Sch. 2 and to the provisions of any Act for the time being in force, all suits of a civil nature of which the value does not exceed Rs. 500 shall be cognizable by a Court of Small Causes. Article 8 of Sch. 2 reads:

> "a suit for the recovery of rent, other than house rent, unless the Judge of the Court of Small Causes has been expressly invested by the Provincial Government with authority to exercise jurisdiction with respect thereto."

The position, therefore, comes to this: if the suit for the half share of the fruits of the fourteen mango trees is a suit for rent, then by reason of Art. 8 of Sch. 2, such a suit will not be cognizable by the Court of Small Causes. The question, therefore, is if the half share of the fruits of the fourteen mango trees is rent or not. The word 'rent' does not appear to have been defined in the Provincial Small Cause Courts Act, or the General Clauses Act. The Bihar Tenancy Act, defines rent as meaning whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant. It is not disputed that the plaintiffs-respondents were not in occupation of the land on which the trees stand. They have been recorded in the record-of-rights as being entitled to a half share in the trees. They are not tenants of the land and do not use or occupy the land. Therefore, it is clear and not disputed that the half share of the fruits of the fourteen mango trees does not come within the definition of rent as given in the Bihar Tenancy Act. Learned counsel for the respondents has very strenuously contended before us that fruit-bearing trees, as distinguished from standing timber, are immoveable property as defined in the T. P. Act, and the half share of the fruits of such trees is rent within the definition of S. 105, T. P. Act. In my opinion, there is a very short answer to this contention. It was nowhere the case of the respondents that a lease of the trees, assuming they are immoveable property within the definition of the Transfer of Property Act, was given in their favour by the landlord. As a matter of fact, such a lease if made from year to year, or for any term exceeding one year, or reserving a yearly rent, could be made only by a registered instrument (*vide*, the provisions of S. 107, T. P. Act). It is not the case of the respondents that any written or registered lease was made in their favour. Learned counsel for the appellant has referred us to S. 117 T. P. Act and has contended that planting of trees is agriculture, a term wider than mere cultivation, and therefore, none of the provisions of Chap. 5, T. P. Act apply to the present case. It is, I think, unnecessary to deal with that argument in the present case. As I have stated above, there was no plea that a lease was made in favour of the respondents in respect of the trees. What happened was that the ancestors of the respondents planted certain trees on the *gairmazrua* land of the landlord. In doing so they acted as mere trespassers and could be sued in eviction. But there was an agreement between the landlord on one side and the ancestors of the respondents on the other to the effect that half share in the trees and the fruits thereof would be taken by the landlord and the other half would be appropriated by the respondents. Such an agreement did not, in my opinion, constitute a lease within the meaning of the Transfer of Property Act, and the half share of the fruits payable to the landlord as a result of the agreement was not rent within the meaning of S. 105, T. P. Act. In this view of the matter, it is unnecessary to consider and examine in detail any apparent conflict of the case law on the subject, such as has been referred to by Meredith J. in his order directing the cases to be placed before a Division Bench for disposal. I may, however, refer very briefly to the case law on the subject. As I have already stated, the word 'rent' has not been defined in the Small Cause Courts Act. In the Oxford Dictionary the word has been shown as having various meanings, one of which is

> "the return or payment made by a tenant to the owner or landlord, at certain specified or customary times, for the use of lands or houses."

The meaning of the word 'rent' in Art. 8 of Sch. 2, Small Cause Courts Act, has given rise to decisions, not all of which are uniform. In the Full Bench decision of the Calcutta High Court in *Siris Chandra* v. *Nasim Quazi*, 4 C. W. N. 367 : (27 Cal. 827), the question raised was if a suit brought by an assignee for recovery of arrears of rent assigned after they fell due, was a suit for recovery of rent, and therefore, excepted from the Court of Small Causes. The majority of the Judges held that such a suit was a suit for rent within the meaning of Art. 8. Banerjee J. dissented from that view. The view expressed by the majority of the Judges was that the money was due as rent at the time of the assignment, and the assignment did not deprive it of that character, so far at all events as the tenant was concerned. Banerjee J. said:

> "The Act does not define . . . . rent ; but according to the ordinary signification of the term, it means (I confine my remarks to money rent) money payable by one person for use and occupation of land to another person under whom he holds the land."

The view of Banerjee, J. was that if the landlord had transferred to the plaintiff not only his right to the arrears of rent, but also his interest in the land, it was then only that the transferee could be said to be claiming the amount in the same right as the landlord; but as the landlord's interest in the land had not been transferred to the assignee of the arrears of rent, the claim for the amount ceased to be one for rent after the assignment, by reason of the second characteristic, namely, that of the debt being due to the landlord, no longer attaching to it, and it became reduced to a claim for an ordinary debt. In an earlier decision in *Brojonath* v. *Gopi Shekrani*, 23 Cal. 835, it was held that a suit by the proprietor of a bustee land for the recovery of municipal taxes from the owner of a hut in the bustee was a suit cognizable by the Small Cause Courts, because Art. 8 was expressly limited to suits for rent, and the liability in the suit under consideration was not a liability for rent. In *Prohlad* v. *Sashadhar Rai*, 14 C. W. N 994 : (7 I. C. 553) the defendant took a lease of a ferry appertaining to the plaintiff's putni mehal for four years agreeing to pay Rs. 60 to him annually. A suit was brought in the Small Cause Court for the amount due for 1313. The contention of the defendant was that the suit was for rent, and the Small Cause Court had no jurisdiction to try it. In that decision, it was observed that each case of this class must be determined according to its own peculiar circumstances, and it was held that what was claimed in the suit was a sum payable under a contractual relationship and referable to that relationship; therefore it was in no sense rent. In the course of the arguments, reference was made to S. 3, T. P. Act, and also to S. 3 (25), General Clauses Act. In the case, *Maharaja of Kashmir* v. *Fatteh Din*, 164 P. R. 1888 at p. 431, it was held that a suit for Rs. 27 as money due for the use of a masonry outlet, alleged to be the property of the plaintiff, for the irrigation of the defendant's land was a suit for the recovery of a sum in the nature of rent, and not being for house-rent, was not cognizable by a Court of Small Causes under Art. 8 of Sch. II. Rattigan J. observed :

> "There is no definition of 'rent' in the Act, but we take it that the term as there used has the ordinary meaning of a compensation paid to the owner of immovable property for its use or occupation. In this sense the money due for the use of the outlet would be rent."

The two decisions of our own High Court which have been brought to our notice are *Jhakar Sahu* v. *Rajkumar Tewari*, 17 P L. T. 88 : (A. I. R. (23) 1936 Pat. 102) and *Kameshwar Singh* v *Mahabir Pasi*, 15 Pat. 626 : A. I. R. (23) 1936 Pat 403). In the earlier decision it was held that a suit for recovery of money value of bhauli produce of some Mahua trees was not a suit for rent, but a suit for money only, and under S. 102, Civil P. C., no second appeal lay. Reliance was placed on *Maung Kywe*, v. *Maungkala*, 4 Rang. 503: (A.I.R. (14) 1927 Rang. 94), where compensation claimed for the lease of palm trees was held to be not rent, as the trees did not come within the definition of immoveable property. Learned counsel for the respondents has contended before us that neither in the Rangoon decision nor in the single Judge decision of this Court referred to above, was the question considered from the point of view of the use of the word 'rent' in S. 105, T. P. Act. Our attention has been drawn to some decisions of this Court in which fruit-bearing trees have been held to be immoveable property within the meaning of the Transfer of Property Act or Registration Act (vide *Bodha Ganderi* v. *Ashloke Singh*, 5 Pat. 765 : (A. I. R. (14) 1927 Pat. 1) and *Lalji Singh* v *Nawab Chaudhury*, 7 Pat. 646 : (A. I. R. (15) 1928 Pat. 652). In the second decision, *Kameshwar Singh* v. *Mahabir Pasi*, 15 Pat. 626 : (A. I. R. (23) 1936 Pat. 403). the question which arose for consideration was one of limitation, namely, whether Art. 110, Limitation Act applied or Art. 2 (b) of Sch. 3, Bengal Tenancy Act. It seems to me that the real question at issue in that case was whether money due on settlement by auction of date and toddy palm trees was rent within the meaning of the Bihar Tenancy Act, though it was observed that the payments sued for were not rent, and suits to realise them ought to have been brought in a Small Cause Court. It was decided that Art. 110, Limitation Act applied, which is also an Article relating to recovery of rent, though not within the meaning of the Bihar Tenancy Act. Therefore, the question whether the payment was rent within the meaning of the Transfer of Property Act was not considered nor decided in that case. Assuming, however, that the question is still at large, I am of the view, as I have already stated, that the payment in the particular case before us is not rent either within the meaning of the Bihar Tenancy Act or the Transfer of Property Act. Here, the payment is not for the use and occupation of any land ; therefore, it is not rent within the meaning of the Bihar Tenancy Act; nor was there any lease of the mango trees in question. Therefore, the payment is not rent within the meaning of S. 105, T. P. Act.

[7] Learned counsel for the appellant has also contended before us that S. 117, T. P. Act will apply, and even if there was a lease it was for horticultural purposes : therefore, the provisions of Chap. V, T. P. Act, will not apply. Our attention has been drawn to a number of decisions where it has been held that the term

'agricultural purposes' is of a wide import and includes horticultural purposes as well. In my view, it is unnecessary to consider this aspect of the case as I am satisfied that this is not the case of a lease of the mango trees. The suit for half share in the fruits of the fourteen mango trees standing on Plot No. 6575, holding No. 85, was, therefore, cognizable by the Court of Small Causes. As to Arts. 13 and 35 (ii) of Sch. 2, I need say only a few words. Article 13 clearly has no application, because the payment was neither malikana, hakk, cess or other dues payable by a person by reason of his interest in the immoveable property, etc. As to Art. 35 (ii), there are decisions of this Court which show that mere wrongful cutting of a tree or taking of fruits from a tree is not necessarily penal so as to bring the person, who cuts the tree or takes the fruits, within the purview of the Penal Code; Therefore, the jurisdiction of the Small Cause Court is not at all barred. (See *Damodar Jha* v. *Baldeo Prasad*, 11 P. L. T. 741: (A. I. R. (17) 1930 Pat. 575) and *Bharosa Singh* v. *Jhauri Sao*, 161 I. C. 937 : (A. I. R. (23) 1936 Pat. 428). Moreover, the bar of Art. 35 (ii) of Sch. 2 was not pleaded in any of the Courts below, and the question is not purely one of law.

[8] I now turn to the other principal question for decision in these two cases; namely, whether the right to the half share in the fruits passed to the appellant. I have already stated that the appellant is a purchaser from Bharat Narain by means of a registered sale-deed, dated 14th April 1936. As to Bharat Narain's interest, the respondents themselves stated as follows in Para. 3 of their plaint :

> "That Babu Mahanand Sahai, the proprietor, settled the lands of Plot No. 6575 along with other lands with Babu Bharat Narain Singh on nakdi rent and treated him as tenant, and Babu Bharat Narain Singh entered into and continued to be in possession of the lands settled with him as a tenant."

Learned counsel for the appellant has contended that the interest of the landlord in the trees would pass to Bharat Narain with the settlement of the land, and has relied on *Shaikh Mohammad Ali* v. *Bolakee Bhuggut*, 24 W. R. 330. That was a suit to recover possession of a tree and of its produce where the defendants were admitted to be the plaintiff's tenant as to the land on which the tree stood. It was held that the tree was rightly presumed to be included in the lease, and that it was for the plaintiff to establish that he was entitled to remain in possession of the tree notwithstanding the lease. In *Jaigobind Singh* v. *Bhawani Singh*, 9 Pat. 401 : (A.I.R. (17) 1930 Pat. 382), it was held that a settlement of land carries with it, in the absence of express reservation, the right to fish when there is water on the land. Bharat Narain's lease was not in dispute; rather it was admitted by the respondents. Therefore, Bharat Narain was entitled to the half share of the fruits, and if he was so entitled, he had transferred the same to the appellant by means of the registered sale-deed referred to above. My view, therefore, is that the right to the half share in the fruits passed to the present appellant.

[9] The result, therefore, is as follows : The second appeal is allowed, the decisions of the Courts below are set aside and the suit of the plaintiffs-respondents will now stand dismissed. The appellant will be entitled to his costs throughout. The application in revision is also allowed and the order of dismissal passed by the learned Small Cause Court Judge on the finding that the suit is not maintainable is set aside. The Small Cause Court suit is remanded, and must now be heard on merits on the question as to the money value of the share payable to the present petitioner. This remand is necessary, as the learned Small Cause Court Judge did not arrive at any findings on this question, in view of his finding on the maintainability of the suit. The petitioner will get his costs but there will be no separate hearing fee as the second appeal and the application in revision have been heard together.

Reuben J.—I agree.

D.R.R. *Order accordingly.*

A. I. R. (37) 1950 Patna 288 [*C. N. 71.*]

SINHA AND NARAYAN JJ.

Motilal Sahu—Appellant v. *Ugrah Narain Sahu and others—Respondents.*

A. F. A. D. No. 1131 of 1947, 22-12 1949, from decision of A. Sub-J., Arrah, D/-9-4-1947.

T. P. Act (1882), S. 54 — Registered sale deed — Recital of payment of full consideration and delivery of possession — Non-payment of price—Possession and deed remaining with vendor — Title, if passes to vendee.

Where a registered sale deed recited the passing of full consideration and the delivery of possession to the vendee but it was found that actually not a farthing passed under the sale deed and the possession and the registered sale-deed remained with the vendor:

Held that the inference was irresistible that the intention of the parties was that title would not pass unless consideration money was paid. As the consideration was never paid title in the property remained with the vendor: A. I. R. (36) 1949 Pat. 364, *Rel. on.* [Para 5]

Annotation: ('45-Com.), T. P. Act, S. 54, N. 14, Pts. 12 & 13.

D. N. Varma and Kanhaiyaji — for Appellant.
G. P. Das, Shambhu Nath and B. C. Ghosh —for Respondents.

Sinha J. — This is a defendant's second appeal from the decision of the learned Additional Subordinate Judge of Arrah, dated 9th April 1947, reversing that of the Munsif of the same place dated 29th June 1946, in a suit for ejectment.

[2] The plaintiffs-respondents instituted the suit for possession in respect of the southern portion of survey plot No. 71 in khata No. 199 of village Nasriganj on the basis of a sale-deed admittedly executed by the defendant on 17th January 1941. The plaintiffs' case was that plaintiffs 2 to 4 having obtained the sale-deed executed another sale-deed in favour of plaintiff 1 on 2nd July 1943, and thereupon the plaintiffs came in possession of the disputed property. Subsequently, the defendant dispossessed plaintiff 1. Hence, the suit for possession and mesne profits as also for injunction.

[3] The suit was contested by the defendant on the ground that though he executed the sale deed on 17th January 1941, no consideration was paid for that deed with the result that the registered document remained with the defendant, and the transaction was never given effect to, as the intention of the parties was that the title would pass only upon payment of the consideration money.

[4] The trial Court dismissed the suit holding that the plaintiffs were never in possession because the contract between the parties appears to have been that the title would pass only upon payment of the consideration money, and as consideration never passed, title and possession both remained with the defendant. On appeal by the plaintiffs, the lower appellate Court has reversed that decision and come to the conclusion which, as will presently appear, is not very consistent. In part I of its judgment the lower appellate Court finds that on a true construction of the sale deed itself the inference was that the title would pass on the execution of the sale-deed ; but in the latter part of the judgment, it has observed that the contract between the parties was that possession will not be delivered over to the purchaser without the payment of the consideration money, and that on that ground the plaintiffs were not entitled to recovery of possession and mesne profits. Therefore, the lower appellate Court passed a conditional decree for possession on payment of the consideration money, namely, Rs. 1100.

[5] In this second appeal, the learned counsel for the defendant-appellant has contended, and in my opinion rightly, that the finding of the appellate Court is inconsistent, and that on a proper consideration of the sale-deed in question (Ex. A) the intention of the parties unmistakably was that the title would not pass until the money had been paid, and as the money remained unpaid for about three years, the contract fell through and the transaction was never given effect to. We have read the original document, the sale-deed of 1941, and the recitals are on the same lines as in the case which went before a Letters Patent Bench, in the case of *Md. Murtaza* v. *Abdul Rahman*, 27 Pat. 122: (A.I.R. (36) 1949 Pat. 364). It is clearly recited that for a consideration of Rs. 1100 the property was being sold as the money was very urgently needed; and that every farthing of the consideration money had been paid up and possession made over to the purchasers. But both the Courts below have found that possession was never delivered to the purchasers, nor was the registered sale-deed itself, which continued in the custody of the vendor. Both the Courts below have agreed in finding that not a single farthing passed under the document. Hence, the construction, which was put in the case refered to, is the construction which must be placed upon Ex. A. The inference, therefore, is irresistible that the intention of the parties was that title would not pass if money had not been paid, and as the money had not been paid, the title remained where it was. In other words, the transaction was a dead letter. That being so, the decision of the learned Munsif was more correct and the decision of the lower appellate Court was a confused one, inasmuch as the lower appellate Court has divorced the question of title from the question of possession. If title was to pass on the execution of the sale-deed, certainly the vendees were entitled to possession also. But the lower appellate Court has found that it was intended that possession would pass only upon payment of the consideration money. That, in effect, amounts to a finding that the contract between the parties was that title would pass to the vendees only upon payment of the consideration money. That not having been done, it is clear that title remained where it was, namely, with the vendor, the defendant-appellant. The lower appellate Court has rightly observed that the contract between the parties must be determined with reference to the sale-deed itself, and, on a reference to the deed itself, it is clear, as already pointed out, that the parties intended that the passing of the consideration was *sine qua-non* of the passing of the title.

[6] In view of these considerations, the judgment and decree passed by the lower appellate Court are set aside and those of the trial Court restored with costs throughout.

Narayan J.—I agree.

K.S. *Appeal allowed.*

A. I. R. (37) 1950 Patna 290 *[C. N. 72.]*

SINHA AND REUBEN JJ.

Laxmi Narayan Narayan Singh and another—Appellants v. *Dipen Rai and others —Respondents.*

A. F. A. O. No. 120 of 1948, D/- 31-1-1950, from an order of D. J., Saran, D/- 22-3-1948.

(a) Civil P. C. (1908), O. 22, Rr. 3, 12, O. 21, R. 90, Ss. 141 and 151 — Proceedings to set aside sale—Appeal—Abatement.

The proceedings to set aside a sale under O. 21, R. 90 are 'proceedings in excecution' within the meaning of O. 22 R. 12, and hence an appeal in a proceeding for setting aside a sale on the ground of fraud does not abate by death of the only appellant and absence of an application for substitution of his legal representative within 90 days under O. 22, R. 3. The appeal is still pending and an application for substitution, being really an application to be allowed to continue the proceedings, comes under the inherent powers of the Court and the Court can allow it in its discretion if it is satisfied that the application was filed within reasonable time: *Case law discussed*; A. I. R. (10) 1923 Pat. 29 and A. I. R. (8) 1921 Pat. 107, *Dissent.* [Paras 10, 12]

Even assuming that these proceedings are not 'proceedings in execution' provisions for abatement in O. 22 do not apply to them as they in terms apply to 'suits' or are made to apply to 'appeals' by R. 11. The only positive provision which makes the provisions applicable to any proceedings under the Code is S. 141 but, confined as it is to original matters in the nature of suits such as proceedings in probate, guardianship etc., it is not available to apply the provisions as to abatement to a proceeding under O. 21, R. 90. [Para 7]

Annotation: ('44-Com.) Civil P. C. O. 22, R. 12, N. 1, Pt. 28; S. 141, N. 2, 3.

(b) Civil P. C. (1908), S. 115, O. 21, R. 90—Proceeding to set aside sale—Revision.

Where in an appeal from a proceeding to set aside a sale, an appellant dies and the Court, under a mistaken view of law, applies O. 22, R. 3 and decides that the appeal has abated in absence of an application for substitution of legal representative within 90 days, it amounts to refusal to exercise jurisdiction vested in it and hence a revision lies against the order. [Para 13]

Annotation : ('44-Com.) Civil P. C. S. 115, N. 11, O. 21, R. 90 N. 51.

Krishna Prakash—for Appellants.

Harnarayan Prasad—for Respondents.

Reuben J.—This appeal is directed against an order of the District Judge of Saran, treating as abated an appeal directed against an order of the Munsif at Chapra setting aside an execution sale under O. 21, R. 90, Civil P. C.

[2] The sale which is challenged was held as long ago as 1942 in execution of a decree obtained in 1940, an area of 14 bighas 11 kathas being sold for Rs. 1,541. Delivery of possession was given in the year 1943. The application under O. 21, R. 90 was filed in October 1946, and was allowed by the Munsif on the finding that there was fraud in the conducting of the execution, by which fraud knowledge of the sale was kept from the judgment-debtor till within thirty days of the finding of the application, and that by reason of this fraud the judgment-debtor had suffered substantial injury. The decree-holder appealed against this decision. In October 1947, he died and an application for substitution in his place was filed by the appellants, the son and the widow of the said decree-holder, in March 1948, that is to say, beyond the period of ninety days. The application has been dismissed as time-barred.

[3] It is contended by the appellants that the provisions of Civil P. C. relating to abatement had no application to the appeal before the District Judge.

[4] I reproduce below the relevant rules of O. 22, Civil P. C.:

"3 (1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned and, on the application of the defendant, the Court may award to him the cost which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

11. In the application of this Order to appeals, so far as may be, the word 'plaintiff' shall be held to include an appellant, the word 'defendant' a respondent, and the word 'suit' an appeal.

12. Nothing in rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order."

Rule 4 relates to substitution when a defenant dies and R. 8 to the insolvency of a plaintiff.

[5] At first sight, it would appear that the effect of R. 11 is to apply R. 3 to the appeal before the District Judge. But it has been held by the majority of a Full Bench of this Court (Das, J. dissenting) in *Muhammad Taki* v. *Fateh Bahadur Singh* 9 Pat. 372 (A. I. R. (16) 1929 Pat. 565 that R. 11 must be read subject to R. 12. Therefore, the applicability of the provisions regarding abatement to an appeal depends upon their applicability to the original proceedings out of which the appeal has arisen. The learned District Judge held that a proceeding under O. 21, R. 90, is not a proceeding in execution of a decree and, therefore is not excluded from the operation of the provisions as to abatement by R. 12.

[6] This finding of the District Judge finds apparent support from the decision of Das and Ross JJ. in *Jagdish* v. *Sureshwar*, 6 Pat. L. J. 253: (A. I. R. (8) 1921 Pat. 107), dealing with the effect of a similar exemption as to proceedings in execution contained in O. 23, R. 4, of the Code, and an apparently direct case on

the point is *Gobind Nath* v. *Pratap Udai Nath*, 2 Pat. 243: (A. I. R. (10) 1923 Pat. 29) decided by Das and Adami JJ. The latter case arose out of an application under S. 213, Chota Nagpur Tenancy Act for setting aside a sale held in execution of a rent decree. This section corresponds to O. 21, R. 90, Civil P. C., but, unlike the Code of Civil Procedure, the Chota Nagpur Tenancy Act contains in S. 265, sub-s. (3), cl. (a), an express direction making the provisions of the Code of Civil Procedure relating to substitution and addition of parties applicable to "all suits, appeals and *proceedings* before the Deputy Commissioner" under the Act. The decision is, therefore, not a binding authority in the present case. In the course of this judgment, in the last mentioned case, Das J. reaffirmed his opinion already expressed in the case of *Jagdish* v. *Sureshwar*, 6 Pat. L. J. 253: (A.I.R. (8) 1921 Pat. 107) *(ante)* that an application for setting aside a sale cannot be regarded as an application in a proceeding in execution of a decree or order.

[7] Accepting this opinion as correct for the sake of argument, does it follow that the provisions regarding abatement necessarily apply to such a proceeding? In my opinion, it does not. A perusal of O. 22, R. 3, shows that in terms it relates to a suit. The same is the case with respect to Rr. 4 and 8. There is nothing in any of these three rules which would make them applicable to any proceeding other than a suit. Then, R. 11 provides that these provisions shall apply to appeals, the necessary amendments being deemed to have been made in them by the substitution of "appellant" for the word "plaintiff", "respondent" for the word "defendant" and "appeal" for the word "suit". Rule 12 merely excludes proceedings in execution of a decree or order from the application of the provisions. But it has no positive effect to apply the provisions to other proceedings. The positive provision is contained in S. 141 of the Code which I reproduce below :

> "The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction."

The corresponding provision in the Code of 1882 was S. 647, which ran as follows :

> "The procedure herein prescribed shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction other than suits and appeals."

A difference of opinion arose between the High Courts as to whether this provision covered proceedings in execution, and, by an amendment in 1892, an explanation was added to the section : "This section does not apply to applications for the execution of decrees which are proceedings in suits." In the meantime, a decision of the Allahabad High Court in *Fakirullah* v. *Thakur Prasad*, 12 ALL. 179 : (1890 A. W. N. 53) interpreting this section in its unamended form was taken to the Privy Council, and it was held by the Judicial Committee in *Thakur Prasad* v. *Fakir-ullah*, 17 ALL. 106 : (22 I. A. 44) that the section did not apply to proceedings in the suit, but it related to original matters in the nature of suits, such as, proceedings in probate, guardianship and so on. It is now well settled that S. 141, Civil P. C. must be interpreted in the same sense. It is not available, therefore, to apply the provisions as to abatement to a proceeding under O. 21, R. 90, even supposing that such a proceeding is not one in execution.

[8] I have noticed above that Rr. 3, 4 and 8 in terms relate to suits and speak of a suit, a plaintiff and a defendant. An application under O. 21, R. 90, may be made by the decree-holder or by any person entitled to a share in a rateable distribution of assets, or whose interests are affected by the sale. It is quite possible, therefore, that persons who do not answer to the description either of plaintiff or defendant will be impleaded as parties to such an application. How, are the provisions as to abatement to be applied to such parties? Are they to apply only to the case of the death or insolvency of a plaintiff and the death of a defendant and not to the case of the death or insolvency of other parties?

[9] It is true that the provision in O. 22, R. 12, expressly excluding proceedings in execution of decrees or orders, suggests *prima facie* that the provisions as to abatement are intended to apply to other proceedings. But the apparent difficulty created by this rule is, to my mind, dissolved by a study of the scheme of the Code. A suit, according to the scheme, passes through several stages. There is a stage prior to the decree in the Court of first instance. Then, there is the stage of appeal and, finally, the stage of execution. There may be various miscellaneous proceedings at all the three stages. So far as the first two stages are concerned, the Code has made it clear that the provisions as to abatement will apply, and the application of the provisions to the suit of the appeal, as the case may be, will to this extent affect any miscellaneous proceedings or appeals pending at that stage. It is as regards the third stage that R. 12 excludes proceedings from the application of the provisions as to abatement. Once the execution has been finally disposed of, the suit is at an end. The provisions of O. 22, thus, cover all the stages of a suit, and S. 141 of the Code which makes these provisions applicable to other proceedings of a civil nature. In the above analysis, I have not thought it necessary to complicate matters by considering how proceedings in revision or review

of judgment would fit into the different stages of a suit.

[10] According to my analysis, a proceeding under O. 21, R. 90, is a proceeding in execution. With all respect, I read the words "proceedings in execution" in R. 12 in a different sense from that adopted by Das J. in the case *Jagdish* v. *Sureshwar*, 6 Pat. L. J. 253 : (A. I. R. (8) 1921 Pat. 107) *(ante)* where he says :

> "Nor do I see how a proceeding for setting aside a sale can (quite apart from this consideration) be regarded as a proceeding in execution. Such a proceeding may eventually result in the execution proceeding being reopened, but, in my view, it cannot be regarded as a proceeding in execution. Execution proceedings ordinarily end with sale which results in satisfaction or part satisfaction of the decree."

He cites the Full Bench decision in *Abdul Gani* v. *Raja Ram*, 1 Pat. L. J. 232 : (A. I. R. (3) 1916 Pat. 216 F. B.) in support of this opinion. That was a decision as to whether an appeal lies from an order under O. 21, R. 95, Civil P. C. and involved only an interpretation of S. 47 of the Code. The question whether a proceeding under O. 21, R. 95, is a proceeding in execution was not considered. That it is a proceeding in execution would appear from a decision of Jenkins C. J. and Ray J. in *Hari Charan* v. *Manmatha Nath*, 41 Cal. 1 : (A. I. R. (1) 1914 Cal. 126), relating to proceedings under O. 21, Rr. 100 and 101, a decision which was approved by a Full Bench of this Court in *Bhubuneswar Prasad* v. *Tilakdhari Lall*, 4 Pat. L. J. 135 : (A. I. R. (6) 1919 Pat. 192). If an application under O. 21, R 100, which comes at a stage when the execution sale has become final, can be regarded as a proceeding in execution, then this description will apply with all the more force to a proceeding under O. 21, R 90, which attacks the sale and may result in the setting aside of the sale and the reopening of the execution proceedings. I would not interpret the words "proceeding in execution" as meaning a proceeding in which the applicant seeks to execute the decree, but a proceeding which relates to a period before the execution of the decree or order has been finally disposed of. Order 21, R. 90, comes at a stage before the sale has even been confirmed. Under R. 92, the sale does not become absolute unless the application under O. 21, R. 90, has been disposed of, or the period limited for the filing of such an application has expired without an application having been filed. In the present case, it is true that the application has come long after the execution was disposed of. But, that is not a difficulty which matters to my interpretation, for the Legislature, by S. 18, Limitation Act, has given sanction to the equitable view that where a party by the fraud of another has been kept out of the knowledge of his rights, the party defrauded will be put back in the position in which he would have been if he had not been so defended. In this sense, the execution, though long disposed of is re-opened and the application under O. 21, R. 90, is an application in execution.

[11] My analysis of the stages of a suit and my interpretation of the words "proceedings in execution" are supported by *Thakur Prasad* v. *Fakir-ullah*, 17 ALL. 106 : (22 I. A. 44 (P. C.)) *(ante)*, the line of reasoning adopted in which decision and in a number of subsequent decisions was followed by a Full Bench of this Court in *Bhubaneshwar Prasad* v. *Tilakdhari Lall*, 4 Pat. L. J. 135 : (A. I. R. (6) 1919 Pat. 192) *(ante)*. The Judicial Committee pointed out in that decision that the whole of Chap. 19, Civil P. C. (1882), consisting of 121 sections is devoted to "procedure in executions." This Chapter corresponds to Part II comprising Ss. 36 to 74, Civil P. C. (1908), and O. 21 of Sch. 1 and the whole of the Sch. 3 to this Code. Proceedings under these provisions, therefore, should be regarded as proceedings in execution. I would also cite the observations of Das J. in *Muhammad Taki* v. *Fateh Bahadur*, 9 Pat. 372 at p. 381 : (A. I. R. (16) 1929 Pat. 565 (F. B.)) :

> "Reading the Code as a whole, it seems to me that there is a procedure for suits, a procedure for execution, and a procedure for appeals; and Rr. 3, 4 and 8 apply to suits by their own force and to appeals by force of R. 11; but they do not apply to proceedings in execution as contemplated by Chap. (Part.?) II and O. 21 of the Code."

With great respect I would suggest that the view taken by Das J. in *Jagdish* v. *Sureshwar*, 6 Pat. L. J. 253 : (A. I. R. (8) 1921 Pat. 107) *(ante)*, forces him into a decision which is not consistent with the provisions of the Civil Procedure Code. In the case before him, in an appeal against an order under O. 21, R. 90, an application was made by the appellant to the High Court to record a compromise to the effect that on his paying a certain sum into Court by a particular date the auction sale which was the subject-matter of the litigation should be set aside. In the opinion of his Lordship, the proceeding not being one in execution, the provisions of O. 21, R. 2 were not applicable, but the compromise could be recorded under O. 23, R. 3. Order 23, R. 3, on its terms relates to the adjustment of a suit or the satisfaction of the plaintiff by the defendant in respect of the whole or part of the subject-matter of a suit. When the matter arose at the stage of the proceedings under O. 21, R. 90, the suit had terminated in a decree and the rights of the plaintiff whatever they were had merged in the decree. The question of the adjustment of the suit, therefore, could no longer arise, and the provisions of O. 21, R. 2, would appear to have been more properly applicable. This view as urged by Mr. Das J. as he had by then become, at p. 518 of *Harihar Prasad* v. *Gopal Saran*, 14 Pat. 488 : (A. I. R. (22) 1935 Pat. 385).

[12] For the reasons which I have given above, I consider that the rules regarding abatement contained in O. 22, Civil P. C., did not apply to the appeal before the District Judge. The position, therefore, was that the appeal did not abate by reason of the death of the appellant and the absence of an application for substitution within the period of ninety days, thereafter, and was still a pending appeal at the time when the application for substitution was filed. As has been explained in *F. A. Mcnaught* v. *Mt. Saraswati Thakurain*, 13 Pat. 777 : (A. I. R. (22) 1935 Pat. 117), such an application is really an application for being allowed to continue the proceeding (*vide* also *Mt. Gulab Kuer* v. *Md. Zaffar Hussan Khan*, 6 Pat. L. J. 358 : (A.I.R. (8) 1921 Pat. 180). There is no express provision of law under which such an application can be entertained. This is done under the inherent powers of the Court, and this jurisdiction is discretionary. It was, therefore, open to the District Judge in the present case to consider the application and, if he was satisfied that the application was filed within a reasonable time of the death of the appellant, to permit the applicants to continue the appeal. For the purposes of the present case, it is not necessary to consider what would be the position if the proceeding in execution in which substitution is sought is no longer pending, for instance, having been dismissed for default in prosecution following the death of the original applicant, in which case the question would arise whether the Court is *functus officio* and cannot entertain such an application.

[13] The question as to whether in the present case an appeal lies to this Court against the order passed by the District Judge has not been raised before us. It is not necessary to consider the point as this is obviously a case in which, supposing an appeal does not lie, we must interfere in revision, the ground of interference being that the District Judge under a wrong impression as to the correct view of the law has refused to exercise jurisdiction which was vested in him.

[14] In the result, I would allow this appeal, set aside the order of the District Judge, and remand the case to the District Judge to be dealt with in the light of the above remarks. The costs in the case will follow the result. The hearing fee will be assessed at two gold *mohars*.

Sinha J. — I agree.

D.R.R. *Appeal allowed.*

A. I. R (37) 1950 Patna 293 *[C. N. 73.]*

DAS J.

Mohan Jha and other—Appellants v. *Shivadayal Prasad and others — Respondents.*

A. F. A. D. No. 1039 of 1948, D/-16th January 1950, from a decision of 2nd Addl. Sub-J., Darbhanga, D/-31st March 1948.

Tenancy Laws—Bihar Tenancy Act (VIII [8] of 1885), Ss. 103B, 102—Entry in record of rights not one of particulars required by S. 102—Presumption — Finding — Error of record — Civil P. C. (1908), S. 100 — Evidence Act (1872), S. 35.

An entry in the remarks column of the record of rights with regard to certain plots that a suit was brought in respect of those plots by a plaintiff on the strength of sale-deed and it was dismissed does not carry with it any statutory presumption of accuracy under S. 103 (B), Bihar Tenancy Act, the entry being not one of the particulars required to be entered under S. 102, and the finding of the lower appellate Court on the basis of such an entry that the sale-deed was not valid or operative being arrived at by committing an error of record is not binding in second appeal. [Para 5]

Annotation : ('44-Com.) C. P. C., Ss. 100, 101, N. 32, 53 ; ('46-Man.) Evi. Act, S. 35, N. 3, 12.

Rati Kant Choudhury and Baidya Nath Jha —for Appellants.

Sirinath Singh and T. Pd. — for Respondents.

Judgment.—This is a second appeal by defendants 2, 3, 6 and heirs of defendant 5 from the decision of the learned Additional Subordinate Judge of Darbhanga, dated 31st March 1948, reversing in part the judgment and decree of the learned Munsif of Madhubani, dated 26th May 1947, in a suit for a declaration of title and possession of 1 bigha, 12 kathas and 1½ dhurs of land forming part of two plots 10630 and 10631, and of plot No. 6661 in its entirety. The case of the plaintiffs-respondents was that they had purchased the lands from two persons Faturi Jha and Bulan Jha, defendants 9 and 10 in the auction. The sale deed in favour of the plaintiffs-respondents was dated 18th of November 1943. There were three persons named Ramji Jha, Nanda Jha and Durgadut Jha. Durgadut died issueless. Ramji had two sons, Markande Jha and Chiranjib Jha. Nanda had a son called Lambodar Jha. Admittedly, Lambodar Jha separated from Markande Jha and Chiranjib Jha. The case of the plaintiffs-respondents was that there was a partition between Markande and Chiranjib also, and as a result of such partition, the three plots in question fell to the share of Chiranjib Jha. The plaintiffs-respondents alleged that they had purchased two thirds share from Faturi Jha and Bulan Jha, grandson and son respectively of Chiranjib Jha. Defendant 7 was the widow of Chiranjib Jha, and defendant 8 was the widow of another son of Chiranjib called Kulanand Jha. The main contest was by defendants 1st party. There were two sets amongst defendants 1st party. One set consisted of defendants 1 and 4, and the other set of defendants 2, 3, 5 and 6. The present appellants represent the second set. On behalf of these defendants, the plea taken was that the disputed plots were the joint property of Markande Jha and Chiranjib Jha. It was alleged that Markande and Chiranjib were members of a joint family, and Markande was the karta. Markande executed two registered sale-deeds, one on 8th January 1892, and the other on 16th January 1892. The Courts below concurrently found that the sale-deed of 8th January 1892, related to plot No. 10631, and the other sale-deed of 16th January 1892, related to plots 10630 and 6661. The defendants first party who relied on these two sale-deeds, said that Markande as karta of the family having sold the lands to the defendants, the plaintiffs-respondents had acquired no title by reason of the sale-deed in their favour executed on 18th November 1943.

[2] The learned Munsif, who dealt with the suit in the first instance, held that Markande and Chiranjib were members of a joint family who owned and were in possession of the disputed plots, and Markande was the karta of the joint family. He further held that the defendants had acquired good title by the two sale-deeds of 1892, both of which were valid and operative. He held that the defendants were in possession since 1892. On these findings, the suit was dismissed. The learned Subordinate Judge affirmed the finding of the learned Munsif on the question of Markande and Chiranjib being members of a joint family of which Markande was the karta. He held, however, that only one of the sale deeds, namely, that executed on 8th January 1892, was valid and operative. He held that the other sale-deed dated 16th January 1892, was not valid or operative. He further found that the vendors of the plaintiffs-respondents and co-sharers were in possession of the disputed plots on the day on which the sale-deed in favour of the plaintiffs-respondents was executed. On these findings, he gave a decree for joint possession to the plaintiffs respondents with regard to the two plots covered by the sale-deed of 16th January 1892.

[3] Learned counsel for the appellants has taken three substantial points before me. Firstly, he has contended that the learned Subordinate Judge did not consider how the plaintiffs respondents acquired any title by a purchase from two members of the family when other members of the joint family had not joined; nor did he come to any finding that the persons, who executed the sale-deed in favour of the plaintiffs-respondents, were acting on behalf of the others either as the karta of the family or otherwise. It appears that the learned Subordinate Judge merely found that the sale deed in favour of the plaintiffs respondents was for consideration. Earlier he had affirmed the finding of the learned Munsif that Markande and Chiranjib were members of a joint family who owned and possessed the disputed plots. Markande left sons. Chiranjib also left heirs other than those who transferred to the plaintiffs-respondents. If all these persons constituted a joint family under the Mitakshara law, no one member would have any specified share in the property. The question how the plaintiffs respondents acquired any title by a purchase from two members of the family only has to be considered and decided. It is not known whether those two members, who sold to the plaintiffs respondents, were junior members in the family or not. If they were junior members, they would not be competent to sell any part of the joint family property, and the purchaser would acquire no title by a purchase from junior members. These questions have to be considered and decided in connection with the title of the plaintiffs respondents. The learned Subordinate Judge has not considered these questions.

[4] Secondly, it is contended that the findings of the learned Subordinate Judge with regard to the possession of the plaintiffs-respondents or their vendors is not based on any evidence in the record. The learned Subordinate Judge, it appears, has rejected the oral evidence as to possession of both parties as unsatisfactory. He has referred to some documents which the present-appellants produced to show their possession, such as rent receipts granted in the name of Markande. He has not referred to any documentary evidence on the side of the respondents which would show that the respondents came in possession in 1943, or that their predecessors-in-interest were in possession before 1943. The learned Subordinate Judge seems to have arrived at the finding of possession merely on the presumption that possession follows title. The finding is really based on no evidence, and cannot be accepted as binding in second appeal.

[5] Thirdly, it is contended that with regard to the sale-deed of 16th January 1892, the learned Subordinate Judge has committed an error of record, and has further misdirected himself with regard to the presumption arising out of an entry made in the record-of-rights. In the record-of-rights with regard to plots 10630 and 6661, there is a note in the remarks column to the effect that a suit, numbered 172/106 dated 3rd April 1903, was brought in respect of these two plots by a plaintiff on the strength of a kebala, and the suit was dismissed. The name of the plaintiff is not mentioned. The date of the sale-deed is not given. The learned Subordinate Judge thought that this entry in the record-of-

rights had a statutory presumption of correctness under S. 103B (3), Bihar Tenancy Act. He further held that the plaintiff referred to in the entry meant Biseswar Jha, the transferee under the sale-deed of 16th January 1892. In my opinion, the learned Subordinate Judge was wrong in thinking that there was any statutory presumption of accuracy attaching to that particular entry in the remarks column. The entry about a suit in the Civil Court is not one of the particulars required to be entered under S. 102, Bihar Tenancy Act. In my opinion, the entry was not an authorised entry, and does not carry with it any statutory presumption of accuracy under S. 103B, Bihar Tenancy Act; nor was it an entry made under S. 107 (2) of the said Act. Furthermore, the entry by itself does not show who had unsuccessfully brought the suit regarding those two plots on the strength of a sale-deed. The learned Subordinate Judge said that Janak Jha, a nephew of Biseswar Jha, who had been examined on behalf of the appellants, did not say that Biseswar Jha had not brought any such suit as was referred to in the remarks column of the record-of-rights. From this failure to make a denial, as the learned Subordinate Judge puts it, he concluded that Biseswar Jha was the plaintiff. Learned counsel for the appellants has drawn my attention to the evidence of Janak Jha, D. W. 6. In the examination in chief, this witness had stated very clearly that Biseswar Jha had never filed any case in respect of the disputed lands. The learned Subordinate Judge, therefore, committed an error of record when he said that Janak Jha had not denied the entry in the remarks column of the record of rights. This error of record vitiates, to a large extent, the finding of the learned Subordinate Judge. Therefore, the finding of the learned Subordinate Judge with regard to the validity of the sale deed of 16th January 1892, is vitiated on two substantial grounds: firstly, erroneously thinking that there is a statutory presumption of accuracy attaching to the particular entry in the remarks column of the record of rights; and secondly by committing the error of record mentioned above. That finding cannot, therefore, be accepted as binding in second appeal.

[6] The result, therefore, is that the appeal is allowed, the decision of the learned Subordinate Judge is set aside and the case must now go back on remand to the learned Subordinate Judge for a fresh consideration of the evidence and a decision in accordance with law in the light of the observations made above. Costs of this appeal will abide the result of the fresh decision.

D.H. *Appeal allowed.*

A. I. R. (37) 1950 Patna 295 [*C. N. 74.*]

MEREDITH C. J. AND SARJOO PRASAD J.

Bageshwari Devi and others — Petitioners v. *Indian Union.*

Criminal Revn. No. 1549 of 1949, D/-16th February 1950, against order of A. S. J., Gaya, D/-23rd September 1949.

(a) Penal Code (1860), S. 441 — Intention — Proof.

In order to constitute criminal trespass, the prosecution must prove that the accused had the intention to intimidate, insult or annoy when he made the entry. A mere knowledge that the trespass is likely to cause insult or annoyance does not amount to an intent to insult or annoy within S. 441. Where certain persons re-occupy the lands acquired from them by the Government in the belief that the lands would be restored to them on return of the compensation money, they cannot be held guilty under S. 441 in the absence of any criminal intention as required by the section. [Para 4]

Annotation: ('46-Man.) Penal Code, Ss. 441 and 447, N. 1.

(b) Criminal P. C. (1898), S. 522 — Dispossession by show of force.

An order for restoration under S. 522 can be passed in favour of a person only if he has been dispossessed by use of criminal force. Otherwise, the order would be illegal. [Para 5]

Annotation: ('49-Com.), Cr. P. C., S. 522, N. 4, Pts. 1 and 2.

(c) Criminal P. C. (1898), S. 239 (a) — Same offence — Same transaction.

Where several persons commit severally acts of trespass without any community of purpose, it cannot be said that the acts are committed in the course of the same transaction so as to justify their joint trial under S. 239 (a). [Paras 6 and 8]

Annotation: ('49-Com.) Cr. P. C. S. 239, N. 4.

Madan Mohan Prasad — for Petitioners.
Government Advocate — for the State.

Sarjoo Prasad J. — This application is on behalf of 34 petitioners who have been convicted by a Magistrate, vested with first class powers of Gaya under S. 447, Penal Code, and sentenced to a fine of Rs. 200 each, in default, to undergo simple imprisonment for 1 month each. The order of conviction and sentence has been affirmed by the Additional Sessions Judge of Gaya, Mr. N. Ahmad.

[2] The prosecution case is that the lands of village Kharanti, to which the petitioners belong, with the houses of the petitioners were acquired in connection with the construction of an aerodrome by Government sometime in the year 1942-43 and compensations were paid to the petitioners in respect of those acquisitions. The petitioners had evacuated the houses, and had gone and settled in a nearby locality. Subsequently there was an outbreak of fire, and houses of these petitioners, which they had constructed later after acquisition of their houses in the village, were burnt to ashes and destroyed by the fire in the year 1946. Thereafter, these petitioners took shelter in the verandah of structures which had

been constructed by the military at the site of the village and, which, after the termination of the war, had been lying vacant. Subsequently, it is alleged that they started building houses on the old sites, and when the site was inspected by one T. S. Jotwani on 5th March 1948, he noticed that the villagers generally re-occupied their old sites, and he submitted a report of this fact to the Collector for necessary action. The Collector then directed that an enquiry should be made by the land acquisition officer, and an enquiry was accordingly made and a report submitted to the Collector. This report is Ex. 6 in the case. It is alleged by the prosecution that as the petitioners failed to vacate the premises, they were liable to be prosecuted under S. 447, Penal Code. When the matter came before the Subdivisional Magistrate, he issued notice to the petitioners to show cause why they should not be prosecuted for trespass. On 11th June 1948, cause was shown by the petitioners. In that show-cause petition they alleged that they had constructed their houses on the Government acquired lands with the permission and consent of the then land acquisition officer, Mr. Sanyal, after their houses had been destroyed by fire in the year 1946. They say in Paras. 11 and 12 of their petition that they approached Mr. Sanyal for the return of lands as the war was over and the lands acquired by the Government were lying useless while the petitioners were in urgent need of the lands which Government had acquired from them, and that Mr. Sanyal, sympathising with their helpless condition, allowed them orally to erect their dwellings on the old sites of their houses and directed them to refund the compensation received by them minus 15 per cent. on receipt of notices, and gave assurance that he would get every thing done in communication with the Government. The petitioners further went on to say that on the oral order of Mr. Sanyal. the then land acquisition officer, they constructed their houses on the old sites, though the said sites had been acquired by the Government about a year ago. They further stated that they had submitted a long application before Mr. Sanyal for fixing the amount of compensation to be returned by them to Government, but on which application no action appears to have been taken. They accordingly prayed that they should not be prosecuted for trespass, and they further alleged that they had made a representation to the higher authorities including the military authorities for consideration of this question of settlement of the lands with them. On this cause being shown before the learned Subdivisional Magistrate, the learned Magistrate observed, as it appears from the order-sheet dated 11th June 1948, that

> "I think it is at best a case of civil trespass, and the point being doubtful whether the opposite parties were permitted or were under a *bona fide* impression of having been permitted, though actually not so, I do not think criminal prosecution should lie. The proceeding should, therefore, be dropped."

It appears, however, that after some discussion with the District Magistrate, the petitioners' prosecution commenced ending in their conviction and sentence as stated by me above.

[3] In support of this petition, three points have been urged by learned counsel for the petitioners. The first contention is that there is nothing to show that there was any criminal intent on the part of the petitioners, and, therefore, there has been no offence committed under S. 447, Penal Code. The second contention is that there should have been no order for restoration of the possession passed by the learned Magistrate under S. 522, Criminal P. C., as the said section had no application to the facts of the case and the third point raised is that there should not have been a joint trial of all the petitioners as there was no community or identity of purpose.

[4] In regard to the first contention, it seems pretty clear from the circumstances of this case that there was no question of any criminal intent. Section 441, Penal Code requires that in order to constitute "criminal trespass" the act must have been done with intent to commit an offence or to intimidate, insult or annoy any person in possession of any such property." This criminal intent has of course to be gathered from the circumstances of each case. In this case all that I find is that these petitioners, whose houses and lands had been acquired previously by Government for the purpose of an aerodrome, had returned to this place because their houses had been destroyed by fire and they were allowed to stay in the military structures which had been constructed by Government. It may be that they may have no right to construct buildings upon the old sites, but still it could not be said that there were any criminal intention in building upon those lands. Their case is that they did so on the faith of some understanding given to them by Mr. Sanyal, the then land acquisition officer. They may not be perfectly right in assuming that they had been allowed to build their houses upon the old sites, or that they had any legal right to do so. But still it could not be said that they had any criminal intent in that regard. It has been pointed out in various cases that in order to constitute criminal trespass it must be essentially proved that the person actually intended to annoy the owner and that by such conduct on the part of the accused person annoyance was caused; the mere knowledge that by such conduct the trespass is likely to cause annoyance may not be sufficient to impute cri-

minal intent on the part of the person who commits the act of trespass. In *Queen-Empress* v. *Rayapadayachi*, 19 Mad. 240, it has been held that though the accused may have known that, if discovered, his act would be likely to cause annoyance to the owner of the house, he cannot be said to have intended either actually or constructively to cause such annoyance. It is one thing to entertain a certain intention and another to have the knowledge that one's act may possibly lead to a certain result. Section 441 is so worded as to show that the act must be done with intent and does not, as other section do, embrace the case of an act done with knowledge of the likelihood of a given consequence. The same view has been expressed in a later Full bench of the same High Court in *Vullappa* v. *Bheema Row*, 41 Mad. 156 : (A. I. R. (5) 1918 Mad. 136 : 19 Cr. L. J. 162). It has been held by the Full Bench in that case that :

> "Trespass is an offence under S. 441, Penal Code, only if it is committed with one of the intents specified in the section, and proof that a trespass committed with some other object was known to the accused to be likely or certain to cause insult or annoyance is insufficient to sustain a conviction under S. 448, Penal Code."

Again, in another case in *Emperor* v. *Baldewa*, 56 ALL. 33 : (A. I. R. (20) 1933 ALL. 816 : 35 Cr. L. J. 947) it was observed that every unlawful act was not necessarily an offence, and the mere entry without right upon another's land did not render the accompanying trespass a criminal trespass. There is a distinction between the phrases "with intent" and "with knowledge"; it must be proved by the prosecution that the accused had the intention to intimidate, insult or annoy when he made the entry, and it is not enough that the prosecution should ask the Court to infer that the entry is bound to cause intimidation, insult or annoyance. A mere knowledge that the trespass is likely to cause insult or annoyance does not amount to an intent to insult or annoy within S. 441, Penal Code. Now, it is contended by the learned Government Advocate appearing on behalf of the State that there is a definite finding by the learned Additional Sessions Judge to the effect that there was a criminal intent on the part the petitioners. He referred us to the passage in the judgment of the learned Sessions Judge which runs as follows:

> "The evidence shows that they were repeatedly asked to vacate, but, in spite of that, much to the annoyance of the authorities they continued to hold on. The very act of recapturing their old sites in the circumstances of the case was an offence coming within the mischief of the definition of criminal trespass."

This finding is challenged by the petitioner. Now, we have tried to examine the record from this point of view as to whether in spite of being repeatedly asked the petitioners refused to vacate the sites in question or to desist from reoccupying the same. The learned Government Advocate has referred us to the evidence of Mr. Sanyal on the point; but that evidence only shows that Mr. Sanyal merely told the petitioners not to continue to build up their dwellings on the lands and this he did at a time when Mr. Sanyal had ceased to be the land acquisition officer. That does not mean that the petitioners were warned that if they continued to go on building, they would be committing an act of trespass on the land; nor does it show that the petitioners were repeatedly asked not to build. He then draws our attention to another statement in the evidence from which it appears that there was some service of notice upon the petitioners to vacate the land, but no such service appears to have been proved in this case. On the other hand, the report (Ex. 6), submitted to the District Magistrate, definitely states that :

> "it is clear from his report (meaning thereby the report of the amin who went to the spot along with the then land acquisition officer, Mr. Sanyal) that hope was held out to the tenants of a chance of the restoration of their old lands, and the condition on which such restoration could take place, if at all, was also intimated to them, viz. the refund of the compensation money minus 15 p. c."

This evidently shows that the petitioners were acting on the faith of some understanding given to them that the lands would be restored to the petitioners on payment of the compensation money to Government. In my opinion, therefore, the learned Subdivisional Magistrate had rightly held that at best it should be a case of civil trespass, if at all, and it was not a case where the petitioners could be held criminally liable. In fact, the learned Additional Sessions Judge does not seem to be very sanguine in regard to that part of his finding, and, therefore, goes on to observe that the very act of recapturing their old sites would constitute a case of criminal trespass. For the reasons which I have given above, there was no act of criminality when they originally entered upon the site; nor could it be said to be an act of criminality because they continued to be on the site in the belief that they would get settlement of their old lands on payment of compensation. In fact, we are told that their application is still pending before the higher authorities and has not been finally disposed of. In these circumstances it was indiscreet to launch a criminal prosecution against the petitioners.

[5] The next point urged is about the application of S. 522, Criminal P. C. The language of S. 522 is absolutely clear. I fail to understand how the learned Magistrate could act under this provision of the law. Section 522 applies where a transaction is attended by criminal force or show of force or criminal intimidation and it appears to the Court that by such force any

person has been dispossessed of any immovable property. It is only in such a case that under S. 522 the Court may, if it thinks fit, order that the person dispossessed may be restored to possession. There is no such case here of any dispossession or show of force and criminal intimidation. At any rate, there is no such finding on the point anywhere in the record. That being so, the order passed under S. 522, Criminal P. C., is clearly illegal.

[6] Lastly, it has been urged that the joint trial of the petitioners is also illegal. Now, it may be that the act of trespass, if any, committed by the petitioners individually may be similar. But unless it is shown that there was some identity or community of object amongst them, it could not be said that their offence came within the purview of S. 239 (a), Criminal P. C.; in other words, it could not be said that the act of trespass, if any, committed by each individual accused was committed in the course of the same transaction. If any authority is needed on the point, I may refer to the decision in *Samiullah Sahib* v. *Emperor*, 50 Mad. 735 : A. I. R. (14) 1927 Mad. 177 : (27 Cr. L. J. 1381) which was a case where a number of persons were all separately engaged in fishing, and were merely several poachers gathered in the same place at the same time, and there was no evidence of any common object or common intention. All those persons were tried together for offences under Ss. 379 and 447, Penal Code as having been committed in the course of the same transaction, and convicted. It was held by Jackson J. sitting singly that the cases ought not to have been jointly tried, and that such joint trial was not a mere irregularity, but vitiated the trial altogether. He accordingly set aside the conviction of the petitioners in that case. The illustration which has been given by the learned Judge in the course of his discussion of the matter is quite illuminating. He says:

> "The terms of the section itself offer the best solution of these problems. Were the offences committed in the course of the same transaction; or, in other words, were the offenders putting through the same thing? *A*, *B* and *C* travel in the same train without tickets; the purpose of each is to be conveyed without paying; it is a similar purpose but not identical. because *A* does not intend that *B* and *C* shall escape paying and so with *B* or *C*. They cannot be jointly tried."

There is obviously a difference between a similarity of purpose and identity of purpose, and unless it could be shewn that there was an identity of purpose or community of purpose, it could not be said that the offence committed by all the accused was in the course of the same transaction. The position may have been different if all of them combined together to do a certain illegal act. For instance, if all the three persons in that illustration had, with the common purpose, intended to travel without tickets and without any payment to the railway authorities, the purpose would be identical. But in the absence of any evidence of common intention or communinty of purpose or conspiracy, it could hardly be said that the individual act of trespass committed by one accused was in the course of the same transaction as an act committed by another accused. In that view of the matter, I would hold that the joint trial of the accused persons was also illegal. In any event, in view of my finding that there was really no criminal intent on the part of the petitioners, I hold that the petitioners have been wrongly convicted of an offence under S. 447, Penal Code. I accordingly acquit the petitioners and set aside the order of conviction and sentence passed against them, and direct that the fine, if paid, should be refunded. The application is, therefore, allowed.

[7] **Meredith C. J.** — I agree that the petitioners have been wrongly convicted, and must be acquitted.

[8] With regard to the question of joint trial, I am of opinion that there are no materials in this case upon which a finding can be based that the re-occupation by the various petitioners of their various holdings all formed part of the same transaction. For all we know the different petitioners, who apparently re-occupied their lands at intervals over a fairly long period, may have acted quite independently, or one petitioner may have decided later to rebuild on the old site, because he saw that the other petitioners had already rebuilt on their old sites, and there had been no protest or interference : in other words, the intention of each petitioner would merely be to rebuild his own house on his own land, but not necessarily to further rebuilding by all the petioners of their houses on their lands. The case was not, in my opinion, one which could fall either within S. 239 (a) or S. 239 (d), and it is not contended that there is any other clause of S. 239 which is applicable.

K.S. *Accused acquitted.*

A. I. R. (37) 1950 Patna 298 *[C. N. 75.]*

REUBEN AND JAMUAR JJ.

Lal Suraj Prasad — Appellant v. *Ram Charitar Singh and others — Respondents.*

A. F. A. D. No. 279 of 1946, D/- 18-1-1950, from decision of Dist. Judge, Motihari, D/- 4-12-1945.

(a) Civil P. C. (1908), O. 41, R. 31 — Judgment of affirmance — Contents of.

A judgment of an appellate Court should contain the grounds on which its decision is based. It is not sufficient for the appellate Court to state in general terms that it agrees with the reasoning of the subordinate Court;

although in a judgment of affirmance it is not necessary that the appellate Court should repeat all that has been said by the subordinate Court, there must be a sufficient discussion to show that it has applied its own mind to the evidence. [Para 8]

Annotation : ('44-Com.) Civil P. C., O. 41, R. 31, N. 3.

(b) Civil P. C. (1908), S. 100—Concurrent finding of fact — Interference.

Where the appellate judgment after carefully considering the evidence on the point confirms the trial Court's finding as to farzi nature of a sale, the finding will not be interfered with in second appeal even though no reasons are given for the decision. [Para 8]

Annotation : ('44-Com.) Civil P. C., Ss. 100 & 101, N. 54.

(c) Limitation Act (1908), Arts. 142 & 144 — Co-owners — Adverse possession.

An uninterrupted sole possession by one co-owner of undivided property does not by itself amount to ouster of his co-owners and is not sufficient to establish his adverse possession against them. This principle will apply even more strongly where the co-sharer is in possession as representing all the co-sharers. [Para 11]

Annotation : ('42-Com.) Limitation Act, Arts. 142 & 144, N. 35, Pts. 1 and 13.

C. P. Das, K. P. Upadhyaya and Rameshwar Misra — for Appellant.

L. K. Jha and Rameshwar Choudhri — for Respondents.

Reuben J.— This is an appeal by defendant 4 against an order of the District Judge of Motihari, reversing a decision of the Subordinate Judge of the same place.

[2] The suit was brought by the plaintiff-respondent for partition of 21 bighas purchased by him on 10th October 1941, from defendants 6 and 7 out of their half share of a tenancy of 61 bighas 7 kathas in village Jagdishpur, taken in settlement from the Turkaulia Factory on 13th February 1922, by their father Kripal Narain Singh and certain other persons. According to the plaintiff, the settlees were (1) Kripal Narain, (2) defendants 2 and 3, who are brothers (3) Chaturbhuj Sahay deceased, father of defendants 5 and (4) Jadulal deceased, father of defendant 1, whereas defendant 4 denies that Chaturbhuj and Jadulal had any interest in the property. The Courts below did not find it necessary to investigate this point, as they were merely concerned with the share of Kripal Narain and the parties were in agreement that his share was one-half.

[3] In the year 1929 the tenancy was sold in execution of a certificate for arrears of rent filed by the Battiah Estate, to whom the landlord's interest had by then passed, and was purchased by defendant 4, the brother-in-law of defendant 3. The case of the plaintiff is that this sale was brought about by the fraud of defendants 2 and 3, who were managing the property on behalf of all the co-sharers, and that they purchased it themselves in the *farzi* name of defendant 4, that the possession of defendants 2 and 3 remained unchanged and that, by reason of the fraud, the purchase enured to the benefit of all the co-sharers. It was further their case that, the certificate have been filed against defendant 2 alone, the sale had the effect of a money sale ; therefore, only the share of defendant 2 passed, and the share of Kripal Narain remained unaffected.

[4] The defence of defendant 4 was that his purchase was genuine and on his own account, that Kripal Narain surrendered his interest in 1925 and, therefore, his sons had no interest which they could transfer by the sale in favour of the plaintiff and further that, after the surrender by Kripal Narain, the tenancy was wholly represented by defendant 2 and so the certificate sale operated as a rent sale. He also attacked the genuineness of the sale in favour of the plaintiff.

[5] The Subordinate Judge disbelieved the story of surrender. He found that Kripal Narain and defendant 2 were at first recorded in the landlord's papers as tenants in respect of the tenancy and, after the death of Kripal Narain, his son defendant 6 was mutated in his place, that, therefore, defendant 2 did not represent the tenancy and the certificate sale left the share of Kripal Narain unaffected. He held that defendant 4 was merely the *farzidar* of defendants 2 and 3, and that the sale was brought about by defendants 2 and 3 in fraud of their co sharers. He further held to be fictitious a *zarpeshgi* deed executed by defendant 4 in favour of defendant 9 in respect of this tenancy. According to him, the possession of defendants 2 and 3 as managing the property on behalf of all the co-sharers remained unchanged by these transactions. He dismissed the suit, however on the finding that the sale in favour of the plaintiff was itself fictitious.

[6] The District Judge accepted all the findings of the Subordinate Judge in favour of the plaintiff. He came to a contrary conclusion on the question of the genuineness of the sale-deed in favour of the plaintiff, and, therefore, reversed the decree of the Subordinate Judge and decreed the suit.

[7] The appeal has been pressed on three grounds: 1. That the decision of the District Judge is defective as he has not come to a definite finding regarding the *farzi* nature of the purchase by defendant 4. 2. That defendant 2 represented the holding, and the sale operated to transfer the interest of Kripal Narain's sons. 3 That, even on the findings of the District Judge, the plaintiff was not in present possession of the property and is not entitled to partition.

[8] The impression that the District Judge was not definite about the *farzi* nature of the purchase by defendant 4 is created by his discussing at some length what, in view of the certificate sale being a money sale, the position would be if the purchase was really by defendant 4. At p. 41 of the paper book, however, the District Judge has come to a definite conclusion accepting the Subordinate Judge's finding of *farzi*. The defect lies not in the failure to come to a definite finding but in the District Judge's failure to set out his reasons for his decision on this point. The parties are entitled to a consideration by the appellate Court of the evidence on the points raised by them, and judgment should contain the grounds on which the decision of the appellate Court is based. It is not sufficient for the appellate Court to state in general terms that it agrees with the reasoning of the Subordinate Court; although, in a judgment of affirmance, it is not necessary that the appellate Court should repeat all that has been said by the Subordinate Court, there must be a sufficient discussion to show that it has applied its own mind to the evidence. Fortunately, the point has been dealt with by the Subordinate Judge very completely and carefully, and on a perusal of the judgments as a whole I do not think an interference is called for.

[9] Regarding the question of representation it is pointed out that, according to the plaint, the arrangement among the co-sharers was that defendant 2 would manage the property, that he would be responsible for paying the rent and other dues, that he would meet the other expenses, and that the balance of the income after meeting all these demands would be shared among the co-sharers. We are asked to treat this arrangement as holding out to the landlord that defendant 2 represented the tenancy. I do not think this view can be taken in face of the fact that the landlord's *jamabandi* continued to be in the names of defendants 2 and 6.

[10] Regarding the third point, it is urged that the purchase by defendants 2 and 3 being on their own account, they cannot be treated as holding on behalf of the other co-sharers, and, therefore, the plaintiff cannot be regarded as in present possession and entitled to partition. In this connection it is urged that the District Judge made a confusion between loss of title by adverse possession and loss of right of partition in a pure partition suit by reason of absence of unity of possession. This contention is not correct; the District Judge went into the question of adverse possession in connection with an argument urged before him that the suit was barred by limitation. Later, at p. 43 of the paper book, he came to an express finding that the plaintiff was in present possession, and that there was unity of possession.

[11] According to learned counsel for the appellant, even this latter finding in insufficient to meet his point, namely, that defendants were in possession on their own account. This argument ignores the finding of fraud, the effect of which was that the purchase enured for the benefit of all the co-sharers. The position of the parties remained unchanged and our attention was not drawn to anything to show that the plaintiff knew of the sale and the changed attitude of the defendants 2 and 3. It is well established that uninterrupted sole possession by one co-owner of undivided property does not by itself amount to ouster of his co-owners and is not sufficient to establish his adverse possession against them, and that his possession will be referred to his lawful title as a co-owner and will be taken to be the possession of his co-owners, *Hardit Singh* v. *Gurumukh Singh*, 28 C. L. J. 487: (A. I. R. (5) 1918 P. C. 1): *Robert Watson & Co.* v. *Ram Chand Dutt*, 17 I. A. 110: (18 Cal. 10 P. C.); *The Midnapur Zamindary Co., Ltd.* v. *Naresh Narayan Roy*; 29 C. W. N. 34: (A. I. R. (11) 1924 P. C. 144). This principle will apply even more strongly in the present case where, according to the findings, the co-sharers in possession came into possession as representing all the co-sharers, and nothing has occurred to change that position.

[12] In the course of the argument, it was faintly suggested that according to the findings, the fraud was that of defendant 3 and he is not one of the co-sharers. This contention is not open to the appellant, who in his written statement did not deny the allegations in the plaint that defendant 3 was one of the settlers of property along with defendant 2. On the contrary, in para. 15 of the appellant's written statement one of the reasons assigned for the rent of the tenancy falling into arrear is that the land is "far away from the residence of defendants 2 and 3" and in the judgment of the Subordinate Judge we find mention of the fact that defendant 3 appeared at least twice and took steps in the certificate proceedings.

[13] On the above grounds, I would dismiss the appeal with costs.

Jamuar J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 300 *[C. N. 76.]*

SHEARER J.

Shaikh Ali Jan and others—Appellants v. *Mt. Phaguni—Respondents.*

A. F. A. D. No. 1643 of 1948, D/- 17th January 1950, from decision of A. Sub-J., Hazaribagh, D/- 9th August 1948.

Muhammadan law— Gift—Revocation.

Where a Muhammadan woman made a gift to her relations on the condition that the donees should maintain her for the rest of her life and, on their failure to do so, sued for revocation of the gift deed for possession and also for arrears of maintenance for three years :

Held that the plaintiff was not entitled to claim last relief in a suit for revocation of gift and had to choose between revocation of deed and claim for maintenance on the ground of breach of promise. [Para 1]

T. K. Prasad—for Appellants.

A. K. Chatterji—for Respondents.

Judgment. — The subject-matter of the suit out of which this second appeal arises is certain land which admittedly belonged to the plaintiff. In 1939 the plaintiff, who is a Muhammadan woman, executed a deed of gift conveying the land in suit to the defendants, who are her relations. The deed of gift contains a recital that, in return for the gift, the defendants undertook to maintain her out of the usufruct of the property for the rest of her life. According to the plaintiff, the defendants, sometime after the execution of the deed of gift, declined to fulfil this obligation, and, in 1944, she executed and registered a deed purporting to revoke the gift. The plaintiff asked for a declaration that the defendants had ceased to have any title to the property and for recovery of possession. She also claimed a sum of Rs. 295 as arrears of maintenance for the period of three years. The suit was dismissed by the trial Court, but was decreed on appeal. The defendants asserted that the plaintiff was not entitled to revoke the deed of gift as she and they were related within the prohibited degrees. The lower appellate Court has found it as a fact that they were not so related, and Mr. T. K. Prasad, for the appellants, now concedes that the plaintiff was entitled to revoke the gift. The plaintiff was under a misapprehension in thinking that the deed of gift was automatically revoked when she executed the deed of cancellation in 1944. The gift cannot be revoked except by a decree of Court. Mr. T.K. Prasad conceded that the suit might be treated as, in substance, a suit for revocation of the gift, but contended that, in that event, the plaintiff was not entitled to a decree for arrears of maintenance. This argument is, in my opinion, well-grounded. The return which the plaintiff expected for the gift which she made to the defendants was that she should be maintained by them for the rest of her life. Her cause of action for the revocation of the deed of gift was that the return for the gift which she had expected had failed. It would, no doubt, have been open to her to sue for arrears of maintenance on the ground that the defendants had committed a breach of contract or a breach of trust. In my opinion, however, she was bound to elect between these two alternative courses which were open to her. If a decree for arrears of maintenance was passed and the amount due under it was paid, the defendants would have fulfilled their obligation. As I understand it, the plaintiff desires to recover possession of her land. The appeal will be allowed and the decree will be varied in that the sum of Rs. 295 allowed to the plaintiff will be deleted. The plaintiff is entitled to costs in proportion to the extent of her success in this Court and in the Courts below.

D.R.R. *Appeal allowed.*

A. I. R. (37) 1950 Patna 301 *[C. N. 77.]*

DAS J.

Devabrata Ganguli — Petitioner v. The State of Bihar — Opposite Party.

Criminal Revn. No. 1634 of 1949, D/- 3th February 1950, against order of Dist. Magistrate, Bhagalpur, D/- 24th October 1949.

(a) **Bihar Prevention of Food Adulteration Act (V [5] of 1948), S. 3 (b) and (h)—The analyst of the Harcourt Butler Technological Institute, Kanpur, is neither a public analyst within the meaning of S. 3 (h) nor a Chemical Examiner within the meaning of S. 3 (b).** [Para 3]

(b) **Bihar Prevention of Food Adulteration Act (V [5] of 1948), Ss. 8 and 9 — Sale of adulterated mustard oil — Applicability.**

Section 8 has no application to a case where a person keeps or stores for sale mustard oil which is not exclusively derived from mustard seeds. The provision applicable is S. 9. [Para 3]

(c) **Bihar Prevention of Food Adulteration Act (V [5] of 1948), S. 9 (2)—A manager of a Mill which manufactures or stores for sale adulterated mustard oil comes within the very wide terms of S. 9 (2).** [Para 4]

(d) **Bihar Prevention of Food Adulteration Act (V [5] of 1948), Ss. 9 (2) (e) and 27 — Contravention of S. 9 (2) (e) — Sentence in default of fine — Penal Code (1860), S. 67.**

The sentence for contravention of S. 9(2)(e) in default of fine imposed under S. 27, can only be simple imprisonment, where the offence committed is accused's first offence. Section 67, Penal Code, applies in such a case. [Para 5]

S. K. Sarkar — for Petitioner.

G. P. Shai for Govt.-Advocate and G. Prasad — for Opposite Party.

Order. — The petitioner is the Manager of the Hanuman Mills, Sultanganj, in the district of Bhagalpur. He has been convicted under S. 27 read with S. 9 (2) (e), Bihar Prevention of Food Adulteration Act, 1947 (Bihar Act V [5] of 1948), and sentenced to a fine of Rs. 125, or in default, rigorous imprisonment for four months. Under S. 22 of the Act, he has also been directed to pay a sum of Rs. 50 as costs.

[2] The case against the petitioner was that he as a Manager of the said Mills, kept or stored

for sale mustard oil which was not exclusively derived from mustard seeds and thereby contravened the provisions of S. 9 (2) (e), Bihar Prevention of Food Adulteration Act, 1947. The section which punishes such contravention, is S. 27 of the Act. It appears that the Sanitary Sub-Inspector of Bhagalpur took a sample of mustard oil from the petitioner. This sample was sent to the Chemical examiner of Government, who found that the oil was adulterated and not made exclusively from mustard seeds. It appears that at the request of the petitioner the same sample was sent again to the analyst of the Harcourt Butler Technological Institute, Kanpur, in the U. P. now called Uttar Pradesh. That analyst also submitted a report to the effect that the sample contained traces of linseed. In the circumstances, the petitioner was found guilty of contravening the provisions of sub-s. (2) Cl. (e) of S. 9, Bihar Prevention of Food Adulteration Act, 1947.

[3] The material portion of that section reads as follows:

> "No person shall, directly or indirectly, himself, or by any other person on his behalf, sell, expose for sale or manufacture or store for sale mustard oil, unless it is exclusively derived from mustard seeds."

It is clear that the oil, of which a sample was taken and which the petitioner stored or exposed for sale, was not mustard oil exclusively derived from mustard seeds. Learned counsel for the petitioner has contended before me that in view of the report of the analyst of the Harcourt Butler Technological Institute, Kanpur, the proviso to S. 8 of the Act will come into operation. There are two difficulties in the way of accepting the contention of learned counsel for the petitioner. Firstly, it seems to me that the report of the analyst of the Technological Institute, Kanpur, was not admissible in evidence. The analyst of the Technological Institute, Kanpur, was not a public analyst within the meaning of S. 3 (h) of the Act; nor was he, in my opinion, a chemical examiner within the meaning of S. 3 (b) of the Act. The learned Magistrate was, I think, wrong in thinking that the analyst of the Technological Institute, Kanpur, was a Chemical Examiner within the meaning of S. 3 (b) or S. 16 (2), Bihar Prevention of Food Adulteration Act, 1947. Secondly, even if the report of that analyst is taken in evidence in the absence of the analyst being himself examined, that report also shows that the oil in question was not mustard oil exclucively derived from mustard seeds. Section 8 refers to articles of food in general. That section, in my opinion, has no application to the present case, which is specifically dealt with in Cl. (e) of sub-s. (2) of S. 9 of the Act. Therefore, the question of applying the proviso to sub-s. (1) of S. 8 does not arise.

[4] The next point urged before me is that the petitioner was merely the Manager of the Mill, and therefore not liable under sub-s. (2) of S. 9 of the Act. Sub-section (2) of S. 9 is expressed in very wide terms. It refers to a person who sells, exposes for sale, manufactures or stores for sale, directly or indirectly, by himself or by any other person on his behalf. The petitioner comes within the very wide terms of sub-s. (2) of S. 9.

[5] It is clear to me that the petitioner was rightly convicted for having contravened the provisions of Cl. (e) of sub-s. (2) of S. 9 of the Act. The fine does not appear to me to be severe in the circumstances of the case. Learned counsel for the petitioner has, however, submitted that the sentence in default of the payment of fine is not legal. He has referred to S. 67, Penal Code, and has contended that the imprisonment in default of the payment of fine can only be simple imprisonment unnder that section. Section 27, Prevention of Food Adulteration Act, 1947, imposes for a first offence a fine only, as given in the table appended to the section. It is not in dispute that the offence committed by the petitioner is his first offence. That being the position, S. 67, Penal Code will apply, and the imprisonment in default of the payment of fine can only be simple imprisonment. The order of the learned Magistrate will, therefore, be modified to this extent only that the imprisonment in default of the payment of fine will be simple imprisonment, and not rigorous imprisonment.

[6] Subject to this modification, the application is dismissed.

V.B.B. *Sentence modified.*

. I. R. (37) 1950 Patna 302 *[C. N. 78.]*

REUBEN AND JAMUAR JJ.

Suba Dusadh — Appellant v. *Shiva Prasad and another — Respondents.*

A. F. A. D. No. 1904 of 1949, D/- 10-3-1950, from a decision of Addl. Sub-J., 4th Court, Patna, D/- 15-9-1949.

(a) Specific Relief Act (1877), S. 42 — Suit for declaration of title and possession — Essentials to be proved — Limitation Act (1908), Arts 120 & 144.

In a suit for recovery of possession based on title, the plaintiff has to prove not only his possession within 12 years but also his title to the property.

A sued for declaration that he was entitled to perform the duty of a road-chaukidar which office was hereditary in his family and for possession of certain kasht lands which *A* alleged had been granted to his ancestors in lieu of their services as road-chaukidar. *A* relied on an entry in village khatian as 'jagir chakrahi' in the name of his grand-father but could not show as to when and why the grant was made, who was in possession

before or after *A*'s grand-father or whether *A*'s father had worked as chaukidar :

Held that as *A* had failed to prove the origin of the grant, he could not establish his title to the suit land and hence could not succeed in his suit. [Paras 9, 12]

Annotation : ('46-Man.) Specific Relief Act, S. 42, N. 33.

(b) Custom (General) — Proof of — One instance cannot make custom—No general inference can be drawn from one instance, governing all cases — Evidence Act (1872), S. 13. [Para 8]

Annotation : ('46-Man.) Evidence Act, S. 13, N. 5.

(c) Civil P. C. (1908), Ss. 100, 101 — Finding of fact — Second appeal — Finding of fact arrived at by lower Court by relying on certain order of revenue officer which was not evidence in the case, is not binding. [Para 11]

Annotation:('44-Com.) Civil P. C., Ss. 100, 101, N. 52.

Mahabir Prasad and Ramanugrah Prasad — for Appellant.

S. C. Sinha and B. B. Lal — for Respondents.

Jamuar J. — This is a defendant's appeal against the judgment and decree of the learned Additional Subordinate Judge, 4th Court, Patna, dated 15th September 1949, by which he affirmed a judgment and decree of the Munsif, 1st Court, Patna, dated 15th February 1949, decreeing the plaintiffs' suit.

[2] The plaintiffs are brothers and their suit was for a declaration of their title and for recovery of possession of certain kasht lands situated in villages Rampur Ismail, Nagwan and Bahpura having an area of 4.40 acres as described in the plaint. The plaintiffs also claimed mesne profits. There was a further relief sought by them, namely, for a declaration that they are entitled to perform the duty of a road-chaukidar, which office they alleged to be hereditary in their family, as the kasht lands, which are the subject-matter of the suit, were granted to their ancestor in lieu of his services as a road-chaukidar.

[3] The lands have been recorded in the survey khatian as "jagir chakrahi" in the name of one Chaitu Dusadh who was the grandfather of the plaintiffs. Chaitu Dusadh, died in Ashin 1326 Fasli and then, according to the plaintiffs Dhurkheli Dusadh, the son of Chaitu Dusadh, worked as a road-chaukidar and held the lands until his death in Chait 1336 Fasli. The plaintiffs are the sons of Dhurkheli Dusadh and at the time of the death of Dhurkheli Dusadh plaintiff 1 was a minor, aged about 5 years; plaintiff 2 was born six months after the death of Dhurkheli Dusadh. It is then the case of the plaintiffs that as plaintiff 1, being a small child at the time of the death of his father Dhurkheli Dusadh, could not succeed him on his death as the road-chaukidar, one Feku Dusadh, a brother of Chaitu Dusadh, became the road-chaukidar and as such was in possession of the lands in suit. When Feku Dusadh died the plaintiffs were still minors. Hence the plaintiffs' mother entered into an arrangement with one Palakdhari Dusadh to work as the road-chaukidar in place of the plaintiffs and to hold the lands in suit as a bataidar. Palakdhari Dusadh died in 1337 Fasli and then the plaintiffs' mother entered into a similar arrangement with the defendant Suba Dusadh, a brother of Palakdhari Dusadh, to officiate as the road-chaukidar and cultivate the lands on the same terms as a bataidar, and he divided the produce of the lands making over half to the plaintiffs' mother.

[4] In January 1939, plaintiff 1 became physically fit to work as a road-chaukidar and then, it is stated, he asked the defendant to relinquish possession of the lands and to allow him to work as a road-chaukidar, but the defendant refused to comply with this demand. The plaintiffs, therefore, filed an application before the Subdivisional Officer of Dinapur to give them them (*Sic*) the relief which the defendant had refused to give them, but the Subdivisional Officer rejected their prayer. The plaintiffs then preferred an appeal to the District Magistrate of Patna, who, while affirming the order of the Subdivisional Officer, directed the plaintiffs to establish their claim in the civil Court before any redress could be given to them. Hence the plaintiffs filed the suit out of which this appeal has arisen.

[5] The defence was that the jagir land in suit is not hereditary in the family of the plaintiffs but that, being attached to the office of the road-chaukidar, it is to be held by the person who is appointed as a road-chaukidar. The defendant claimed, in brief, that as he had been appointed to this office he was entitled to this land. The defendant furthermore denied to have entered into any arrangement with the plaintiffs' mother to hold the land in batai. A further defence was that the suit was barred by the law of limitation.

[6] In my view this appeal can be disposed of on the short point that the plaintiffs' suit being in ejectment, the plaintiffs had to prove not only their possession within 12 years but also their title to the land and as they have failed to prove their title, the suit is liable to be dismissed.

[7] The entry in the survey khatian shows that the land has been recorded in the name of Chaitu Dusadh as his kasht land in a separate khata and it was thus argued that this entry was in support of the argument of absolute grant in favour of Chaitu Dusadh. I do not think that this inference can be drawn from this entry. The fact of Chaitu Dusadh having been recorded separately is explained by the circumstance that at the time he was the road chaukidar rendering

his services and was in possession of this land as such. The Court below has clearly found that:

> "the origin of the said tenancy is unknown. There is no evidence to show how and why the said grant was made and to whom it was originally made."

Unless there be some evidence showing how and in what circumstances the grant had been made to Chaitu Dusadh, I do not think that any inference can be drawn in his favour that a mere record of his name in the survey khatian would prove that there was an absolute grant of the land to him. The Court below has repeated that observation by stating "There is nothing to indicate as to when, why and to whom the grant was originally made," and it has also been found:

> "On the evidence adduced, therefore, it cannot safely be said as to who worked as a road-chaukidar before Chaitu who died in Aswin 1326 which will be sometime in September 1918."

The Court of appeal below has been much influenced by certain observations made by the District Magistrate of Patna in his order (Ex. 2) dismissing the appeal preferred to him as against the order of the Sub-divisional Officer of Dinapur rejecting the prayer of the plaintiffs that posssession of the land in suit might be restored to them, on their being appointed as road-chaukidars in place of the defendant. The learned Additional Subordinate Judge in the Court below has pointed out in his judgment that the District Magistrate of Patna stated in his order (Ex. 2) that:

> "strictly speaking the Collector cannot exercise any disciplinary control over the road-chaukidar nor can he resume the ancestral jagir land and that the appointment of the defendant by the S. D. O. would amount more to the public recognition of the private arrangement made by the family of the plaintiffs than to a new appointment."

The learned Additional Subordinate Judge then gave his finding:

> "Thus the order (Ex. 2) clearly shows that the suit land is ancestral jagir land of the plaintiffs, and that there is no provision of law authorising the executive to appoint any person as a road-chaukidar and vest the suit land in him."

I have no doubt in my mind that the learned Additional Subordinate Judge has been much influenced by this order (Ex. 2). Whatever has been stated in the order (Ex. 2), the statements can be no more than mere observations made by the District Magistrate and they cannot in my judgment be used as evidence in this case to prove title in favour of the plaintiffs: indeed, the learned Additional Subordinate Judge in the Court below considers that the plaintiffs have succeeded in proving their title by reason of those very observations quoted above, for, the learned Additional Subordinate Judge has stated:

> ". . . Keeping in mind the aforesaid order of the District Magistrate the point for consideration is whether the plaintiffs have title to the suit land. They have clearly alleged in the plaint that the land is hereditary and is coming down from the time of their ancestors. The defendant asserts that the land goes with the office of road-choukidar and the person appointed as such by the S. O. is entitled to hold the land in his own right. The said assertion is not supported by any official record and is negatived by the said order of the District Magistrate."

[7A] I cannot agree with this finding as this is not a finding based on the evidence in the case but rather influenced by the observations made by the District Magistrate in his order (Ex. 2). In the present suit filed by the plaintiffs, in my opinion, the plaintiffs have totally failed to prove the origin of the grant to their ancestor Chaitu Dusadh and thus their title to the land in suit. On the facts of the present case, the question of resumption of the land by Government does not arise. On the evidence adduced in the case, the only conclusion which can be drawn is that the person appointed as the road-chaukidar by the proper authority is the person entitled to the land.

[8] With regard to the oral evidence adduced in the case, the Court below has rightly stated that this goes no further than oath against oath. One witness (D. W. 6), however, stated in his evidence that one Dukhit, who is one another road-chaukidar, had given some of his Jagir *chakrohi* chaukidari land in rehan to one Chander, and the Court below has drawn the inference that:

> "That being so it appears that the jagir is transferable, and this indicates that the person holding the jagir land has an absolute interest in it and that it can not be taken away by appointing another chaukidar in his place."

It is not known why and in what circumstances Dukhit had given some of his land in rehan to Chander but it is clear that this one instance can not make a custom and no general inference can be drawn from this one instance as governing all cases. In this view of the matter, I am unable to uphold the finding of the Court below which is to the effect that Chaitu Dusadh had obtained an absolute interest in the land in suit and thus his title to it could not have been affected by his ceasing to work as a chaukidar.

[9] In this view of the case, I would hold that there is no evidence in support of the plaintiffs' claim that their ancestor Chaitu Dusadh had obtained an absolute interest in the land in suit and as the plaintiffs have failed to prove their title to this land they cannot succeed in their suit.

[10] I would accordingly allow the appeal with costs and dismiss the plaintiffs' suit.

[11] **Reuben J.**—I agree. It has been urged that the decision of the Courts below is based on a finding of fact which is binding in second appeal. The finding, such as it is, was arrived at in reliance on observations of the District Magistrate in his order, Ex. 2, which are not evidence. We are therefore, entitled to disregard it.

[12] Further, the findings actually indicate a decree against and not in favour of the plaintiff.

The suit is for recovery of possession. The plaintiff can only succeed if he proves his title. His case is that of a permanent heritable grant of land in favour of one of his ancestors burdened with the performance of a duty. The learned Subordinate Judge finds that there is no satisfactory evidence to show when, why and to whom the grant was made or as to who was in possession of the land before Chaitu. He finds that Chaitu's father did not work as Choukidar and that it cannot be ascertained whether Chaitu became a Choukidar in succession to a stranger or to a member of the family. Further, he finds that there is no satisfactory evidence that Chaitu's son Dhurkeli succeeded him as Choukidar. How then can it be held that a permanent grant in favour of the plaintiff's family has been established?

D.R.R. *Appeal allowed.*

A. I. R. (37) 1950 Patna 305 *[C. N. 79.]*

IMAM AND NARAYAN JJ.

Janki Prasad Choudhary and others — *Appellants* v. *Ramkripal Pandey and others* —*Respondents.*

Federal Court Appeal No. 43 of 1949, D/-25-1-1950.

(a) Civil P. C. (1908), S. 110 — Valuation of property — Report of lower Court—Correctness of.

Where in an application for leave to appeal to the Federal Court, the High Court calls for the report of value of the suit property on the date of the suit from the lower Court and the Judge holding proper enquiry gives his valuation stating the grounds for arriving at it, what the High Court has to look to is the principle which has been adopted in arriving at the valuation and not the precise particulars in the statements of the various witnesses or the documents. [Para 4]

Annotation : ('44-Com.) Civil P. C., S. 110, N. 3.

(b) Civil P. C. (1908), S. 110 — Valuation of property in suit less than Rs. 10,000 —No substantial question of law arising though important rights are in question — Leave to appeal to Federal Court cannot be granted. [Para 6]

Annotation : ('44-Com.) Civil P. C., S. 110, N. 17.

B. C. De, Janak Kishore and K. P. Sinha —for Appellants.

P. R Das, Prem Lal, S. Akbar Imam, Ganesh Sharma, Rajeshwari Prasad, Rai I. B. Saran, Rameshwar Prasad Sinha and Medni Prasad Singh — for Respondents.

Order.—This is an application for leave to appeal to the Federal Court. In the Court below, the plaintiffs had valued the property in suit including mesne profits at Rs. 5,104. The area involved was 111 bighas, 14 kathas and 3 dhurs of which 76 bighas odd was included in Sch. 1 as appertaining to village Salha and 35 bighas odd in Sch. 2 as appertaining to village Hasanpur. The plaintiffs' suit was dismissed. An appeal was filed to this Court but it was confined to the 76 bighas odd in village Salha. The decision of the trial Court concerning 35 bighas odd in village Hasanpur was not questioned. This Court reversed the decision of the trial Court and decreed the suit of the plaintiffs concerning 76 bighas odd in village Salha. Against the decision of this Court the defendants have filed the present application for leave to appeal to the Federal Court.

[2] The valuation given by the plaintiffs, as has already been stated, was Rs. 5,104 including mesne profits (Rs. 400) regarding the properties mentioned in Schs. 1 and 2. The defendants in their written statement questioned this valuation asserting that the true valuation of the properties involved was Rs. 25,000. An issue was framed by the trial Court on this point. At the hearing, however, the issue was not pressed. After the decision of this Court, the question of the real valuation of the properties involved in the suit was raised by the defendants, and this Court directed the Court below to hold an enquiry and send a report as to the true valuation of the properties in suit at the time of the institution of the suit as well as its value at the time of the application for leave to appeal to the Federal Court. The Subordinate Judge, after holding an enquiry, has reported that the market value of the properties mentioned in Schs. 1 and 2 of the plaint on the date of the suit, namely, 12th September 1940 was Rs. 4,704 and that the market value of these lands on the date of the proposed appeal to the Federal Court, namely, 20th May 1949, was so far as Sch. 1 is concerned Rs. 35 000 and so far as Sch. 2 is concerned Rs. 15,000. The Subordinate Judge also gave a finding in pursuance of the directions of this Court on the point as to whether the defendants, appellants to the Federal Court, were entitled to challenge the valuation determined by the learned Subordinate Judge at the original trial. According to his opinion, the defendants, appellants to the Federal Court, were not entitled to challenge the value of the suit land in the Court of the first instance as determined by the learned trial Court.

[3] Mr. De on behalf of the defendants challenged in the first instance the report of the Subordinate Judge as to the valuation of the properties in suit. He further contended that the defendants were entitled to challenge the valuation as given by the plaintiffs at the trial and that the principle of approbating and reprobating did not arise. He further contended that even if the valuation as given by the plaintiffs and as found by the Subordinate Judge in his report be accepted, that is to say the true valuation of the lands in suit was below Rs 10,000, substantial questions of law arise in the case

and leave should be granted to appeal to the Federal Court.

[4] As to the valuation arrived at by the Subordinate Judge in his report, which he has submitted, we cannot find any good reason for supposing that he had adopted a wrong principle in arriving at his conclusions. The lands in suit were certainly subjected to flood until 1940 and they could not be assessed on the same rates as lands in village Hasanpur. According to the decision of this Court, the change in the situation of the land was a sudden one due to the earthquake of 1934, and the lands which appertained to village Salha before that event came to be joined with the lands of Hasanpur as the result of that violent event. The Subordinate Judge has dealt with the evidence led before him at the time of his enquiry, and it seems to us that he had good grounds for the finding which he has given as to the valuation. In proceedings of this kind what is to be looked to is the principle which has been adopted in arriving at the valuation and not the precise particulars in the statements of the various witnesses or the documents. After having heard Mr. De at considerable length, no sufficient ground has been established for expressing an opinion different to that of the Subordinate Judge on the question of valuation and his report is accepted.

[5] On the second point, having regard to the view already expressed, it is not necessary to consider the various authorities cited and the arguments raised by Mr. De. It is, however, to be borne in mind that the plaintiffs' valuation given in the plaint was not a notional valuation which he might have been compelled to give in order to comply with some statutory provision. It is abundantly clear from the plaint that the value given by the plaintiff was intended by him to be the market value having regard to the quality of the land and the circumstances indicated in the plaint. That the defendants understood this to be so is also clear from the fact that they asserted in their written statement that the real value of the land was not less than Rs. 25,000 and on that pleading a specific issue was framed at the trial. At the hearing, the defendants made no effort to have this issue determined. Such conduct should be regarded as one indicating acquiescence to the plaintiffs' valuation given in the plaint. In the written statement, it had been specifically stated that the suit should be dismissed unless the true valuation was given and the requisite court fee was paid thereon. The defendants not having pressed this issue, the suit proceeded on the basis that the properties had been properly valued and no further court-fee was necessary from the plaintiffs. It is on this footing that the trial proceeded, and the defendants must be regarded as having accepted the valuation given by the plaintiffs. The question of valuation was again raised by them when this Court decreed the plaintiffs' suit reversing the decision of the Court below with respect to the lands mentioned in Sch. 1. As we have already stated, it is not necessary to go into this question in great detail or to express any definite opinion having regard to the fact that the valuation given by the plaintiffs and the valuation found by the Subordinate Judge in his report has been accepted by us. It follows, therefore, from a consideration of these two points raised by Mr. De that the valuation of the properties in suit at the time of the institution of the suit was below Rs. 10,000.

[6] As to the third point, we have been through the decision of this Court and we cannot find it possible to say that any substantial question of law arises. The case is undoubtedly an important one where important rights are in question but as we read the judgment of this Court, it would not be possible judicially to say that substantial questions of law arise out of the judgment of this Court.

[7] In the net result, the application for leave to appeal to the Federal Court is dismissed with costs : hearing fee two gold mohurs.

D.R.R. *Application dismissed.*

A. I. R. (37) 1950 Patna 306 *[C. N. 80.]*

DAS J.

Chutahru Bhagat and others — Appellants v. Hialal Sah and others — Respondents.

A. F. A. D. No. 1993 of 1948, D/- 12-1-1950, from decision of Sub-J., Purnea, D/ 14-7-1948.

(a) Civil P. C. (1908) O. 7, R. 3 — Suit for immovable property — Sufficient description to identify land in suit—Absence of.

In a suit for declaration of title and recovery of possession of certain portion of land the plaintiff must indicate the identity of the portion claimed by him either by means of boundaries or by means of a map. In the absence of such indication it is not possible to pass a decree capable of execution. The question of prejudice to the defendants also comes in. [Para 5]

Annotation: ('44-Com.) Civil P. C., O. 7, R. 3, N. 2, Pts. 1, 2.

(b) Civil P. C. (1908), O. 20, R. 4—Suit for declaration of title and recovery of possession — Judgment in—Specific Relief Act (1877), S. 42.

In a suit for a declaration of title and recovery of possession two things have to be found—title and possession. If it is found that the plaintiffs have proved subsisting title, then they are entitled to a decree for recovery of possession to the extent of the area from which they have been dispossessed. No decree for demarcation of the whole plot of land belonging to the plaintiff can be granted in such a suit, particularly when it is not asked for. [Para 4]

Annotation: ('44-Com.) Civil P. C., O. 20, R. 40, N. 6, 9; ('46-Man.) Specific Relief Act, S. 42, N. 33.

B. N. Jha and Ashwini Kumar Sinha
— for Appellants.

Rajkishore Prasad and Nakuleshwar Prasad
— for Respondents.

Das J. — This is a second appeal by the defendants first party from the decision of the learned Subordinate Judge of Purnea dated 14th July 1948, modifying the decision of the Additional Munsif of Purnea dated 28th June 1946, in a suit for a declaration of title and recovery of possession in respect of some lands comprised in plot No. 1248. The short facts are the following: Two plots, namely, plot No. 1238 with an area of .91 acres and plot No. 1248 with an area of 4.57 acres appertained to khata No. 207 of village Dharahra. Against the khata or holding in question the name of one Lalit Dhangar was recorded as *gair dakhalkar* for two years. The tenure-holder under whom the land was held was one Gulab Missir. It was the admitted case of the parties that Lalit abandoned the holding, and the tenure-holder Gulab Missir came in possession. On the death of Gulab Missir his son, Ramji Missir, came in possession. This Ramji Missir settled portions of plot No 1248 with different persons. Some portion was settled with one Lalit Dhangar; another portion, the exact area of which is in dispute, was settled with one Prem Singh. The plaintiffs-respondents alleged that an area of 1 bigha 18 kathas 7 dhurs out of plot No. 1248 was settled with them by Ramji Missir by means of a parwana dated 12th Aghan 1329 Fasli. It appears that subsequently the interest of Ramji Missir was sold and purchased by one Syed Asad Reza, mutwalli of the waqf property of one Rani Quamarunnissa Begum Nageshwar Singh, nephew and heir of Prem Singh, sold his interest of the portion settled with Prem Singh out of plot No. 1248 to defendant 2 Girwar Narain Bhagat on 10th August 1934. The present appellants based their title on that purchase, and their case was that what was settled with Prem Singh out of plot No. 1248 was not 2.10 acres only but a much larger area, namely, 3.61 acres. The case of the plaintiffs-respondents was that the patwari of the waqf estate under the mutwalli Syed Asad Reza came in collusion with Prem Singh and granted rent receipts to Prem Singh in respect of the entire area of plot No. 1248 They further alleged that by the purchase which the appellants had made from Nageshwar Singh the appellants had acquired no title to more than 2.10 acres settled with Prem Singh. But some time in 1940, that is Pous 1347 Fasli, the appellants who are men of influence, had dispossessed the plaintiffs-respondents from part of the land which had been settled with the plaintiffs-respondents. Originally, the area from which the plaintiffs-respondents were alleged to have been dispossessed was given to be 10 kathas and odd. Subsequently, after the report of a pleader commissioner who was deputed to measure the land on the spot, an amendment was made by which the plaintiff-respondents alleged that they had been dispossessed from .69 acres out of the area settled with them.

[2] The learned Munsif who dealt with the suit in the first instance held that the plaintiffs-respondents had established their title with regard to 1 bigha 18 kathas 7 dhurs of land out of plot No. 1248. He did not, however, accept the story of dispossession and gave a decree declaring the title of the plaintiffs-respondents and confirming their possession over the entire area of 1 bigha 18 kathas 7 dhurs. He further directed that the plaintiffs-respondents would be entitled to construct a ridge or some line of demarcation to avoid any dispute in future. The learned Subordinate Judge in appeal affirmed the decision of the learned Munsif on the question of title. He held that the plaintiffs-respondents had proved their settlement and their title based on that settlement with regard to 1 bigha 18 kathas 7 dhurs out of plot No. 1248. He further held that what was settled with Prem Singh was 2.10 acres only and not 3.61 acres. He also found that the plaintiffs-respondents had been dispossessed from portion of the land settled with them, and on the basis of the report of the pleader commissioner he held that the area from which the plaintiffs-respondents had been dispossessed was 69 acres towards the south west of the land settled with the plaintiffs-respondents. He passed a decree affirming the decision of the learned Munsif but modifying it in a way indicated below He stated as follows:

> "In my opinion, the plaintiffs' story of possession and dispossession is substantially correct and they are, on the facts proved in this case, entitled to a decree for possession. It will be, however, necessary for the plaintiffs to get a survey knowing pleader commissioner appointed for the purpose of demarcating his own land from the lands of the defendants and Lalit Dhangar out of plot No. 1248. The pleader Commissioner will measure out the lands of the parties as indicated above and then deliver possession to the plaintiffs over the area from which they have been dispossessed by the defendants."

In other words the learned Subordinate Judge has given the plaintiffs-respondents a decree for possession by means of demarcation, though the relief of demarcation was not asked for by the plaintiffs respondents.

[3] In the view which I have taken of this appeal, it would be inadvisable for me to express any opinion on the question of title. The point which has been urged before me on behalf of the appellants is that they were greatly prejudiced by the failure of the plaintiffs-respondents to

indicate clearly by means of boundaries etc. the identity of the particular portion of plot No. 1248 which the plaintiffs-respondents were claiming in the suit. Learned counsel for the appellants has drawn my attention to O. 7, R. 3 and to O. 20, R. 9, Civil P C Order 7, R. 3 states that where the subject-matter of the suit is immoveable property the plaint shall contain a description of the property sufficient to identify it, and in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers. Order 20, R. 9 is in similar terms and states that where the subject-matter of the suit is immoveable property, the decree shall contain a description of such property sufficient to identify the same. In the case before me, the plaintiffs-respondents were claiming a portion of plot No. 1248. It is true that they did mention the plot number in the plaint. They also gave the area which they were claiming, namely, 1 bigha 18 kathas 7 dhurs. In a schedule appended to the plaint it was stated that the portion which had been encroached on was from the southern side, but nowhere was it stated in the plaint from which side of the plot the settlement of 1 bigha 18 kathas 7 dhurs was made in favour of the plaintiffs respondents. It is to be observed that the area of plot No. 1248 is 4 acres and odd. It is also to be observed that Ramji Missir had settled portions of this plot with three different sets of persons, the settlement in favour of Prem Singh and Lalit Dhangar being earlier in point of time than the settlement in favour of the plaintiffs-respondents. It was, therefore, very necessary to fix the identity of the particular portion which the plaintiffs-respondents were claiming as having been settled with them. Learned counsel for the plaintiffs-respondents has drawn my attention to a petition which his clients had filed on 24th January 1946. In that petition a reference was made to an earlier demarcation of the different portions of the plot by a Collectorate *amin* in a demarcation proceeding. It was alleged in that petition that the portion of plot No. 1248, which is south of plot No. 1249, marked 1 in plot No. 1248 as shown in a map attached to the petition along with the portion marked 2 in plot No. 1248 was the area of the plaintiffs' land measuring 1 bigha 18 kathas 7 dhurs. It was further alleged that the plaintiffs-respondents had been dispossessed from the area marked 2 in the map. The plaintiffs respondents wanted that the said map of the Collectorate *amin* should form part of the plaint so as to fix the identity of the lands which the plaintiffs respondents were claiming. Unfortunately, however, no order was passed on this petition Order No. 45, dated 24th January 1946, which deals with this petition merely states that a pleader commissioner be appointed to measure the land on the spot. It seems to me that the points which the appellants have taken, namely, that the plaint did not clearly indicate the identity of the lands which the plaintiffs-respondents were claiming, and that the present appellants were prejudiced in their defence have some substance.

[4] The learned Subordinate Judge has no doubt relied on the report and map of the pleader Commissioner. I am not saying anything about the correctness or otherwise of that report and map, but from the map which the pleader Commissioner prepared it appears that the portion which the plaintiffs-respondents showed as the portion from which they had been dispossessed had an area of .45 acres only. What happened was this. On behalf of the plaintiffs-respondents a particular place was shown as the place where the old ridge stood—the ridge which had been broken by the present appellants at the time of encroachment. The pleader Commissioner drew a line across the field at that place, and by measurement he found that the encroached portion, according to that ridge, would be .45 acres. The learned Subordinate Judge, however, proceeded on a somewhat different footing. He held that 1 bigha 18 kathas 7 dhurs had been settled with the plaintiffs-respondents; but the plaintiffs-respondents were in possession of only .90 acres, that is, 22 and 23 kathas. The shortage was, therefore, .69 acres and in that way the learned Subordinate Judge found that the encroachment was to the extent of .69 acres. If the learned Subordinate Judge was in a position definitely to find that an area of .69 acres had been encroached on by the appellants, then the proper decree to pass would have been a decree for recovery of possession of that area. It is difficult to understand why the plaintiffs-respondents were given a decree for a demarcation of their lands when they had not asked for it. It is obvious that in a suit for a declaration of title and recovery of possession two things have to be found—title and possession. If it is found that the plaintiffs have proved subsisting title, then they are entitled to a decree for recovery of possession to the extent of the area from which they have been dispossessed.

[5] It seems to me that unless the plaintiffs respondents indicate the identity of the lands which they are claiming either by means of boundaries or by means of a map as they purported to do by their petition dated 24th January 1946, it is difficult, if not impossible, to find whether they have title to the lands, and whether any encroachment has been made by the appellants. It would be impossible to pass

a decree capable of execution unless the identity of the lands is known. The question of prejudice also comes in, and it would be difficult for the appellants as defendants to show, if they are able to so (*sic*) show, that the plaintiffs respondents have no title to the lands which they are claiming.

[6] For the reasons given above, I would allow this appeal set aside the decisions of the Courts below, and send the case back on remand to the learned Munsif for a fresh decision in accordance with law. The learned Munsif will allow the plaintiffs-respondents an opportunity to indicate the identity of the lands which they are claiming either by stating the boundaries or by filing a map by way of an amendment, of the plaint. If after such amendment, the appellants wish to file any additional written statement, they should be allowed to do so, and the parties will be entitled to adduce additional evidence. The evidence already recorded will be evidence in the case but any additional evidence which the parties may wish to adduce after amendment of the plaint and the filing of the additional written statement, if any, will be recorded by the learned Munsif. The learned Munsif will then consider the entire evidence in the case afresh in the light of the observations made above, and thereafter decide all the questions at issue between the parties. Costs incurred at the present hearing as also costs incurred before the order of remand will abide the result of the fresh decision. Fresh costs incurred after the order of remand will be dealt with by the learned Munsif.

D.R.R. *Order accordingly.*

A. I. R. (37) 1950 Patna 309 [*C. N. 81.*]

SINHA AND RAI JJ.

Gupteshwar Missir — Petitioner v. *Chaturanand Missir and others — Opposite Party.*

Civil Revn. No. 683 of 1949, D/- 24th February 1950, against order of Munsif, 2nd Court, Buxar, D/- 23rd July 1949.

(a) Civil P. C. (1908), O. 33, Rr. 5 to 8, O. 14, R. 2 — Application for leave to sue as pauper — Objection as to pecuniary jurisdiction of Court — Decision of, before leave is granted.

Under the provisions of O. 33, it is not open to the Court to which an application for leave to sue as pauper has been made under O. 33, R. 2, to go into the question of valuation of the property, so as to determine the preliminary issue of jurisdiction, because it is a matter which arises only after the application has been granted and the application treated as a plaint, in answer to which the defendant has to raise his pleas in bar of the suit or of the jurisdiction of the Court: *Case law discussed:* [Para 5]

Annotation : ('44 Com.) Civil P. C, O. 33, R. 7, N. 1 ; O. 14, R. 2 N. 2.

(b) Civil P. C. (1908), O. 33, R. 7; O. 7. R. 10 and S. 141 — Application for leave to sue as pauper — Objection as to pecuniary jurisdiction — Return of application for presentation to proper Court.

It is not open to a Court to decide under O. 7, R. 10, read with S. 141, Civil P. C. an objection as to its pecuniary jurisdiction and return an application for leave to sue as pauper for presentation to proper Court before granting it, as such an application is not deemed to be a plaint until it is granted and O. 7 relates to plaints. Section 141 which is a general provision is also excluded by the specific provisions in O. 33. [Para 4]

Annotation : ('44-Com.) Civil P. C., O. 33, R. 7, N. 1 ; O. 7, R. 10, N. 6, Pt. 2 ; S. 141, N. 9 Pt. 5.

(c) Civil P.C. (1908), Preamble — Code is exhaustive in matters specifically provided for. [Para 4]

Annotation : ('44-Com.) Civil P. C., Pre. N. 4 Pt. 1

(d) Precedents — Case is an authority for what it actually decides and not for what logically follows from it. [Para 6]

Annotation : ('44-Com.) Civil P. C., Pre. N. 15 Pt. 10.

A. B. Saran and K. N. Chaturvedy — for Petitioner.
N. Bagchi and R. K. Bagchi — for Opposite Party.

Sinha J. — The petitioner made an application for leave to sue in *forma pauperis*. In due course, the defendants appeared after notice and contested the application on the grounds, *inter alia*, that the plaintiff was a man of means, and could pay the court-fees chargeable on the plaint; that the suit was a champartous one that the plaintiff had under-valued the property in suit; and that, on a proper valuation of the subject-matter of the suit, it would be beyond the pecuniary jurisdiction of the Court—in this case the Munsif's Court at Buxar. The defendants' pleader asked the Court to decide the preliminary question of jurisdiction in the first instance, before going into the merits of the plaintiff's application for leave to sue as a pauper. The plaintiff's pleader contended that the Court, at that stage, had no jurisdiction to go into that question, and that, after the leave prayed for had been granted, and the plaint registered as a suit, the Court could go into the question as a preliminary issue in the suit after the defendants had filed their written statement, challenging the valuation of the subject-matter of the suit, and the pecuniary jurisdiction of the Court dependent upon that valuation. The learned Munsif, relying upon certain decisions, presently to be noticed, accepted the defendants' contention, and decided to go into the preliminary question of valuation in the first instance. Aggrieved by that determination of the Court below, the plaintiff-applicant has moved this Court in revision.

[2] The matter came, in the first instance, for hearing before a single Judge of this Court who referred it to be heard by a Division Bench.

[3] The only question for determination in this case is whether the Court below was entitled to go into the question of valuation of the subject-matter of the suit to determine its pecuniary jurisdiction as a preliminary question before deciding the merits of the application itself. The answer to this question must naturally depend upon the interpretation of the provisions of O. 33, Civil P. C., relating to "Suits by Paupers." It is not disputed in this case that the provisions of Rr. 2, 3 and 4 of O. 33 of the Code have been duly complied with. The argument on either side in this case has centred round the provisions of Rr. 5 to 8 of O. 33 of the Code. It may be mentioned, at the outset, that there is no direct decision of this Court bearing on the question in controversy certainly none has been brought to our notice. Order 33, Civil P. C., does not, in terms, make any provision for return of the application for leave to sue as a pauper, in the event of the Court coming to the conclusion that the proposed suit, in connection with which the application for leave had been made, was beyond the pecuniary jurisdiction of the Court; nor, as will presently appear, is there any provision for recording evidence on the question of the true valuation of the property in question. Rule 5 of O. 33 lays down the circumstances in which the Court shall reject the application for permission to sue as a pauper. The only relevant clause of that rule is (d), that is to say, where the allegations in the application do not show a cause of action. Rule 6 provides for reception of evidence on the question of the applicant's pauperism, so that the applicant is entitled to adduce evidence in proof of his pauperism, and the party opposing the application is entitled to adduce evidence to the contrary. Rule 7 provides that, after reception of evidence, as aforesaid, and hearing of argument, the Court has to decide whether the application should be allowed or refused. Rule 8 provides that, in the event of the application for leave to sue as a pauper being granted, it shall be numbered and registered as a plaint in the suit to be proceeded with in the ordinary course, without payment of court-fees on the plaint. Rule 15 provides that, on the application being refused, no fresh application for leave to sue as a pauper in respect of the same right to sue shall be entertained, but that the applicant may institute a suit in the ordinary manner, that is to say, on payment of court-fees, provided that costs of the party opposing the application for leave to sue as a pauper must first be paid. It will thus appear that no provision has been made in O. 33, and particularly in Rr. 6 and 7, for the reception of evidence on the question of valuation of the property to determine the pecuniary jurisdiction of the Court, if and when that preliminary question is raised in controversy. It will also appear that the rules in O. 33 contemplate either the granting or the rejection of the leave prayed for but not the return of the document which case law has described as of a composite nature comprising an application to sue as a pauper and a plaint. It is only upon the application being granted that the document ripens into a plaint in the suit under R. 8. So long as the leave prayed for has not been granted, it is not deemed to be a plaint, and, therefore, cannot be returned as such, if the Court were to take the view that it was beyond the pecuniary jurisdiction of the Court. Hence, on a plain reading of the provisions of O. 33, it is clear that the rules therein laid down do not contemplate an enquiry into the valuation of the property in question with a view to determining whether the subject-matter of the dispute was or was not within the pecuniary jurisdiction of the Court.

[4] But it has been argued on behalf of the petitioner that the provisions of O. 7, R. 10, read with those of S. 141 of the Code, entitled the Court to return the application for leave to sue as a pauper to be presented to the proper Court. But, in my opinion, this contention is not well-founded. Order 7 relates to plaints, and, as already pointed out, such an application is not deemed to be a plaint until it has been granted. Section 141 of the Code has the effect only of assimilating the procedure in relation to suits to that in relation to all proceedings in any Court of civil jurisdiction. These are generally provisions which, in my opinion, are excluded by the specific provisions laid down in O. 33 of the Code. It is true the Code is not exhaustive, but certainly it is exhaustive in matters specifically provided for. An order returning a plaint to be presented to the proper Court is an appealable order, so that, if the Court of First instance has determined the question of its jurisdiction one way or the other, it is open to the aggrieved party to prefer an appeal from that order to the appellate Court. But the question arises—Is an order returning the application for leave to sue as a pauper to be presented to the proper Court such an order as comes within the purview of O. 43, R. 1 (a)? In my opinion, it cannot come within the purview of cl. (a) of R. 1 of O. 43, because, at that stage, the application for leave to sue as a pauper could not be deemed to be a plaint. On the other hand, if the Court found that the applicant is not subject to any of the prohibitions contained in R. 5 of O. 33, the Court naturally would grant the leave prayed for. On such leave being granted, the application would ripen into a plaint. The contesting party then would have an opportunity of raising the ques-

tion of the Court's jurisdiction, pecuniary or otherwise, and the Court would then have the necessary power to go into the question of the valuation of the property with a view to determining the question of jurisdiction. If the Court came to the conclusion that the matter was beyond the pecuniary jurisdiction of the Court, it would naturally return the plaint to be presented to the proper Court, and the aggrieved party may avail itself of the right of appeal. But it was argued on behalf of the opposite party that the determination of the question of pauperism by the Court returning the plaint would not be binding on the Court to which the plaint may be presented in due course. The second Court will have the jurisdiction to determine for itself the question of the applicant's pauperism. Hence, it was argued that such a course would lead to duplication of proceedings under O. 33 of the Code. That is so. But, in my experience, such contingencies are rare, inasmuch as litigants are more prone to exaggerate the value of the property in suit, if a prayer for permission to sue as a pauper is to be made, than to under estimate the value of the property. In most of such cases, it is generally found that, in order to become qualified for suing as a pauper, the applicant very much over-estimates the value of the property in dispute, so as to make it out that the large amount of court-fees payable on the plaint is beyond the means of the applicant.

[5] The decision of this Court in the case of *Bihari Sahu* v. *Mt. Sudama Kuer*, 19 P. L. T. 101 : (A. I. R. (25) 1938 Pat 209) was cited as an instance of the application under S. 141, Civil P. C., to a matter arising under O. 33 of the Code. But that case is an authority only for the proposition that the Court hearing such an application has jurisdiction to allow amendment of the application, as O. 6 of the Code was not exhaustive of the powers of the Court in such matters. In that case, their Lordships pointed out that this Court had ruled in the case of ***Muhammad Nasrullah* v. *Muhammad Shukurullah***, 6 P. L. T. 209 : (A. I. R. (12) 1925 Pat. 30), that the Court had no jurisdiction to take evidence on the question of limitation with a view to seeing whether the claim was or was not barred by limitation. Hence, apart from authority, the interpretation of the rules of O. 33 of the Code leads me to the conclusion that it was not open to the Court below to go into the question of valuation of the property, so as to determine the preliminary issue of jurisdiction, because that is a matter which arises only after the application has been granted and the application treated as a plaint, in answer to which the defendant has to raise his pleas in bar of the suit or of the jurisdiction of the Court.

[6] The authorities bearing on the question may now be examined. Very strong reliance was placed both here and in the Court below on the decision of a single Judge of the Madras High Court in the case of *Periyasami Padayachi* v. *Ulaganathan*, A. I. R. (36) 1949 Mad 162 : (I. L. R. (1949) Mad. 333). It has been ruled in that decision that it is the imperative duty of a Court, when a preliminary objection as to jurisdiction is taken, to decide that question at the earliest stage of the trial, and that, if the Court, on such an enquiry, came to the conclusion that the matter was beyond its pecuniary jurisdiction, it should return the application for presentation to the proper Court. The learned Judge in the Madras High Court relied greatly on the decision of their Lordships of the Judicial Committee in the case of *Stuart Skinner* v. *William Orde*, 2 ALL. 241 : (6 I. A. 126 P. C.). That was a case arising under the Code of 1859. In that case, an application was made for permission to sue as a pauper; but, during the pendency of the application, the applicant obtained funds, with which he paid the court-fees, and, thereupon, his application was registered as a plaint. The question that was decided by their Lordships of the Privy Council was that, for the purposes of limitation, the suit will be deemed to have been instituted on the date the pauper application was filed, and not on the date when it was treated as a plaint on payment of full court-fees. Their Lordships based their conclusion on the terms of the Limitation Act (Act IX [9] of 1871) which they have quoted in the penultimate paragraph of their judgment and which specifically provided that, in the case of a pauper, the suit would be deemed to have been filed when the application for leave to sue as a pauper was made. That decision of their Lordships has naturally and necessarily been followed by all the Courts in India. In this Court also, a Division Bench has held that the document referred to in R. 2 of O. 33, Civil P. C. is a complete document consisting of an application for permission to sue as a pauper and a plaint—see *Bank of Bihar Ltd.* v. *Ramchanderji Maharaj*, 9 Pat 439 : (A. I. R. (16) 1929 Pat. 637). The learned Judge of the Madras High Court also referred to the terms of R. 5 of O. 33 and the corresponding clause in the old Code which contained the words: "That his allegations do not show a right to sue in such Court." Those words have been substituted by the words "the allegations do not show a cause of action," which naturally have very much enlarged the scope of the enquiry by the Court. But even then, in my opinion, there is no warrant for the conclusion that the Court had been empowered to hold an enquiry into matters bearing upon

its pecuniary jurisdiction. The Court, in every case, is confined to the "allegations" in the application. Hence, it is open to the Court, if it can come to that conclusion on the allegations in the petition, to hold that, on these allegations, the matter was beyond its pecuniary jurisdiction. By way of illustration, it may be supposed that the applicant for leave to sue as a pauper stated in his petition that the real value of the property in dispute was five thousand rupees but that he valued his relief only at three thousand rupees, apparently with a view to bring the matter within the pecuniary jurisdiction of the Court in which the application was filed. It will be open to the Court to throw out the application on the ground that it was beyond its pecuniary jurisdiction. But the provisions of O. 33, which have laid down with a good deal of particularity, the procedure to be followed by the Court when dealing with an application of this kind, do not contemplate an enquiry, that is to say, reception of evidence, pro and con, on the question of the valuation of the property. Such a question is more pertinently raised in the defendants' pleadings in answer to the plaint, if and when the permission to sue as a pauper is granted. A large number of decisions have been noticed in the Madras decision, referred to above; but none of them, so far as I have been able to see, except the Allahabad ruling presently to be discussed, is directly in point. It must be remembered that a case is an authority for what it has actually decided, and not for what may logically follow from that decision. The document may answer to the description of a plaint, and may have the effect of a plaint on being admitted, but is not a plaint so long as the leave has not been granted, or the necessary court-fees paid thereon.

[7] Another single Judge decision of the same Court in the case of *Eswaramma* v. *Chinna*, A.I.R. (36) 1949 Mad. 417 : (1948-2 M. L. J. 623), has taken the same view, following mainly the decision referred to above. In that case, the learned Judge also relied upon an amendment of the original R. 5 (d) of O. 33 of the Code, which amendment does not find place in the Code as amended by this Court. The other decisions of Madras High Court in *Swaminatha* v. *Gopalaswami*, A. I. R. (26) 1939 Mad. 81 : (183 I. C. 545); *Govindaraju* v. *Hanumantha Rao*, A. I. R. (32) 1945 Mad. 7 : (1944-2 M. L. J. 258) and *Brahamaramba* v. *Seetharamayya*, A. I. R. (34) 1947 Mad. 405 : (I. L. R. (1947) Mad. 820), of the Calcutta High Court in *Jagadiswari Debi* v. *Tinkari Bibi*, A. I. R. (23) 1936 Cal. 28 : (62 Cal. 711), and of the Bombay High Court in *Totaram* v. *Dattu*, A. I. R. (30) 1943 Bom. 143 : (I. L. R. (1943) Bom. 198), are not cases directly in point. They have only been relied upon to show that, in proceedings commenced under O. 33, Civil P. C. certain matters, which ordinarily can be gone into in a suit, have been entertained by the Court holding the enquiry. But those are matters incidental to the institution of a claim to property.

[8] On behalf of the petitioner, reliance was placed upon the decision of a Division Bench of this Court in the case of *Tulshi Mahatani* v. *Gajadhar Marwari*, 61 I. C. 891 (Pat.) which has laid it down that it is not open to a Court to investigate the question whether the applicant has overruled his claim in order to enable him to sue as a pauper. That decision has not discussed the relevant provisions of the Code, though it may incidentally help the petitioner's contention. The decision of the Allahabad High Court in the case of *Nur Muhammad* v. *Jamil Ahmeed*, 52 I. C. 683 : (A. I. R. (6) 1919 ALL. 213), supports the petitioner's contention that the provisions of O. 33, Civil P. C. do not entitle the Court to return an application for leave to sue as a pauper for presentation to the proper Court.

[9] Apparently, there is a divergence of judicial opinion on the question in controversy in the present case; but I would prefer to act upon the plain words of the statute as contained in O. 33 of the Code, and hold that the Court in the present case exceeded its jurisdiction in deciding to go into the question of valuation of the property in order to determine the question of jurisdiction.

[10] The application is, therefore, allowed, and the order of the Court below set aside. It is directed that the Court below should determine the question of the petitioner's pauperism as quickly as possible. In the special circumstances of this case, there will be no order as to costs.

Rai J.—I agree.

D.R.R. *Application allowed.*

A. I. R. (37) 1950 Patna 312 *[C. N. 82.]*

SINHA J.

Premlal Hajra and others — Petitioners v. *The King.*

Criminal Revns. Nos. 1531 and 1542 of 1949, D/- 31st January 1950, against order of S. J. Purnea, D/- 17th September 1949.

Criminal P. C. (1898), S. 239(d) — Same transaction.

In a pending suit a Commissioner was appointed to take charge of and harvest the standing paddy crop on the land in dispute. The accused persons resisted the Commissioner in removing the paddy crops already cut and the next day removed the remaining portion of the standing crops :

Held that the accused persons, from start to finish, were acting in pursuance of the common design to prevent the Commissioner from taking charge of the

property and harvesting the crop. The two incidents were parts of the same transaction and a joint trial of the accused under Ss. 353 and 379, Penal Code was not illegal. [Para 7]

Annotation ('49-Com.) Cr. P. C., S. 239 N. 6.

S. P. Samaiyar and S. L. Nandkeolyar — for Petitioners.

The Standing Counsel — for the Crown.

Order. — These two applications in revision arise out of a single case for the prosecution resulting in the conviction of the six petitioners, four in the one and two in the other, who have been convicted and sentenced by the Courts below under S. 379, Penal Code to nine month' rigorous imprisonment and under S. 353, Penal Code, to six months' rigorous imprisonment, no separate sentence being recorded in respect on the conviction under S 143, Penal Code. The two sentences of imprisonment were directed to run concurrently.

[2] The prosecution case, shortly stated, is that there had been a dispute between one Sital Singh on the one hand and some of the petitioners on the other in respect of about 40 bighas of cultivated land in village Kamalpur within the Police station Dhamdaha. Sital Singh had instituted a civil suit in respect of the property, and had prayed for appointment of a receiver in respect of the property. He had also obtained an order from the Court appointing a pleader of the Court, Babu Ram Narain Das Commissioner, to go to the spot, and take charge of and harvest the standing paddy crop on the entire area. He reached the spot on the afternoon of 12th January 1948, and started getting the standing paddy crop harvested. He could succeed in getting the standing paddy crop cut out in respect of about four to five bighas. As it became evening time, he directed the labourers, who had cut the crop to store it in a neutral Khaliban, belonging to Sk. Subedar in the same village for safe custody and thrashing; but the accused party led by the petitioner Parmanand Thakur, who is said to be a Socialist leader in that locality, resisted the removal of the crop, and used bad abusive languages against the Commissioner, and even threatened him with use of force. Finding the attitude of the mob, consisting of the petitioners and many others, very threatening, the commissioner did not think it safe and advisable to persist in his attempt to get the cut paddy removed to the Khaliban of Sheikh Subedar. He left the crop in charge of a constable Mohammad Kazim Khan and Barka Besa, who were there on the spot in connection with an apprehended breach of the peace in that locality. On the morning of 13th January 1948, the petitioners came with a large mob, and began harvesting the paddy. The Commissioner sent a report of the occurrence of the last evening and of the morning of 13th January, to the Subordinate Judge who had deputed him, as also to the Police station. On receiving the report, the Sub-Inspector of Dhamdaha Police station arrived at the spot at about 2 p. M. on 13th. Seeing the Police Sub-Inspector arriving, the mob dispersed, taking away with them bulk of the paddy cut and leaving some standing paddy crop behind. On the report of the Commissioner, the Sub-Inspector drew up a first information report, and, after investigation, submitted charge sheet against the petitioners and nineteen others, in all twenty five persons, for trial under Ss. 144, 145, 353 and 379, Penal Code.

[3] At the trial, the prosecution examined a large number of witnesses including the public officers like the commissioner and the constables. The defence of the petitioners was a denial of the occurrence. The accused did not examine any witnesses on their behalf. The trial Court acquitted nineteen accused persons on the ground that they had not been properly identified as the persons who were concerned in the crime. He convicted the petitioners, and sentenced them as stated above. The lower appellate Court only converted the conviction of some of the petitioners under S. 144 to one under S. 143, Penal Code. But that modification did not affect the substantive terms of imprisonment given to each one of these petitioners.

[4] In this Court, it has not been argued before me that the Commissioner did not go to the spot, or that he had not taken charge of the standing paddy crops, or even that he was not legally in possession. The only point argued in support of the application for revision is that the joint trial of the two substantive offences, under S. 353 and 379, Penal Code was illegal. It is, therefore, necessary to set out the two charges against the petitioners, namely, (1) that, on or about 12th January 1948 they assaulted Mr. R. N. Das, the pleader commissioner (a public servant) in the execution of the duties as such public servant, and prevented him from discharging his official duties and that thereby they committed an offence under S. 353, Penal Code; and (2) that, on 13th January 1948, they committed theft of standing paddy crops from about 31 bighas of land, worth about three thousand rupees, from the possession of the Sub Judge's Court, Purnea, (Title Suit No. 1 of 1948).

[5] It is contended that these two charges, one in respect of the occurrence on 12th January and the other in respect of the occurrence on 13th January, could not have been legally joined and tried together. If this contention is well founded in law, it is manifest that the convictions under either of these two sections cannot be sustained. The answer to this contention depends upon the

interpretation of S. 239 with particular reference to cl. (d) which authorises the joint trial of "persons accused of different offences committed in the course of the same transaction." On behalf of the petitioners, it has been contended that the aforesaid two offences could not be said to have been committed in the course of the same transaction, and that, as a matter of law and fact both, the occurrence on 12th January, had nothing to do with the occurrence on 13th January. On the other hand, the prosecution version is that the two occurrences were parts of the same transaction, and that a common purpose ran through both the incidents on the two dates aforesaid. The finding of both the Courts below is that these six petitioners were certainly present on both the occasions, and were concerned in offering resistance to the commissioner when he proposed to remove the paddy crops already cut on 12th afternoon, and in removing the remaining portion of the standing crops except for a few bighas on the morning of 13th January. The Courts below have taken the view that these petitioners who were the ring-leaders of the mob, acted in concert in defiance of the commissioner, and prevented him from discharging his duties and ultimately removed the crops of which he had been commissioned by the Court to take charge. It is true that the two occurrences are separated by about twelve to fifteen hours; but the fact remains that the mob on both the occasions led by these petitioners, acted in the way they did with a veiw not only to obstructing the Commissioner in the discharge of his duties but also to preventing him from exercising his functions in respect of the standing crops. Reliance was placed upon a decision of a Division Bench of the Bombay High Court, in the case of *Krishnaji* v *Emperor*, A. I. R. (19) 1932 Bom. 277 : (33 Cr. L. J. 619) in which Beaumont C. J. has made the following observations:

> "But the mere fact that there may have been a common purpose of that nature cannot make two perfectly distinct offences part of the same transaction. A mere common purpose does not constitute a transaction and in my opinion, there was no sufficient connexion between these two offences to justify their being tried together under S. 235 or S. 239 (d)."

These observations were made with special reference to the facts of the case before the Court. In the case before their Lordships of the Bombay High Court, there were two distinct offences one of theft on 28th May 1931, in the house of the complainant, and the other the offence of breaking into the house of the complainant, and committing theft on 7th June 1931. In that case, the Magistrate had framed a single charge both under S. 380 and under S 457, Penal Code, on the assumption that they were offences of the same kind, and therefore, a joint trial was permissible under S. 234, Criminal P. C. In the High Court, for the first time, the conviction was sought to be supported on the ground that the two offences had been committed by the accused persons in order to compel the complainant to quit his house. Broomfield J. who agreed with the Chief Justice, observed that the two incidents of the two dates, as aforesaid, could not reasonably be regarded as parts of the same transaction. Hence both their Lordships of the Bombay High Court did not treat the two incidents as parts of the same transaction but as two distinct and separate offences committed on two dates, separated by about ten days in between them. Reliance was also placed upon a decision of the Division Bench of this Court, in the case of *Chintaman* v. *Emperor*, 24 Pat. 303: (A. I. R (32) 1945 Pat. 388) to which I was a party. There also the facts were of an entirely different nature and Meredith J. (as he then was) made the following pertinent observations with respect to the question of the legality of the joinder of the two charges under Ss. 214 and 302, Penal Code:

> "The prosecution has not sought to prove that there was any conspiracy between the different persons tried, that those who attempted to get the matter hushed up were acting in concert with Chintaman. No attempt has been made to prove any continuity of purpose as beween them. . . . ."

That would entirely distinguish the present case from the case then before their Lordships. The learned counsel for the petitioner also invited my attention to the decision of a Division Bench of this Court in the case of *Gobinda Chandra* v. *Emperor*, 5 Pat. L. J. 11 : (A. I. R. (7) 1920 Pat. 230. 21 Cr. L. J. 161). In that case accused 1 had seized the woman with a criminal intent when he was attacked by her husband, and accused 2 and 3 thereupon appeared on the scene, and assaulted the husband. It was held in those circumstances, that, in the absence of proof that the three accused were acting for a common purpose in execution of a common design, a joint trial of accused 1 under S. 354 and of accused 2 and 3 under S. 323, Penal Code was illegal. Their Lordships have made the following observations with reference to the evidence on the record in that case:

> "There is no evidence on the record to suggest or prove that accused 2 and 3 were *particips criminis* with accused 1 in his acts or purpose relative to the assault which they committed upon Mt. Khiradmani."

[5] Though, in that case, their Lordships held the joint trial to be illegal, they adopted the following observations of their Lordships of the Bombay High Court in the case of *Emperor* v. *Datto Hanmant*, 30 Bom. 49 : (2 Cr L. J. 578) bearing on the construction of S. 239, Criminal P. C.

"According to its etymological and dictionary meaning, the word 'transaction' means carrying through' and suggests, we think not necessarily proximity in time so much as *continuity of action and purpose* . . . . . .

We think the *foundation for the procedure in that section is the association of two persons* concurring from start to finish to attain the same end."

[6] Their Lordships also adopted the following language used by a Division Bench of the Madras High Court in the case of *Venkatadri v. Emperor*, 33 Mad. 502 : (5 I. C. 847):

"I think—and this seems to be the effect of the decisions—that at least in a certain class of cases—the present case is alleged to be within that category—*community of purpose or design and continuity of action* are essential elements of the connection necessary to link together different acts into one and the same transaction. In such cases, the *acts alleged to be connected with each other must have been done in pursuance of a particular end in view and as accessory thereto or perhaps as suggested by the circumstances in which the acts in pursuance of the original design, were done and in close proximity of time to those acts.*"

[7] Applying those tests to the facts of the present case, in my opinion, there is no doubt that, from start to finish, these petitioners were acting in pursuance of the common design to prevent the Commissioner from taking charge of the property and harvesting the crop, which he had been commissioned by the Court to do in a pending litigation between the parties. Hence, I would hold that the joint trial in this case was not illegal and that the two incidents were parts of the same transaction within the meaning of S. 239 (d), Criminal P. C.

[8] As that is the only point raised in support of the petitions—a point which was raised for the first time in this Court, which I have held to be without any substance—the applications must be dismissed, and the rules discharged. If the petitioners are on bail they must surrender and serve the remaining portion of their sentence.

D.H. *Rules discharged.*

A. I. R. (37) 1950 Patna 315 *[C. N. 83.]*

DAS J.

Panchan J. Rathore—Petitioner v. *Mohan Mogha—Opposite Party.*

Criminal Revn. 1609 of 1949, D/- 1st February 1950, against order of S. J., Manbhum-Singbhum, D/- 2nd December 1949.

Criminal P. C. (1898), Ss. 133 and 147—Conversion of proceeding under S. 133 into one under S. 147.

Where in a proceeding initiated under S. 133, the Magistrate after hearing the parties and perusing the cause shown is satisfied that the real dispute between the parties is as to the right of user of certain public pathway in respect of which there is an apprehension of the breach of peace and the Magistrate orders the drawing up of proceedings under S. 147 and directs the parties to file their written statements, the order is perfectly within jurisdiction: A. I. R. (3) 1916 Cal. 151 and 9 I. C. 262 (Cal.), *Disting.* [Para 2]

Annotation : ('49-Com.) Cr. P. C., S. 133 N. 5 ; S. 147 N. 17 Pt. 4.

M. K. Mukharji—for Petitioner.

S. K. Sarkar for S. C. Mazumdar — for Opposite Party.

Order.—The principal point for consideration on this application is if a proceeding under S. 147, Criminal P. C., started by the learned Sub-divisional Magistrate of Dhanbad on 16th September 1949, is with jurisdiction or not. The facts are these. On a Police report, dated 24th August 1949, relating to the fencing and digging of ditches on a path, alleged to be a public path between two collieries, regarding which there was an apprehension of a breach of the peace, the learned Sub-divisional Magistrate directed the issue of a conditional order under S. 133, Criminal P. C. This was on 26th of August 1949. The order stated that either the obstructions should be removed or cause should be shown by 16th of September 1949. On 16th September 1949, the Magistrate, who was on that date acting as the Sub-divisional Magistrate heard the parties and perused the cause shown. After hearing the parties and perusing the cause shown, he was satisfied that the dispute really related to an alleged right of user of a particular piece of land, and inasmuch as there was an apprehension of a breach of the peace, he directed the drawing up of a proceeding under S. 147, Criminal P. C. On the next date the parties filed written statements, and the case was transferred to Mr. G. P. Varma. Subsequently, the case was transferred to another Magistrate on the transfer of G. P. Varma.

[2] The question before me is if the order of the learned Magistrate acting as the Sub-divisional Magistrate on 16th of September 1949 and directing the initiation of a proceeding under S. 147, Criminal P. C. is an order with jurisdiction. It is not disputed that the Magistrate who passed the order on that date, was a Magistrate of the first class, and that he was acting as the Sub-divisional Magistrate on that date. The point which is urged on behalf of the petitioner is that a proceeding under S. 133 once started must be brought to termination, and that without terminating that proceeding, it was not open to the Magistrate to start a proceeding under S. 147, Criminal P. C. It seems to me that there is now no proceeding under S. 133, Criminal P. C. The learned Magistrate, on hearing the parties and on perusing the cause shown, was satisfied that the section which would properly apply in the present case was S. 147 of the Code. In my opinion, the

learned Magistrate was right in that view. I have myself examined the cause shown and the written statements filed. It appears that the opposite party before me claimed not merely that the land in question was a public path over which every member of the public had a right to access; but also claimed that the opposite party had a right of easement over this land—an easement of necessity there being no other way by which the opposite party could transport coal from its colliery. It seems, therefore, that the real dispute between the parties relates to an alleged right of user of the land in question. That being so, the learned Magistrate was right in his view that S. 147 was the proper section, particularly when the police report showed, and the learned Magistrate was so satisfied, that there was an apprehension of a breach of the peace over the dispute regarding the alleged right of user. The learned Magistrate had, in my opinion, jurisdiction to start a proceeding under S. 147, Criminal P. C., on the materials, before him. Learned counsel for the petitioner had relied on two decisions. The first is *Sarojbashini Devi* v. *Sripati Charan*, 42 Cal. 702: (A. I. R. (3) 1916 Cal. 151). That was a case in which the learned Magistrate allowed a proceeding under S. 133 to drop without following the procedure prescribed by S. 137 (1). The facts of that case are entirely different and the principle laid down in that decision has no application to the facts of the present case. The other decision is *Abdul Rahman* v. *Safar Ali*, 15 C. W. N. 667 : (9 I. C. 262). That was a case in which in a proceeding under S. 133, Criminal P. C., an order was passed under S. 147, Criminal P. C., without taking any action in accordance with the procedure laid down in S. 145, Criminal P. C. It appears that the learned Magistrate in that case passed an order under S. 147 in a proceeding under S. 133, Criminal P. C. without taking any evidence. It is obvious that no order under S. 147, Criminal P. C. can be passed without first initiating proceeding under that section and following the procedure laid down therein. In the case before me, the learned Magistrate had jurisdiction to start a proceeding under S. 147, Criminal P. C. and he passed an order directing the filing of written statements, etc. In other words, he followed the procedure which has to be followed in a proceeding under S. 147, Criminal P. C. In my opinion the order of the learned Magistrate dated 16th September 1949 is an order with jurisdiction.

[3] The result, therefore, is that the application fails, and the rule is discharged.

K S. *Rule discharged.*

A. I. R. (37) 1950 Patna 316 [C. N. 84.]

REUBEN AND JAMUAR JJ.

Kamakshya Narain Singh—Appellant v. *The Province of Bihar—Respondent.*

First Appeal No. 33 of 1949, D/ 9-1-1950.

Court-fees Act (1870), S. 7 (iv) (c) — Suit for declaration and injunction — Valuation for court-fee and jurisdiction — Suits Valuation Act (1887), S. 8.

Where in a suit for declaration and injunction the plaintiff states the amount at which he values the relief sought for purposes of court-fee, no separate valuation is necessary for purposes of jurisdiction as under S. 8, Suits Valuation Act, the value as determinable for the computation of court-fees and the value for purposes of jurisdiction are the same. [Para 2]

Annotation: ('49-Com.) Court-fees Act, S. 7 (iv) (c) N. 4. N. 21, 22, Pt. 1, Suits Valuation Act, S. 8, N. 5, Pt. 1.

Shambhu Prasad Singh—for Appellant.

Govt. Advocate—for Respondent.

Order.— The question which arises in this case is as to the correct court-fee payable on the plaint. The plaintiff-appellant sued for a declaration that the Private Forests Act, 1946 (Bihar Act, III [3] of 1946) is *ultra vires* and for an injunction restraining the Provincial Government from taking over the management of the forests of his estate under the said Act. In his plaint he valued the prayer for perpetual injunction at Rs. 5,100 and paid court fee thereon. He also paid a court-fee of Rs. 18-12-0 for the declaration sought, and added the sentence: 'The value of the suit for the purpose of jurisdiction is laid at Rs. 1,00 000 (Rupees one lakh) which is within the pecuniary jurisdiction of this Court." It is contended by the Stamp Reporter that under the provisions of S. 8, Suits Valuation Act, the valutation of the suit for purposes of jurisdiction and for court-fee should be the same, and that, therefore, the *ad valorem* court fee should be charged on the higher valuation which the plaintiff himself has put upon the suit.'

[2] It appears to us that this case is on all fours with the case of *Gobinda* v. *Hanmaya*, 45 Bom. 567: (A. I. R. (8) 1921 Bom. 65) in which their Lordships of the Bombay High Court accepted the lower valuation which was mentioned in the plaint, pointing out that under S. 7, cl. (iv), Court-fees Act, the plaintiff was entitled to value the relief sought by him and a further statement as to the value for the purposes of jurisdiction was unnecessary. Our attention has been drawn to *Manni Lal* v. *Radhe Gopalji*, 47 All. 501: (A. I. R. (12) 1925 All. 602), in which Piggott J. in a similar case held that a court-fee should be charged on the sum-total of the two valuations mentioned by the plaintiff. That was a case in which his Lordship was of the opinion that the value put upon the injunction sought was a nominal one. We are not pre-

pared in the present case to say this of the valuation put by the plaintiff on his prayer for an injunction. The decision in substance is to our mind in support of the plaintiff in the present case. His Lordship pointed out that under the provisions of S. 7, Court fees Act, read with S. 8, Suits Valuation Act, the valuation for purposes of the court fees is to be determined first and that for purposes of jurisdiction must follow the valuation thus determined. Section 7 (iv) (c) requires the plaintiff to state the amount at which he values the relief sought. This has been done in the present case, the valuation put on the relief being Rs. 5,100. Section 8, Suits Valuation Act, provides that the value as determinable for the computation of court fees and the value for purposes of jurisdiction shall be the same. It follows, therefore, that Rs. 5,100 is the correct valuation of the suit for purposes of jurisdiction. The statement in the plaint that the value of the suit for purposes of jurisdiction is laid at Rs. 1,00,000 was, therefore, uncalled for. Apparently this valuation was for the declaration sought. It gives the valuation of the property and was unnecessary and should be ignored. Let the court-fees paid on the plaint be accepted as sufficient.

G.M.J. *Order accordingly.*

A. I. R. (37) 1950 Patna 317 *[C. N. 85.]*

REUBEN AND JAMUAR JJ.

Abinash Chandra Chakraverty — Appellant v. Sm. Kamla Devi—Respondent.

Second Appeal No. 677 of 1948, D/- 13th February 1950.

Court-fees Act (1870), Section 7 (iv) (b) — Partition Act (IV [4] of 1893), S. 4 — Co-sharer owning five-sixth share selling entire property — Owner of one-sixth share suing for declaration of title, possession and partition—Prayer for permission under S. 4, Partition Act, to buy out defendant's share — Court-fee paid ad valorem on one-sixth share and in addition fixed fee for partition — Suit decreed except for prayer under S. 4—Appeal in respect of that prayer only — Prayer simply amounts to asking for partition indicating the manner in which it should be made—Court-fee chargeable on appeal is only partition court-fee and not ad valorem fee on value of entire property. [Paras 3 and 4]

Annotation : ('49-Com.) Court-fees Act, S. 7 (iv) (b), N. 9.

K. D. Chaterji—for Appellant.

S. C. Mukherji—for Respondent.

Judgment. — The plaintiff-appellant filed a suit for partition in respect of a house which formerly belonged to himself and his brother, the respective shares being one-sixth and five-sixth. The brother executed a sale deed in favour of the defendant-respondent in respect of the entire house. The plaintiff in this suit asks for the declaration of his title to one-sixth share, for recovery of possession and for partition. Further, he asks for an order under S. 4, Partition Act of 1893 permitting him to buy out the defendant. On his plaint, he paid *ad valorem* court-fee on his prayer for declaration of his title and recovery of possession on the value of his one-sixth share, and paid besides a partition court-fee of Rs. 18-12-0. The Court of first instance found the plaintiff's title and decreed possession. As regards the remaining prayers, in view of considerable improvements found by it to have been made by the defendant to the house, the Court directed that the plaintiff, instead of getting any portion of the house, should get the equivalent value amounting to Rs. 700. In appeal to the District Court, the plaintiff asked for the relief under S. 4, Partition Act, namely, to be permitted to buy out the defendant. His appeal being dismissed, he has filed the present appeal. In both the appellate Courts, he has paid merely the court fee for partition. The court-fee payable on the memorandum of appeal in this Court has been determined by the taxing officer under S. 5, Court fees Act. We are concerned with the court-fee payable on the plaint and on the memorandum of appeal in the lower appellate Court.

[2] According to the Stamp Reporter, the suit is one for confirmation of possession or recovery of possession, and, as the plaintiff wants to get the whole house for himself, *ad valorem* court-fee is payable also in respect of the value of the five-sixths share of the house.

[3] It appears to us that the view taken by the Stamp Reporter is incorrect. The relief in question is of an equitable nature and does not follow as a consequence of any finding as to the title of the plaintiff. The relief in this case is one under S. 4, Partition Act, which provides that, where a share of a dwelling house belonging to an undivided family has been transferred to a person who is not a member of such family the Court in a suit for partition shall, if a member of the family being a share-holder undertakes to buy the share of the transferee, make a valuation of such share and direct the sale of such share to such share-holder, and may give all necessary and proper directions in that behalf. The section does not in terms require any particular form of application to be made by the share-holder member of the family, and it is open to the share-holder to get this relief at any stage of the suit. The section in terms applies to a suit for partition brought by a transferee, but has been extended to such a suit brought by a member of the family, *Satyabhama De v. Jatindra Mohan*, 49 C. L. J. 136 : (A. I. R. (16) 1929 Cal. 269). Section 2 Partition Act is also relevant. It provides that, when in a suit for

partition it appears to the Court that, by reason of the nature of the property to which the suit relates, or of the number of the share-holders or of other special circumstance, a division of the property cannot reasonably or conveniently be made, and that a sale of the property, and distribution of the proceeds would be more beneficial for all the share holders, the Court may, if it thinks fit on the request of any of such share-holders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds. This provision as also the provision in S. 4, appears to prescribe modes in which a partition can be made. In this aspect of the matter, it appears to us that the plaintiff, in asking for relief under S. 4, Partition Act, was doing no more than asking for partition and indicating the manner in which the partition should be made.

[4] It has been suggested in the Stamp Report that, even taking the above view, the court fee payable on the memorandum of appeal should be the same as that paid on the plaint. We do not agree. The appellant has succeeded so far as his suit was for declaration of title and recovery of possession. All he is now asking for is partition and the court-fee paid by him is sufficient to cover this.

D.R.R. *Order accordingly.*

A. I. R. (37) 1950 Patna 318 [*C. N. 86.*]

SINHA AND NARAYAN JJ.

Raghuraj Prasad Singh — Appellant v. *Basudeo Singh and others — Respondents.*

A. F. A. D. Nos. 156 to 164 of 1947, D/- 9-2-1950, from decision of Addl. Sub-J., Gaya, D/- 7-9-1946.

(a) Tenancy laws — Bihar Tenancy Act (VIII [8] of 1885), S. 40 (6) — Order passed by Collector on appeal from order under S. 40 (5) — Jurisdiction of Commissioner to interfere with order.

As the Legislature in S. 40 (6) has declared that the decision of a Collector on an appeal from an order under S. 40 (5) shall be final, the Commissioner has no jurisdiction to interfere with that order, even though he has the power of superintendence over such officer. Any reversal or modification by him would be *ultra vires.* [Para 4]

(b) Evidence Act (1872), S. 115 — Estoppel against judgment and statute — Order of Court having no jurisdiction to decide question raised — Order cannot be pleaded as an estoppel — No estoppel against statute — Want of jurisdiction appearing on face of proceeding — Question of approbating and reprobating does not arise. [Paras 5, 6]

Annotation : ('46-Man.) Evidence Act, S. 115, N. 41, 50.

(c) Civil P. C. (1908), S. 9 — Consent if can give jurisdiction.

Where there is no inherent jurisdiction, neither acquiescence nor request nor any application on the part of a party can give such jurisdiction. [Para 5]

Annotation : ('44-Com.) Civil P. C., S. 9, N. 5.

Rajkishore Prasad, Lakshmi N. Sinha and Awadh Kishore Prasad — for Appellant.

Lalnarayan Sinha and Lakshman Saran Sinha — for Respondents.

Narayan J. — These are plaintiff's second appeals in suits for rent. The plaintiff had originally claimed the value of produce rent for the years 1350 and 1351 but as during the pendency of the suits the produce rent was commuted into cash rent, the plaintiff sought an amendment of the plaint and claimed cash rent for the years 1348 to 1351. The prayer was allowed and the jama of Rs. 9-3-6 per acre as fixed by the Rent Commutation Officer on 20th September 939 was inserted in the plaint by an order of the learned Munsif dated 19th April 1945. An appeal having been preferred against the order of the Rent Commutation Officer fixing at Rs. 9-3-6 per acre, the order of the Rent Commutation Officer was confirmed by the Collector on 4th January 1941. Against the order of the Collector the tenants as well as the landlord filed revision applications before the Commissioner, and the Commissioner remanded the cases with the direction that fresh rates should be fixed after a local inspection. After remand, the Rent Commutation Officer by an order dated 6th January 1944 reduced the rates as originally fixed, and a revised schedule was accordingly prepared. The claim having been made on the basis of Sch. 1 the defendants pleaded that the plaintiff was not entitled to a higher jama than the one fixed by the Commutation Officer after remand. The learned Munsif overruled this contention and decreed the plaintiff's claim at the jama as originally fixed by the Rent Commutation Officer. On appeal the learned Subordinate Judge dismissed the claim for 1348 as time-barred and decreed the claim for the remaining years at the reduced rate which had been entered in Sch. 2.

[2] The contention on behalf of the plaintiff-appellant before us is that the order of the Commissioner remanding the cases for fixing fresh rates is *ultra vires*, inasmuch as according to the statute the order of the Collector is final in all such matters, and neither the Commissioner nor the Board of Revenue has jurisdiction to question, modify or reverse that order.

[3] According to sub-s. (6) (a) of S. 40, Bihar Tenancy Act, an appeal shall lie from an order referred to in sub-s. (5) of S. 40 to the Collector of the district or to any officer especially empowered by the Provincial Government by notification to hear such appeals, if such order is passed by any officer other than the Collector of a district, *and the decision of the Collector of the district or of any officer so empowered on any such appeal shall be final.* The statute thus does not provide for any appeal or revision

application to the Commissioner or the Board of Revenue. Section 112B, Bihar Tenancy Act which provides for an appeal from (sic) an order made under S. 112A contains similar provisions, and it was ruled by this Court in *Radhakrishnaji* v. *Ramkhelawan*, 24 Pat. 234 : (A.I.R. (32) 1945 Pat. 179). that because of the provisions of S. 112B, Bihar Tenancy Act, which enacts that the order of the Collector, or the prescribed authority, on appeal from the decision of the Rent Reduction Officer shall be final neither the Commissioner nor the Board of Revenue, has jurisdiction to question, modify or reverse that order, and that any reversal or modification by them would be *ultra vires*. As was pointed out by Agarwala J., (as he then was) in this decision, where the Legislature has declared the decision of a particular officer or tribunal to be final, no other tribunal can substitute its own decision for the decision of that tribunal and that even if the Commissioner or the Board of Revenue has the power of superintendence over Rent Reduction Officers and the Collector of the district in appeal, that power is confined to preventing such officers from exercising a jurisdiction not conferred on them or compelling them to exercise a jurisdiction which they have omitted to exercise. There is no power in the Commissioner or the Board of Revenue even if they consider that the decision of the subordinate tribunal is wrong in law or in fact, to come to another decision or to substitute their own decision in place of the decision of the subordinate tribunal. Their Lordships in this case referred with approval to the decision of Rankin C. J. in *Manmathanath Biswas* v. *Emperor*, 60 Cal. 618 : (A. I. R. (20) 1933 Cal. 132 : 34 Cr. L. J. 299), in which their Lordships of the Calcutta High Court had to consider the power of superintendence as laid down in S. 107, Government of India Act. The principle laid down by Rankin C. J. in this case would be fully applicable to a case in which we have to consider the power of superintendence as conferred on the Commissioner or the Board of Revenue over Rent Reduction Officers and the Collector of the district in appeal. The following observation of Rankin C. J. appears to be important for our present purpose :

> "I agree with Roe J. in the Patna case that superintendence is not a legal fiction, whereby a High Court Judge is vested with omnipotence, but is, as Norman J. had said, a term having a legal force and signification. The general superintendence, which this Court has over all jurisdictions subject to appeal, is a duty to keep them within the bounds of their authority, to see that they do what their duty requires and that they do it in a legal manner. It does not involve responsibility for the correctness of their decisions, either in fact or law. Thus in England, a mandamus to hear and determine according to law does not mean that the inferior tribunal is ordered to give a correct decision, nor does prohibition lie to correct a wrong decision on the merits. The limits put upon appeals by the Indian Legislature are a part of the Judicial system which it is just as necessary for this Court to enforce under S. 107, as any other feature of that system."

[4] In *Kumar Rani Sayeed Khatun* v. *Bharose Singh* which is an unreported decision dated 6th October 1948 in Letters Patent Appeal No. 49 of 1947 and in which their Lordships had to consider S 22, Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act (Act IX [9] of 1938) which lays down that the order of the Revenue Officer shall be final, the decision in *Radha Krishnaji* v. *Ramkhelawan*, 24 Pat. 234 : (A. I. R. (32) 1945 Pat. 179) was relied on, and it was held mainly on the strength of this decision that the Commissioner's order and the order passed subsequent to the order of remand by the Commissioner who had proceeded to revise the orders of the subordinate tribunal were wholly without jurisdiction and complete nullities. It is now, therefore, well settled that the power of superintendence conferred on the Board of Revenue or the Commissioner and as provided in the rules framed according to the provisions of the Bihar Tenancy Act is not a power to interfere judicially and if there be any rule purporting to confer on the Commissioner or the Board of Revenue powers to interfere judicially, then that rule would be ultra vires of the statute. Where the object of the statute is clearly to secure the finality of a decision no question of a further appeal or of an application in revision against that decision arises. It cannot, therefore, be urged in this case that the Commissioner before whom applications in revision had been filed by the tenants as well as by the landlord had a jurisdiction to interfere with the decision of the Collector in appeal. It is an admitted position that the order of remand passed by the Commissioner on the application which had been preferred before him was an order on the merits, and therefore what was laid down by this Court in *Tahal Mahton* v. *Lachoo Mahton*, 25 Pat. 84 : (A. I. R. (33) 1946 Pat. 298) can have no application in this case. What was decided in this case was that when the order of the Collector in the rent reduction proceeding is vacated by a Court of competent jurisdiction (Board of Revenue) it cannot stand in the way of the civil Court coming to its own independent conclusion on the question whether the holding was held on a cash rental or on bhaoli basis. As was pointed out by Fazl Ali C. J. (as he then was), the order of the Board of Revenue in that case was that the Rent Reduction Officer should not have reduced the rent of the holdings because he had no jurisdiction to reduce the rent of bhaoli holdings. Because the Board of Revenue and the Commis-

sioner have got the power of superintendence they can interfere when they find that a Rent Reduction Officer has acted without jurisdiction. This decision cannot be regarded as an authority to support the view that the power of superintendence conferred on the Commissioner or the Board of Revenue gives them the jurisdiction to interfere with the decision of the subordinate tribunal on merits.

[5] It has, however, been vehemently contended in this case that because the plaintiff landlord had consented to the interference by the Commissioner it is not open to him to turn round and say that the Commissioner had no jurisdiction to interfere, and the principle that a man cannot approbate and reprobate has been relied upon. Apart from filing an application in revision before the Commissioner what the plaintiff-landlord did was that after the order of remand had been passed by the Commissioner he realised produce rents for these holdings by distraint proceedings treating these holdings to be bhaoli. The learned Subordinate Judge was of the opinion that because the plaintiff had taken advantage of the remand order passed by the Commissioner and had realised produce rent for these holdings, he had waived the rights which had accrued to him by the previous commutation order confirmed in appeal by the Collector. But, in my opinion, when the order of the Commissioner was not an order of a Court having competent jurisdiction to decide the question raised it cannot be pleaded as an estoppel, and neither acquiescence nor request nor application on the part of the plaintiff landlord would give the Commissioner a jurisdiction over the subject-matter of the cause. This is a case in which the want of jurisdiction appeared on the face of the proceedings and the question of approbating and reprobating does not at all arise. The objection to jurisdiction could not in this case depend on some matter of fact as to which any of the parties to the cause or the Court concerned itself might have been deceived or misled or might have unconsciously neglected to observe. When the Commissioner made the order of remand he must or ought to have known that he was acting beyond his jurisdiction :

> "It is of the very root of the idea of the right of the state to settle the disputes of individuals that the machinery employed for the purpose should itself be constituted according to law."

Lord Watson in the case of *Ledgard* v. *Bull*, 13 I. A. 134 : (9 ALL. 191 P. C), pointed out the circumstances under which there can be a waiver of a right to complain of a want of jurisdiction, and his Lordship observed as follows :

> "The defendant pleads that there was no jurisdiction in respect that the suit was instituted before a Court incompetent to entertain it ; and that the order of transference was also incompetently made. The District Judge was perfectly competent to entertain and try the suit if it were competently brought ; and their Lordships do not doubt that in such a case a defendant may be barred by his own conduct from objecting to irregularities in the institution of the suit. When the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot by their mutual consent convert it into a proper judicial process, although they may constitute the Judge their arbitrator, and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when, in a cause which the Judge is competent to try, the parties without objection join issue, and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the ground that there were irregularities in the initial procedure which, if objected to at the time, would have led to the dismissal of the suit."

[6] There cannot be the least doubt that in this present case there was an inherent incompetency to decide the questions that had been raised before him and therefore, according to the view taken by their Lordships of the Judicial Committee in *Ledgard* v. *Bull*, 13 I. A. 134 : (9 ALL. 191 P. C.) and *Meenakshi Naidoo* v. *Subramaniya Sastri*, 14 I. A. 160 : (11 Mad. 26 P. C.) no amount of consent by the plaintiffs landlord could confer upon the Commissioner the jurisdiction which he never possessed. The latter case was a case in which the High Court of Madras had interfered with the order of the District Judge of Madura by which the Judge had acted under the powers given to him by Act XX [20] of 1863 which is an Act to enable the Government to divest itself of the management of religious endowments and which is commonly known as the Pagoda Act. In this case also the contention before their Lordships was that the appellants before their Lordships by reason of the course which they had pursued in the High Court had waived the right which they otherwise had to raise the question of want of jurisdiction. Their Lordships held that this view was untenable and no amount of consent under such circumstances could confer jurisdiction where none existed. In my opinion, these two Privy Council decisions are quite in point and are conclusive of the contention raised by the respondents before us. In the case of *Juttendromohun Tagore* v. *Ganendromohun Tagore*, I. A. Sup. Vol. 47 : (9 Beng. L. R. 377 P. C.), their Lordships of the Judicial Committee observed as follows :

> "The plaintiffs, however, is not bound by an admission of a point of law, nor precluded from asserting the contrary, in order to obtain the relief to which, upon a true construction of the law, he may appear to be entitled."

A Single Judge of the Allahabad High Court relying on this passage and also on another passage from another Privy Council decision held in *Jagwant Singh* v. *Silan Singh*

21 ALL. 285:(1899 A.W.N. 66), that an admission on a point of law is not an admission of a "thing" so as to make the admission matter of estoppel within the meaning of S. 115, Evidence Act. The importance of this Single Judge's decision is that it was referred to with approval by a Division Bench of this Court in *Bimalabala Sinha* v. *Deb Kinkar Ghosh*, A. I. R. (19) 1932 Pat. 267 : (140 I. C. 687). In a Division Bench decision of the Allahabad High Court in *Mahabir Singh* v. *Narain Tewari*, A. I. R. (18) 1931 ALL. 490 : (54 ALL. 25 F. B.) the well-known principle that there can be no estoppel against the statute was reiterated, and it was pointed out that if a question of estoppel were dependent on the determination of some facts, a party may be estopped from pleading it, but that if it is patent and apparent on the record, then even if there were estoppel against a party, a Court would not be estopped from considering the point. Sulaiman Ag. C. J., further observed that the principle of estoppel cannot be allowed to defeat the provisions of a statutory enactment which affects the jurisdiction of a Court, as a party cannot by its admission or previous conduct confer jurisdiction on a Court where none exists. In Halsbury's Laws of England, Edn. 2, Vol. 13, the law on the point has been thus summed up :

> "In order that estoppel by record may arise out of a judgment, the Court which pronounced the judgment must have had jurisdiction to do so. The lack of jurisdiction deprives the judgment of any effect, whether by estoppel or otherwise; and this rule applies even where the party alleged to be estopped himself sought the assistance of the Court whose jurisdiction is impugned.'

Being fortified by these authorities, I am not able to agree with the view of law taken by the learned Subordinate Judge and I must hold in disagreement with the learned Subordinate Judge that the order of remand made by the Commissioner and all the subsequent proceedings in consequenue of the order of remand were without jurisdiction and ultra vires. There can be no estoppel against a statute and the doctrine of approbate and reprobate which applies only to the conduct of the parties is not applicable in this case, the conduct of the parties being immaterial when there is complete lack of jurisdiction.

[7] Without meaning any disrespect to the argument advanced before us by the respondents' learned counsel I think only three of the decisions referred to by the learned counsel deserve notice. The learned counsel has referred to a Privy Council case in *Ambu Nair* v. *Kelu Nair*, 60 I. A. 266:(A I.R.(20) 1933 P. C. 167) in which the following observations of Honeyman J. in *Smith* v. *Baker*, (8 C. P. 350) were quoted. Honeyman J. has observed :

> "A party cannot at the same time blow hot and cold. He cannot say at one time that the transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and at another say it is void for the purpose of securing some further advantage."

This observation was quoted by the Judicial Committee in a case in which the main question was the construction of a compromise decree. It was held that the terms of the compromise decree did not appear to show an intention that the remedy by execution should alone be open to the mortgagor, and that the mortgagee was estopped from contending that it did so, because in a previous suit he had recognised that the right to redeem was then subsisting, and thereby had obtained payment under a simple mortgage. On these facts it was held by their Lordships that the mortgagee could not both approbate and reprobate the existence of the right. As already pointed out, their Lordships found that the terms of the compromise decree did not indicate that it was the intention of the parties that the remedy by excution should alone be open to the mortgagors. It was a question of fact whether the right to redeem was subsisting or not, and treating the right as subsisting, the mortgagee had obtained payment under a simple mortgage. It was in these circumstances that their Lordships found that the mortgagee could not both approbate and reprobate. I think, this ruling has got no application in this case. In *Bindeswari Prasad* v. *Lakpat Nath*, 15 C. W. N. 725 : (8 I. C. 26), the Calcutta High Court held that where a Court purporting to act under S. 47, Civil P. C., directed execution to proceed against a minor and an appeal was preferred on the ground that the decree sought to be executed did not bind the minor, the fact that on the appellant's own showing the minor would not be a party to the decree within the meaning of S. 47, and thus the order would not be an order under S. 47 would not make the appeal incompetent. Their Lordships have observed that when jurisdiction has been usurped by a Court an appeal against its order cannot be successfully defeated on the ground that the order has been made without jurisdiction and that a party who had induced a Court to act without jurisdiction could not be permitted, when the validity of the order made for his benefit was challenged by way of appeal to take up an inconsistent position and to defeat the appeal by showing that the order was made without jurisdiction. In this case the question was the competency of the appeal, and I do not think the observation of their Lordships on the facts of that particular case can be applied in this present case before us. In *Ram Khelawan Singh* v. *Maharajah of*

Benares A. I. R. (17) 1930 ALL. 15 : (120 I. C. 125) the decision was to the effect that an appellant who had got a memo of appeal returned by the Commissioner to the High Court was estopped from contending that the High Court was not the proper forum of appeal. Certainly, if a person contends that the Commissioner is not competent to hear the appeal and on his insistence the memorandum of appeal is returned by the Commissioner to the High Court, he cannot thereafter be allowed to contend that the High Court has no jurisdiction to hear the appeal. Every Court has the jurisdiction to decide whether it is competent to hear a particular cause or not, if the question of jurisdiction is raised and agitated before it; and in this case the Commissioner accepted the contention that the appeal should have been filed in the High Court and consequently the memorandum of appeal was returned and presented to the High Court. The same person who had got the memorandum of appeal returned could not thereafter contend that the High Court had no jurisdiction to hear the appeal. This decision also is of little help to us in this case. The respondents' learned counsel could not support the view of the learned Subordinate Judge that every Court has inherent power to revise or alter its own order and that even if the Commissioner had no jurisdiction in the matter, the Rent Commutation Officer was justified in preparing another schedule containing different rates. The learned Subordinate Judge further appears to have confused between irregularity and inherent lack of jurisdiction.

[8] In the result, these appeals are allowed in part and the suits are decreed in part for the rents of the years 1349 to 1351 at the rates originally fixed by the Rent Commutation Officer and indicated in the first commutation schedule, with cess and interest and corresponding costs throughout and future interest at 6 per cent. per annum.

Sinha J.—I agree.

R.G.D. *Appeals allowed.*

A. I. R. (37) 1950 Patna 322 *[C. N. 87.]*

FULL BENCH

MEREDITH C. J., SHEARER AND DAS JJ.

Brajnandan Sharma — Petitioner v. *The State of Bihar.*

Misc. Judicial Case No. 29 of 1950, D/- 29-3-1950.

(a) Constitution of India, Art. 19 (5)—'Reasonable restrictions'—Expression refers to law and not to order passed under it—Order cannot be considered on merits.

The wording of Art. 19 (5) makes it quite clear that the words "reasonable restrictions" refer to the law itself, and not to orders passed under the law. The clause speaks of any existing law in so far as *it* imposes reasonable restrictions, and the making of a *law* imposing reasonable restrictions. The Courts, of course, on general principles, can always upset an order on the ground of *mala fides*. But when Art. 19 (5) prevents the Courts from going into the merits of the order it is for all practical purposes impossible to consider whether the order is in fact *bona fide* or *mala fide*. On the other hand, if the restrictive provisions in the Act are void, quite obviously the order made thereunder is void. [Para 4]

(b) Public Safety—Bihar Maintenance of Public Order Act (III [3] of 1950), S. 2 (1) (b) — Constitution of India, Arts. 13 (1), 19 (1) (d) and (5) — Validity of S. 2 (1) (b) of Bihar Act (III [3] of 1950).

(Per *Majority, Shearer J.* Contra.) — Section 2 (1) (b), Bihar Maintenance of Public Order Act, 1949 (Bihar Act III [3] of 1950), in so far as it operates to restrict freedom of movement of a free citizen, has become void by reason of Art. 13 (1), read with Art. 19, of the Constitution of India, which came into force on 26th January 1950. [Paras 4 & 12]

(c) Constitution of India, Art. 19 (5) — Reasonableness of restriction—Power of Court to decide.

(Per *Meredith C. J., Shearer J.* Contra.) — When the Constitution says that the restrictions must be reasonable, obviously it is for the Court to decide whether restrictive provisions are reasonable or not. The argument that the legislature itself is the sole judge of reasonableness and that if it makes a provision the Courts must accept it as reasonable, if accepted, renders the word 'reasonable' in cl. (5) completely nugatory. [Para 7]

Shearer J. — The criterion to be adopted by Courts to decide the validity of a legislation is whether the restrictions are reasonably necessary in the interests of the general public or in other words. "Is the extent to which the rights of individuals are, or are liable to be, interfered with no more than is reasonably necessary for the protection of the public?" If that is the criterion to be adopted, then it is immaterial that there may be ancillary provisions in the statute which may lead to hardship in individual cases. Whether such provisions are reasonable or not is a matter for the legislature to determine, and the judiciary cannot now sit in review over what the legislature has done. [Para 15]

(d) Constitution of India, Art. 19 (5) — Reasonable restrictions—Tests of reasonableness — Subjective and objective tests explained.

The Courts do not apply any subjective test. There can be an objective test of reasonableness, and that is what the Courts apply. They do not ask themselves, whether they as individuals, feel satisfied that the restrictions are reasonable. But, would that fictitious individual, "the reasonable man," that is to say, the normal average man, regard them as reasonable. That is a well-recognised legal means of examining the question of reasonableness, and it is essentially an objective test : A. I. R. (33) 1946 P. C. 123, *Rel. on.* [Para 7]

(e) Constitution of India, Art. 19 (5) — Reasonable restrictions—Reasonableness—Onus of proof.

Per *Meredith C. J.*—Where there has been a *prima facie* infringement of a fundamental right, and *prima facie* no State law can infringe that right, the burden is on the State to bring that law within the exception contained in Art. 19, cl. (5) which alone can save it. [Para 8]

(f) Public Safety — Bihar Maintenance of Public Order Act (III [3] of 1950), S. 2 (1) (b) — Constitution of India, Art. 19 (5)—Reasonable restrictions—Courts excluded from applying objective test of reasonableness—S. 2 (1) (b) is not reasonable.

A law to satisfy the criterion imposed by Art. 19 (5) must be so framed as to leave it open to the Courts to apply the objective test of reasonableness to its operation. [Para 9]

The power of restriction contained in S. 2 (1) (b) of the Bihar Act III [3] of 1950, is based, not on any reasonable grounds, but upon the satisfaction of some individual and the provision is in such terms that it is not open to the Court to examine the reasonableness or otherwise of orders passed. There can be no presumption that an executive official will always act reasonably. There may be a presumption that he will act *bona fide*; but that is a different thing. The test is not what is actually done under the law, but what the law enables to be done. If the law enables orders to be passed which are unreasonable, and yet are consistent with its terms, then that cannot be called a law operating to impose only reasonable restrictions. [Para 9]

(g) Constitution of India, Art. 226 — Power of High Court — Necessary directions, though not conforming to any of the writs, can be given.

Article 226 gives High Court full authority to issue necessary directions for the enforcement of any of the rights conferred by Part 3 and it does not matter even if the direction does not conform exactly to one of the writs specifically mentioned in the Article. Where, therefore, High Court declares a particular provision of law by a State invalid under Art. 19 (5) of the Constitution, it can issue a direction upon the State Government prohibiting it and its officers from taking any action for the enforcement of any order under that law. [Para 11]

(h) Interpretation of Statutes — Reasonableness of statute — Powers of Court, to decide.

Per *Shearer J.*—The ordinary rule is that, while it is for the judiciary to decide whether the Legislature has exceeded the limits of its Legislative jurisdiction, it is not open to the judiciary to pronounce on the reasonableness or otherwise of anything which has been done by the Legislature within such limits : 1899 A.C. 580, *Ref.* [Para 15]

Annotation : ('44-Com.) Civil P.C., Pre. N. 7.

(i) Interpretation of Statutes — Constitution — Narrow and technical construction ought to be avoided, if possible. [Para 16]

Awadhesh Nandan Sahay and S. I. Nandkeolyar — for Petitioner.

The Advocate-General—for the State.

Meredith C. J. — This is an application on behalf of one Brajnandan Sharma under Art. 226 of the Constitution of India for a writ preventing the Government from enforcing an order under cl. (b) of sub-s. (1) of S. 2, Bihar Maintenance of Public Order Act, 1949 (Bihar Act III [3] of 1950) restricting the petitioner's movements by forbidding him from going to any place in the districts of Singhbhum and Manbhum. The order is in the following terms:

> " Government of Bihar
> Political Department
> *Special Branch*
> Patna, 6th January 1949.
> *ORDERS.*
>
> No. $\frac{3}{62\,(4)/48}$ C. E. Whereas the Governor of Bihar is satisfied with respect to the person known as Shree Brajnandan Sharma, son of Shree Ayodhya Prasad Sharma of village Dabaul P. S. Hilsa, district Patna at present Jamadova P. S. Jorapokhary, Dhanbad, that with a view to preventing him from acting in a manner prejudicial to the public safety and the maintenance of the public order it is necessary to make the following order :
>
> Now, therefore, in exercise of the powers conferred by cl. (b) of sub-s. (1) of S. 2, Bihar Maintenance of Public Order Act, 1949 (Bihar Act (III [3] of 1950) the Governor of Bihar is pleased to direct that the said Shree Brajnandan Sharma shall not with effect from the date of service on him of this order be in any place in the district of Singhbhum and Manbhum.
>
> By order of the Governor of Bihar,
> Sd. B. K. Dutta,
> Under-Secretary to Government."

[2] This order is dated 6th January 1949, but that is obviously a clerical error for 6th January 1950, when in fact the order was passed. It was, thus, passed before the New Constitution came into force on 26th January, and Mr. Awadhesh Nandan Sahay, who represents the petitioner, concedes that he could not successfully challenge the order before 26th January. His contention is, however, that on the Constitution coming into force, the restrictive provisions in Act III [3] of 1950 and also the order passed thereunder became void under Art. 13 (1) of the Constitution read with Arts. 19 (1) (d) and 19 (5). Article 13 (1) says :

> "*13 (1).* All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void."

Article 19 (1) provides :

> "*19 (1).* All citizens shall have the right —
>
> . . . . .
>
> (d) to move freely throughout the territory of India."

Article 19 (5) is in these terms :

> "*19 (5).* Nothing in sub-cls. (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any scheduled tribe."

It is contended that the provision for restricting an individual's movements contained in S. 2 (1) (b) of the Act is not reasonable because it provides for orders not on reasonable grounds, but on the satisfaction of the State Government which may be reasonable or unreasonable. But that, in any event, is a subjective matter in regard to which, upon the terms of the Act, the Courts cannot apply an objective test of reasonableness. Moreover, the Act does not even make it obligatory on any particular individual to satisfy himself, and merely involves the satisfaction of some unknown individual official, purporting to represent the Government. The order purports to express the satisfaction of the Governor, but admittedly the Governor personally has nothing to do with it. It is the order of the Government in his name. (We are informed by the learned Advocate-General that in fact in such cases the satisfaction is that of the Chief Minister, who himself considers and approves the order). Next, the Act does not provide any opportunity to the petitioner to vindicate himself, or challenge the order, or even to learn the reasons for the order. It provides no remedy for an unreasonable order, and does not even provide for the service upon him of the grounds for the order as in the case of detenus. The order itself does not set out the grounds on which it was made and gives the petitioner no opportunity to challenge it in the Courts. The petitioner asked for the grounds on 19th January, but received no reply. The present application was made on 9th February and a rule was issued on the 14th. On the 10th February, directly after this application was filed, the petitioner received a letter stating that the grounds for the order were "Repeated incitement to violence." No particulars were given, but merely this vague and general statement.

[3] Secondly, Mr. Sahay contends that whatever may be said about the Act, there were, in any case, no reasonable grounds for this order. The petitioner had not done anything to merit it. It was passed *mala fide* because the petitioner was the General Secretary of the Tatas Collieries Labour Association, which was registered as a Trade Union as far back as 1930 and duly recognised by the employers, the Tata Iron and Steel Company Limited, and the Government was trying to support a rival Trade Union under the auspices of the Indian National Trade Union Congress (I. N. T. U. C.).

[4] In my opinion, we are alone concerned with the validity of the restrictive provisions contained in the Act. We are in no way concerned with the merits of the particular order and cannot enter into them. The wording of the Act does not entitle the Courts to consider the order on its merits; nor do the provisions of Art. 19 (5). The wording of Art. 19 (5) makes it quite clear that the words "reasonable restrictions" refer to the law itself, and not to orders passed under the law. The clause speaks of any existing law in so far as *it* imposes reasonable restrictions, and the making of a *law* imposing reasonable restrictions. If the law is valid, there appears to be nothing anywhere in the Constitution, or in the particular Act itself, enabling the Courts to consider the merits of the order. The Courts, of course, on general principles, can always upset an order on the ground of *mala fides*. But when the Court is prevented from going into the merits, it is for all practical purposes impossible to consider whether the order is in fact *bona fide* or *mala fide*. On the other hand, if the restrictive provisions in the Act are void, quite obviously the order made thereunder is void, so that, in short, the sole question is the validity of S. 2 (1) (b) of the Act.

[5] It is apparent on the face of it that the provision does represent an interference with the fundamental right guaranteed by Art. 19 (1) (d). A citizen (and it is not contended that the petitioner is not a citizen) is entitled to move freely throughout the territory of India. But under the provision in the Act, the Government can, and has, made an order preventing him from going into two districts. The freedom of movement is restricted to that extent. Therefore, there is no escape from the position that under Art. 13 (1) this provision became void on 26th January unless it is saved by Art. 19, cl. (5). During the existence of a state of emergency it might be saved under Art. 358. But there has been no proclamation of an emergency, and Art. 358 has no application to the present case.

[6] This application, therefore, in my judgment, turns entirely upon the narrow point of the interpretation of the relevant Act and of Art. 19 (5) of the Constitution. If we hold that the restrictive provision in the Act is not the imposing of reasonable restrictions on the exercise of the fundamental right in question, then the provision must go.

[7] The learned Advocate-General has argued that it is not open to the Courts to consider the reasonableness or otherwise of the provision. The Legislature itself is the sole Judge of reasonableness, and if the Legislature makes a provision, the Courts must accept it as reasonable. I find it difficult to follow that argument. If this is correct, the word 'reasonable' in cl. (5) is rendered completely nugatory. The Constitution says the restrictions must be reasonable. Obviously, it is for the Courts to decide whether restrictive provisions are reasonable or not. But then, says the Advocate-General, this amounts to substituting one subjective test for another, namely, the satisfaction of the Court hearing the case for the satisfaction of the executive official who makes the order. That argument, in my opinion, is also incorrect. The Courts do not apply any subjective test. It is well settled that there can be an objective test of reasonableness, and that is what the Courts apply. They do not ask themselves, do we, as individuals, feel satisfied that the restrictions are reasonable? But, would that fictitious individual, "the reasonable man," that is to say, the normal average man, regard them as reasonable? That is a well recognised legal means of examining the question of reasonableness, and it is essentially an objective test. If we hold that no normally constituted person of average intelligence could possibly regard the provision as reasonable, then

our decision would be that it is an unreasonable provision, but not otherwise. For an authority for this proposition it is sufficient to cite one Privy Council decision, *Emperor* v. *Vimlabai Deshpande,* 73 I. A. 144 : (A. I. R. (33) 1946 P. C. 123 : 47 Cr. L. J. 831). In that case the Privy Council were considering R. 129, sub r. (1), Defence of India Rules, 1939, under which

> "any police officer . . . . . may arrest without warrant any person whom he *reasonably* suspects of having acted . . . . . in a manner prejudicial to the public safety or to the efficient prosecution of the war."

Where a police officer made an arrest under this provision the Privy Council held that the burden was on him to prove to the satisfaction of the Court before whom the arrest was challenged that he had reasonable grounds of suspicion. If he failed to discharge that burden, an order made by the Provincial Government under sub-r. (4) of R. 129 for the temporary custody of the detenu was invalid.

[8] In exactly the same way the State Government having acted under Act III [3] of 1950 to interfere with the petitioner's fundamental rights, the burden is on the Government to establish that the provision is valid, that is to say, that it is reasonable, for, under the Constitution, the only restrictions that can be placed upon this particular fundamental right must be of reasonable character. There has been a *prima facie* infringement of that right, and *prima facie* no law can infringe that right. Therefore, the burden is, in my opinion, on the State to bring that law within the exception contained in Art. 19, cl. (5) which alone can save it.

[9] Turning now to the question of fact whether the impugned provision imposes only reasonable restrictions, the answer must, I think, be in the negative, for the power of restriction contained in the provision is based, not on any reasonable grounds, but upon the satisfaction of some individual who, so far as the wording of the Act is concerned, is completely amorphous; and the provision is in such terms that it is not open to the Court to examine the reasonableness or otherwise of orders passed. Upon the terms of the Act, all the Court can inquire into is the existence of the satisfaction. Quite clearly, such a provision might conceivably be used merely to exclude political opponents, or, as is suggested in the present case, (I do not mean to say I accept the suggestion. I am not considering it) to favour one of two rival Trade Unions and suppress the other. A law which enables such things to be done is not, in my judgment, a reasonable law. There can be no presumption that an executive official will always act reasonably. There may be presumption that he will act *bona fide*; but that is a different thing. The test is, in my opinion, not what is actually done under the law, but what the law enables to be done. If the law enables orders to be passed which are unreasonable, and yet are consistent with its terms, then that cannot be called a law operating to impose only reasonable restrictions. I use the word "only" advisedly because it appears to me that if the law enables unreasonable action in any case, then it cannot be saved by Art. 19 (5). In my opinion, a law to satisfy the criterion imposed by Art. 19 (5) must be so framed as to leave it open to the Courts to apply the objective test of reasonableness to its operation. This law is not so framed.

[10] A matter which was raised was the effect of R. 28, Adaptation of Laws Order, 1950. That rule runs as follows :

> "Any Court, Tribunal or authority required or empowered to enforce any law in force in the territory of India immediately before the appointed day shall notwithstanding that this order makes no provision or insufficient provision for the adaptation of the law for the purpose of bringing it into accord with the provisions of the Constitution, construe the law with all such adaptations as are necessary for the said purpose:
>
> Provided that if any question arises regarding the adaptations with which such law should be construed for the said purpose, the question shall be referred to the Central Government if the law relates to a matter enumerated in List I or List III in Sch. 7 to the Constitution, and to the State Government concerned in any other case, and the decision of that Government on any such reference shall be final."

[11] Bihar Act III [3] of 1950 has not been specifically adapted in the President's Order, but it might be argued that the Courts must adapt it under this R. 28 so as to insert the word "reasonably" in the objective sense before the word "satisfied". It will suffice to deal with this very briefly because the learned Advocate-General does not rely upon any such argument or on this provision. It is enough to say that I agree entirely with the observations on this point made by the Calcutta Full Bench in Criminal Misc. Case No. 51 of 1950, D/- 27-2-1950 *Sunil Kumar* v. *Chief Secy., Govt. of West Bengal,* 54 C. W. N. 394: (A.I.R. (37) 1950 Cal. 274 (S.B.)). This rule purports to delegate legislative power to the Courts. But the maxim *delegata potestas non potest delegari* clearly applies, and if the President can legislate under Art. 372 in this regard, he cannot delegate his authority to the Courts. Moreover, I think the less said the better about a provision which directs that the final arbiter between two parties concerned in a case before the Courts shall be one of those parties, namely, the State Government. We must take the Act as we find it. And if the Act is in such terms that it prevents the Courts from applying the objective test of reasonableness, then the Act is not one imposing reasonable restrictions

[12] I hold accordingly that S. 2 (1) (b) of the Act became void on 26th January and it necessarily follows that the order made under that provision became void. I would accordingly give the petitioner a declaration to that effect. It has been suggested that the petitioner cannot be afforded any further relief, nor does he require it unless and until the Government take some action against him for disobedience of the order. But I fail to understand why, in circumstance like this, the petitioner should be put to the harassment of possible arrest for disobeying the order and having to approach the Courts once more. I think Art. 226, when it says that the High Court shall have power to issue to any person or authority, including in appropriate cases any Government, directions, orders or writs, including writs in the nature of *habeas corpus, mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose, means more than this and gives us full authority, and indeed, a duty to issue necessary directions. If the direction does not conform exactly to one of the writs specifically mentioned that does not matter. We are given the widest powers of issuing directions, orders or writs, and in the present case, besides making a declaration that the order is void, I would issue a direction upon the State Government prohibiting it and any of its officers from taking any action for the enforcement of the order in question.

[12a] The petitioner, in my opinion, is entitled to his costs against the State, which I would assess at five gold mohurs.

[13] **Shearer J.**—The fundamental rights in the exercise of which the petitioner has been restricted are the rights given to all citizens by cl. (d) of Art. 19 (1), namely, the right "to move freely throughout the territory of India," and the right given by cl. (e), namely, the right "to reside . . . . . in any part of the territory of India." It is patent that, from time to time, the Legislature may find it necessary to restrain individuals or classes of individuals in the enjoyment of their fundamental rights. A convicted criminal, for instance, who has been ordered to report his movements to the police cannot be allowed to move freely throughout the territory of India. The Constituent Assembly recognized this, and in enacting cls. (2) to (6) of Art. 19 endeavoured to define the limits subject to which the Legislature might impose statutory restrictions on the exercise by citizens of their fundamental rights. The question that arises here is whether or not the Bihar Legislature has exceeded the limits imposed on it by the Constitution. In deciding this question it must be assumed that in certain areas in this province conditions exist or are likely to exist in which the public safety may be endangered and the maintenance of public order may become a matter of difficulty. It must also be assumed that, in exercising the powers conferred on it by this Act, the Provincial Government or other authority to whom the powers are entrusted will exercise them in good faith. Clause (b) of S. 2 (1) of the Act empowers the Provincial Government to exclude, either absolutely or subject to certain conditions, an individual from "any area or place." The area or place in question must, it is clear, be an area or place in which, if the person against whom the order is made is permitted to enter it subject to no conditions, the public safety and the maintenance of public order is likely to be endangered. An order excluding a person from any such area or place is an order which is to remain in operation for six months, although it may be renewed for a further period. Certain places or classes of place may, under the Act, be declared protected places and the public in general are not permitted to enter such places without authority. These, in brief, are the restrictions imposed by the Act on the exercise of the fundamental right of freedom of movement. The Act, it may be added, is a temporary Act to meet conditions arising during a period of transition and is to remain in force for two years. The words "reasonable restrictions . . . in the interests of the general public" mean, in my opinion, restrictions which are reasonably necessary for the protection of the public. It seems to me impossible to say that in no circumstances can it be necessary to exclude particular individuals from areas or places in which the public safety and the maintenance of public order has been or is likely to be endangered. Also, it seems to me impossible to say that the extent to which the fundamental rights of such an individual have been interfered with is an unreasonable extent. He is entitled to move freely throughout the whole of the rest of the territory of India and is merely excluded from moving freely or residing in a particular local area or place, so that the restrictions imposed on him are the minimum restrictions necessary in the interests of the general public.

[14] Mr. Awadhesh Nandan Sahai, for the petitioner, has not contended that it may not be necessary in certain circumstances to impose restrictions of this kind on the exercise by individuals of their fundamental rights to move freely and to reside in any part of the territory of India. The learned advocate for the petitioner has directed his attack on the Bihar Maintenance of Public Order Act to other features in it. It is pointed out that it is left to

the Provincial Government to impose the restrictions and that, in practice, under the rules of business, orders may be passed by a comparatively subordinate official. Orders of this kind must, however, in the nature of things, often be passed without delay and must be passed by or on the advice of officials who are in the best position to judge of the seriousness of the situation which has arisen or is likely to arise. The Constituent Assembly conferred on the executive a power of a much more extensive kind, namely, a power to deprive a citizen temporarily of his liberty. When this was pointed out to Mr. Awadhesh Nandan Sahai, the learned advocate for the petitioner said that a person against whom an order of preventive detention was made, was entitled to be informed of the grounds on which it had been made and to make a representation against it, whereas a person, such as his client, against whom an order of externment had been made, was not entitled either to know the grounds on which it had been made or to make any representation against it. This, Mr. Sahai vehemently contended, is in the highest degree unreasonable. In other words, the validity of the Bihar Maintenance of Public Order Act, 1950, is challenged, not on the ground that the restrictions which it imposes are not reasonable restrictions, nor on the ground that these restrictions have not been imposed in the interest of the general public, but on the ground that the law is an unreasonable law.

[15] The word "reasonable" which now appears in cls. (3) to (5) of Art. 19 of the Constitution is not to be found in the Draft Constitution. Under the Draft Constitution, it was left to the legislature, and to the legislature alone, to decide whether any restrictions which the Ministry of the day sought to impose were reasonable restrictions and as such ought to be imposed. I am inclined myself to think that the introduction at the last moment of the word "reasonable" was, perhaps, unfortunate. The result of inserting it clearly is that the judiciary is now empowered to review certain decisions of the legislature, decisions taken quite possibly, after a very full deliberation and with a knowledge of local conditions which the judiciary does not and cannot possess. There must be numerous statutes and statutory orders which in one way or another impose restrictions on the exercise of fundamental rights and I hesitate to subscribe to the proposition that it is now open to the judiciary to examine these statutes and statutory orders in detail and pronounce any of them to be void on the ground that they do not contain provisions which, in the opinion of the judiciary, they ought to have contained. That, in the ultimate analysis, is what we are really invited to do here. What is the criterion to be adopted by the Courts in deciding whether legislation of this kind is or is not valid legislation? What is the question to which the Courts are bound to address themselves? The answer given by the Constitution is that the question is this: "Are the restrictions which have been or can be imposed reasonable restrictions in the interests of the general public? "That, it seems to me, is equivalent to saying: "Are the restrictions reasonably necessary in the interests of the general public?" or, to depart still further from the language used in the Constitution:

> "Is the extent to which the rights of individuals are, or are liable to be, interfered with no more than is reasonably necessary for the protection of the public?"

If that is the criterion to be adopted, then it is, I think, immaterial that there may be ancillary provisions in the statute which may lead to hardship in individual cases. Whether such provisions were reasonable or not was a matter for the legislature to determine, and the judiciary cannot now sit in review over what the legislature has done. My learned brothers, as I understand their judgments, are of opinion that the question to which the Courts should address themselves is this: "Are the restrictions reasonable restrictions?" and that restrictions which, imposed by one authority and in one manner are reasonable restrictions may not be reasonable restrictions if imposed by another authority and in another manner. For more than one reason, however, I am of opinion that the criterion to be adopted is the former and not the latter criterion. In the first place, if the latter criterion is the correct one, then it is necessary to divorce the words "reasonable restrictions" from the words "in the interests of the general public," but these two sets of words must, in my opinion, be read together. Secondly, the ordinary rule is that, while it is for the judiciary to decide whether the legislature has exceeded the limits of its legislative jurisdiction, it is not open to the judiciary to pronounce on the reasonableness or otherwise of anything which has been done by the legislature within such limits (*Union Colliery Co. of British Columbia, Ltd.* v. *Bryden*, 1899 A. C. 580 at p. 585 : (68 L. J. P. C. 118). The framers of the Constitution have, by inserting the word "reasonable", permitted the judiciary to encroach on the sphere of the legislature, but it ought, I think, to be assumed that their intention was that the encroachment should be confined within the narrowest possible dimensions. In other words, the Courts ought not to pronounce on the reasonableness of something that has been done by the legislature, still less render what has been done void and of no effect, unless it is quite clear that it was intended that they should have power to do this under the Constitution. Thirdly—and this is a circumstance which weighs a great deal with me—when the validity of a law which has been duly passed after full discussion by both Chambers of the legislature and has received the assent of the President is challenged, the onus is, and is very heavily, on the person who challenges it to show that it is an unconstitutional law. In this connection I may refer to two American decisions. Strong J., in the *Legal Tender Cases*, 12 wall at p. 531, said :

> "It is incumbent, therefore, upon those who affirm the unconstitutionality of an Act of Congress to show clearly that it is in violation of the provisions of the Constitution. It is not sufficient for them that they succeed in raising a doubt,"

and Marshall C. J., in *Fletcher* v. *Peck*, 6 Cranch 87, said :

> "It is not on slight implication and vain conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered void. The opposition between the constitution and the law should be such that the Judge feels a clear and strong conviction of their incompatability with each other."

While, by the application of these fundamental principles I am driven to the conclusion that it was intended that the judiciary should be entitled to say that the extent to which restrictions can be imposed is or is not reasonable, I am not driven to the conclusion that it was intended that it should also be entitled to say that the manner in which the restrictions are to be imposed in individual cases is or is not a reasonable manner.

[16] I have had the advantage of reading the judgment which has just been delivered by my Lord the Chief Justice and the judgment which is about to be delivered by my brother Das, and as the view which both of them take is diametrically opposed to my own, I have studied them with the care and attention which they deserve. My Lord the Chief Justice in summing up his conclusions observes :

> "A law which enables such things to be done is not, in my judgment, a reasonable law."

With the greatest respect I submit that it is not open to any Court to pronounce a law to be an unconstitutional law on such a ground. My brother Das at the commencement of his judgment observes :

> "Where a Court has to decide whether a particular provision of law does or does not operate to impose reasonable restrictions on the right of free movement, the test must necessarily be what has been described, perhaps not very happily, as the objective test."

Reverting to the point again at a later stage in his jugdment Das J., observes :

> "I would give to the word 'reasonable' occurring in Cl. (5) of Art. 19 the full significance of its accepted connotations."

The word "reasonable" may have been used in the sense in which Das J., now construes it in certain enactments in England, but where so used it has invariably qualified some such word as "cause" or "belief" or "suspicion." I cannot agree that where it qualifies such a word as restrictions this is or indeed can be one of its "accepted connotations." Certainly it is not to be found anywhere in the two columns devoted to the word "reasonable" in the Oxford Dictionary. The argument which has commended itself to my brother Das and which is, substantially the argument which has also commended itself to my Lord the Chief Justice, appears to me to be founded on the single word "reasonable" and further on the assumption that that word was used by the Constituent Assembly not in its ordinary dictionary meaning but in a highly esoteric sense. In *Liversidge* v. *Sir John Anderson*, 1942 A. C. 206 at p. 268 : (1941-3 ALL E. R. 338) an argument based on the word "reasonable" was addressed to the House of Lords, and in repelling it Lord wright observed :

> "I cannot accept that contention, which seems to me to subordinate the whole substance of the enactment to a single word which itself is ambiguous and inconclusive."

If ever there was a case in which it was not permissible, and was in the highest degree dangerous, to depart from the accepted canons of construction it is this case. We are here to construe the constitution, and narrow and technical constructions ought, if possible, to be avoided. Pomeroy in his Constitutional law, para. 18, quoted in Quick and Garran on the Constitution of the Australian Commonwealth, p. 794, says this :

> "In the practical application of legal principles in the common affairs of life, the written agreement, the deed, the testament, the statute, are construed by the aid of the same rules, simply because they are written. The written constitution, merely because it is written, can form no exception. The most that can be said is, that, as greater interests are involved which affect the state rather than the individual, all narrow and technical construction should, as far as possible, be avoided; the nature of the writing as an organic law should be allowed its full effect."

And the result in this case of putting what appears to me to be a highly unnatural and artificial meaning on the word "reasonable" is that a law duly enacted by the legislature of Bihar is pronounced to be void and the executive is deprived of a weapon, which if used in the manner in which it is intended to be used may be of great benefit to the community and productive of comparatively little harm to individuals.

[17] My difficulties in the way of accepting the view taken by my learned brothers by no means end here. We were told by the learned Advocate General that this order was made by and with the approval of the Hon'ble the Chief Minister. It is beyond the power of the Hon'ble

the Chief Minister to establish by evidence in a Court of law what the state of his mind was when he made the order. It is equally beyond the power of the petitioner to disprove what according to the Hon'ble the Chief Minister, the state of his mind then was. But is it beyond the power of the Hon'ble the Chief Minister to satisfy a Court by legal evidence that the restriction imposed on the petitioner is a reasonable restriction? I will give a more striking illustration. The employees of a power-house or a water works go on strike. Tempers rise. Threats of sabotage are uttered, Sticks of dynamite disappear from a neighbouring colliery. The Hon'ble the Chief Minister makes an order under this Act declaring the power house or water-works and surrounding area a "protected place". A constable stops a citizen from exercising his fundamental right to move freely along a road within the area cordoned off. In the view taken by my learned brothers, the order of the Hon'ble the Chief Minister affords no protection to the constable. The constable, if called to answer in a Court of law must show that he had reason to suspect that the man had a stick of dynamite in his pocket. Yet, if what had to be demonstrated in a Court of law, was not the state of the constable's mind but the propriety of the order, any jury would very probably intimate at an early stage of the proceedings that it did not wish to hear further evidence and would return a verdict in favour of the Hon'ble the Chief Minister without leaving the jury-box.

[18] England has a longer legal history than any other country in the world. When England was covered with forests and men moved slowly on horse-back or in stage-coach, the only safeguard which a man had in the enjoyment of personal liberty was the common law and the verdict of a jury. That was why the Barons at Runnymede in 1215 stipulated that no freeman should be arrested or imprisoned "*nisi vel per legem terrae vel per judicium parium.*" But the right to personal liberty and the right to move freely from one place to another are rights of a somewhat different character and are in fact dealt with in separate and distinct articles of the Constitution. The Barons who extorted the Great Charter from King John were as much Frenchmen as they were Englishmen and they demanded and obtained the right to move from their estates in England to their estates in Normandy whenever they chose. But, when the Great Charter was renewed in the reign of King Henry III, this right was not conceded. For centuries thereafter the Crown continued to issue the writ *ne exeat regno* and eventually statute law prohibited any Englishman from leaving the realm except under a license which it was in the discretion of the Crown to grant or to withhold. (*Vide* Blackstone, Vol. I, p. 265). Even today an Englishman refused a passport does not and cannot turn to the Courts. His grievance, it is perfectly well understood, is one to be ventilated elsewhere—on the floor of the House of Commons or the public platform or in the press. In 1944 and 1945, when the invasion of the continent by British and American troops was impending, large numbers of Englishmen were compelled by executive order to leave, or were prevented from entering, certain areas on the south coast. These orders could not be, and so far as I am aware, were never sought to be, challenged in the Courts. It is true that the orders were made in exercise of powers conferred by emergency legislation. But the Bihar Maintenance of Public Order Act, 1950, is a piece of emergency legislation. The emergency may be less grave and less apparent than was the emergency in England in 1944-1945, but as I said at the outset, it is not for us to question the existence of it and it would be rash to do so when yesterday, in a neighbouring province, something very much in the nature of martial law was proclaimed. It is the duty and privilege of the Courts to protect citizens in the exercise of their fundamental rights and when a citizen complains that some fundamental right of his has been invaded the Courts may—and indeed, if a *prima facie* case is made out, must—call on the person or authority responsible to justify what he has done under the law of the land. But when that person or authority can point to a duly enacted law which, on the face of it, affords him complete justification and it is contended that the apparent justification is no real justification as the law is not a law at all, the position materially alters. The onus is no longer on the defendant. It is and is very heavily on the plaintiff. It can make no difference that the question at issue is not whether the Legislature of the State has trespassed into a field of legislative activity reserved for the centre but whether it has trespassed into a field in which neither it nor Parliament itself has any legislative jurisdiction at all. The canons of interpretation which must be applied are the same. The Constituent Assembly met in the middle of the twentieth century and the citizen of India as much as the citizen of England, who has been refused a passport, has other protections besides the Courts. The framers of the Constitution, in express words, themselves conferred on the executive power to deprive a man of his personal liberty, and I cannot be persuaded that they intended that the power of a State Legislature to authorize the executive to place restrictions

on the exercise by individual citizens of fundamental rights for less vital to them than their right to personal liberty should be so circumscribed a power as my learned brothers would have it to be. In my opinion the only ground on which an order of this kind can be challenged here is that it was not made in good faith and as that has not been urged or successfully urged. I would accordingly dismiss the application.

[19] **Das J.**—I have reached the same conclusion as my Lord the Chief Justice that S. 2 (1) (b), Bihar Maintenance of Public Order Act, 1949 (Bihar Act III [3] of 1950), in so far as it operates to restrict freedom of movement of a free citizen, became void by reason of Art. 13 (1), read with Art. 19 of the Constitution of India, which came into force on 26th January 1950. In view of the constitutional importance of the question raised, I think that I should state, briefly, my reasons for reaching the same conclusion, avoiding at the same time a repetition of the reasons already stated by my Lord the Chief Justice.

[20] Section 2 (1) (b), Bihar Maintenance of Public Order Act, 1949, is in the following terms:

> "2 (1) The Provincial Government, if satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to the public safety and the maintenance of public order it is necessary so to do, make an order—
>
> * * * * *
>
> (b) directing that, except in so far as he may be permitted by the provisions of the order, or by such authority or persons as may be specified therein, he shall not be in any such area or place in the Province of Bihar as may be specified in the order;"

Article 19 of the Constitution of India, so far as is relevant to this case, states:

> "19 (1) All citizens shall have the right—
>
> * * * * *
>
> (d) to move freely throughout the territory of India;
>
> (e) to reside and settle in any part of the territory of India."

Article 13 (1) of the Constitution states:

> "*13 (1).* All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall to the extent of such inconsistency, be void."

It is not in dispute that the Bihar Maintenance of Public Order Act, 1949, was a law in force in the territory of India immediately before the commencement of the Constitution, within the meaning of the definition of the expression 'laws in force' in cl. (3) of Art. 13 of the Constitution. If the provisions in S. 2 (1) of the Bihar Act and the provisions in Art. 19 (1) (d) and (e) of the Constitution are juxtaposed, the inconsistency between the two at once strikes the reader. Sub-cl. (d) of Art. 19 (1) of the Constitution guarantees to all citizens of India the right to move freely throughout the territory of India, and sub-cl. (e) gives the right to reside and settle in any part of India. Section 2 (1) (b) of the Bihar Act authorises the issue of an order imposing restrictions on such free movement or on the right of residence in any area or place in the State of Bihar, on the satisfaction of the Provincial Government, that is, the State Government. This inconsistency at once attracts the operation of Art. 13 (1) of the Constitution, and the Bihar Act is rendered void to the extent of the inconsistency under the said article: there is, however, cl. (5) of Art. 19 of the Constitution which, amongst other things, saves the operation of any existing law in so far as it imposes *reasonable* restrictions on the exercise of the right conferred by sub-cl. (d) and sub cl. (e). Clause (5) of Art. 19 is in the following terms:

> "(5) Nothing in sub-cls. (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe."

Therefore, the crucial question in this case is if the operation of S. 2 (1) (b) of the Bihar Act is saved by cl. (5) of Art. 19 of the Constitution.

[21] I do not think that there is any doubt that it is for this Court to consider and decide whether the operation of S. 2 (1) (b) of the Bihar Act is or is not saved by cl. (5) of Art. 19 of the Constitution. The rights guaranteed under Part III of the Constitution are justiciable rights, for the enforcement of which there are remedies including the remedy guaranteed by Art. 32. Article 226 of the Constitution also provides a remedy, and gives this Court power to issue directions, orders or writs to any person or authority, including in appropriate cases any Government, for the enforcement of any of the rights conferred by Part III. If, therefore, this Court is to decide whether the operation of S. 2 (1) (b) of the Bihar Act is saved by cl. (5) of Art. 19 of the Constitution, it would follow, *ex hypothesi,* that this Court must also determine whether S. 2 (1) (b) of the Bihar Act imposes or operates to impose *reasonable* restrictions on the exercise of the right conferred by sub-cls. (d) and (e) of cl. (1) of Art. 19 of the Constitution. Where a Court has to decide whether a particular provision of law does or does not operate to impose reasonable restrictions on the right of free movement or residence, the test must necessarily be what has been described, perhaps not very happily, as the objective test. Since the decision of the House of Lords in the now famous case of *Liversidge* v. *Sir John Anderson,* 1942 A. C. 206: (1941-3 ALL E. R. 338) the distinction between the objective and subjective tests has frequently been the subject of judicial consideration in the Courts in India and England.

The words 'objective' and 'subjective' have a philosophical flavour; but put in ordinary language—e. g., the language used by Lord Wright in *Liversidge's case*, (1942 A. C. 206 : 1941-3 ALL. E. R. 338) the objective test merely means an "external standard to be applied by some one other than the authority imposing the restriction, namely by a judge" ; whereas, the subjective test excludes an external yardstick and means the decision of the person who acts — may be reasonably ; but still it is his decision and not the decision of any one else. As Lord Wright said in *Liversidge's case*, (1942 A. C. 206: 1941-3 ALL E. R. 338) the words 'reasonable' "connotes a quality or characteristic. Who is to decide on reasonableness is a different matter, which depends on the circumstances." Under Art. 19 (5) of the Constitution, the Court is to decide on reasonableness: this cannot be disputed. The position, therefore, reduces itself to this: under cl. (5) of Art. 19 this Court is to determine whether the relevant provisions of the Bihar Act impose or operate to impose reasonable restrictions on the right of free movement or residence of a citizen ; but the relevant provisions of the Bihar Act make it quite clear that the only prerequisite for such imposition is that the Provincial Government (which will mean the Governor under the General Clauses Act, though under the rules of Executive Business the matter may be dealt with by some other person ; may be the Chief Minister as is stated by the learned Advocate-General in this case) is satisfied that a restriction should be imposed on the free movement or residence of a citizen. Thus, while cl. (5) of Art. 19 of the Constitution requires the Court to consider the reasonableness of the restrictions, the law which is to be saved under cl. (5) states that the satisfaction of the Provincial Government, and not reasonableness by any external standard is the only pre-requisite for imposing the restsictions. In my opinion, this, at once, demonstrates that the relevant provisions of the Bihar Act are not saved by cl. (5) of Art. 19 of the Constitution. To hold otherwise would mean that the right of free movement or residence guaranteed by Art. 19 can be taken away by any law irrespective of the consideration whether that law imposes or operates to impose reasonable restrictions or not.

[22] It has been contended by the learned Advocate-General that reasonableness, expediency, public policy are matters for the Legislature and not for the Court. That is so, where no constitutional limitation is imposed on the power of legislation. The Constitution of India, however, imposes certain constitutional limitations, one of such limitations being embodied in Art. 13 of the Constitution. Then, it is contended that all that the Court can examine under cl. (5) of Art. 19 is whether the restrictions imposed are in themselves, as to their nature and extent, reasonable or not. It is pointed out that the adjective "reasonable" qualifies "restrictions"; therefore, so the argument proceeds, the Court should not go into the question as to which authority imposes the restrictions, which authority is to be satisfied, etc. It is argued that these are matters for the Legislature, and ideas such as are involved in the application of subjective or objective tests are irrelevant for the purpose of construing cl. (5) of Art. 19 of the Constitution. I agree that the adjective "reasonable" goes with the word "restrictions." I do not accept, however, the argument that only the territorial or external extent of the restrictions imposed need be considered under cl. (5) of Art. 19. If the Court is to consider the nature of the restrictions, for determining whether they are reasonable or not, the question at once arises whether the law operating to impose the restrictions allows a Court to consider their reasonableness. I concede that, as a matter of fact, the satisfaction of the Governor or of the Chief Minister or, for that matter, of any other officer need not necessarily be unreasonable; and we should not presume that they will act unreasonably. But the test is not the operation of a particular order passed against a particular person; the test is what does the law imposing or operating to impose the restrictions authorise. If that law says that no other pre-requisite is necessary except the satisfaction of one person, however perfect that person may be, then the test of reasonableness as applied by Courts is taken away, and the law to that extent ceases to be a law imposing or operating to impose reasonable restrictions within the meaning of cl. (5) of Art. 19 of the Constitution. In other words, the law which imposes or operates to impose restrictions on the free movement or residence of a citizen must not exclude an external test of reasonableness; if it does, that law is not saved by cl. (5) of Art. 19.

[23] I need not repeat what my Lord the Chief Justice has stated regarding the absence of any provisions in the Bihar Act for giving a person, whose movement is restricted, an opportunity of vindicating his position etc. The whole scheme of the Bihar Act is that the satisfaction of the Provincial Government is the only test, and nobody else can question that satisfaction on any ground whatsoever. That has also been the view consistently expressed by this Court, before the Constitution Act came into force: *see* *Nek Muhammad* v. *Province of Bihar*, A. I. R. (36) 1949 Pat. 1 : (50 Cr. L. J. 44).

[24] It is to be observed that cl. (5) of Art. 19 of the Constitution refers not merely to the operation of an existing law, but also to the making of any law in future by the State under which restrictions can be imposed on the exercise of the right conferred by sub-cls. (d) and (e) of Art. 19 (1) of the Constitution. If the view for which the learned Advocate-General contends is accepted as correct, it would mean that the State can make a law imposing restrictions on the fundamental right of free movement and residence laying down in that law that the only prerequisite for the imposition of the restrictions is the satisfaction of the Executive, and the person whose freedom is restricted will have no remedy to get the curtailment or abridgment of his right tested on the touchstone of reasonableness by a Court of law. It would mean that what the Constitution gives with one hand under Art. 19 (1) is taken away by the other hand under Art. 19 (5). I am unable to subscribe to the view that cl. (5) of Art. 19 was intended to make the right given by Art. 19 (1) so illusory. I would give to the word "reasonable" occurring in cl. (5) of Art. 19 the full significance of its accepted connotation. It is to be observed that there are other Articles where the test of reasonableness has not been incorporated; *see* Art. 25 (2) which is in similar terms but without the word "reasonable." Even in cl. (2) of Art 19, the word "reasonable" does not occur. I do not think that the word "reasonable" which did not occur in the relevant clause of the Draft Constitution was inserted either inadvertently or without meaning.

[25] There has been some argument before us on the footing that if the test of reasonableness does not enter into a law made for preventive detention under Art. 22, *a fortiori* that test should not enter into the lesser matter of a restriction on free movement or residence. The reply to this argument is that the two matters are separately dealt with, and the mechanism of safeguards provided is different in respect of the two matters. The learned Advocate-General referred us to a large number of decisions on the question that this Court cannot sit in appeal over the Legislature, and that the reasonableness of a particular piece of legislation is not for the Courts to determine. All those decisions relate to legislation on which there is no constitutional limitation, and I do not think that any useful purpose will be served by examining those decisions in detail. The question here is not one of legislative theory or practice, but the true scope and effect of cl. (5) of Art. 19.

[26] There has been some argument before us as to whether Art. 226 of the Constitution provides the appropriate remedy in this case. In view of the very wide terms of that Article, I think that the petitioner is entitled to ask us for an order against the State Government prohibiting that Government from enforcing the order which must be declared to be void after 26th January 1950. The order infringes a fundamental right of the citizen, and Art. 226 provides the appropriate remedy.

[27] In conclusion I must make it clear that this decision must not be understood in the sense that the State cannot make any law imposing or operating to impose restrictions on freedom of movement of a citizen. The State can do so, and in so doing may authorise any person or even the Executive to take action; but the law imposing or operating to impose such restrictions must fulfil the test of cl. (5) of Art. 19, viz., the test of reasonableness as distinct from the mere satisfaction of one individual or authority, with or without reason. My learned brother Shearer J. has referred to what is reported to have taken place in a neighbouring province. I do not know, and it is not for me to say, that circumstances have not arisen or may not arise, which necessitate the imposition of restrictions on personal freedom. But our duty is to interpret the law as it is, leaving it to the proper authority to change the law or enforce the emergency provisions in Part XVIII of the Constitution, if necessary. As long as the law is what it is, it must "speak the same language" (to quote the words of Lord Atkin) for all—in times of stress as in times of quiet.

D.R.R. *Application allowed.*

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* A. I. R. (37) 1950 Patna 332 *[C N. 88.]*

SINHA J.

on difference of opinion between

MEREDITH C. J. AND SARJOO PRASAD J.

Ratan Roy — Petitioner v. *State of Bihar and others — Opposite Party.*

Criminal Misc. No. 103 of 1950, D/- 14-3-1950.

*(a) Public Safety—Bihar Preventive Detention Ordinance (II [2] of 1950)—Validity—Constitution of India, Art. 213 (1)—Criminal P. C. (1898), S. 5.

Per *Sinha and Sarjoo Prasad JJ.* — (*Meredith C. J.* contra). In promulgating the Bihar Preventive Detention Ordinance (Bihar Ordinance II of 1950), the Governor has complied with the terms of cl. (1) of Art. 213 of the Constitution of India and therefore the Ordinance is not void on that ground. [Paras 52, 58]

In the first place, the Article does not require that the Ordinance to be promulgated by the Governor has to state in so many words that the Governor was satisfied as to a certain state of affairs. In the second place, all the paragraphs of the Preamble read together would show that the Governor was satisfied in terms of Art. 213 (1) of the Constitution of India. [Para 58]

Per *Meredith C. J.*—The Ordinance is void as not satisfying the conditions laid down in Art. 213 of the Constitution for its promulgation. [Paras 31, 37]

For a valid Ordinance, two conditions are necessary under Art. 213; (1) that the Governor is satisfied that circumstances exist which require immediate action, and (2) that in his opinion the circumstances require such an Ordinance as he promulgates. The preamble makes it clear that the first of these conditions is satisfied. It is stated that the Governor is satisfied of the necessity of immediate action. But the second condition is not satisfied. The Governor has not stated, as he should have done, that in his opinion the circumstances required an Ordinance in these terms. [Para 31]

Per *Meredith C. J. and Surjoo Prasad J.* — There is no other illegality in the Ordinance. [Para 55]

The Government is right in framing the Ordinance in accordance with Art. 22 (4) and not in accordance with the Preventive Detention (Extension of Duration) Order, 1950, made by the President under Art. 22 (7). [Para 7]

The Ordinance is not void on the ground of unreasonableness, so far as it puts restrictions on the personal liberty of the subject. [Para 10]

The provisions of the Ordinance are not repugnant to the provisions of the Criminal P. C. [Para 20]

Repugnancy can arise only when one law says "shall" and the other says "shall not". It does not arise when one law says "may in certain circumstances" and the other says "may also in certain circumstances" and the other says "may also in certain other circumstances". The latter is the true position as between the Criminal Procedure Code and the Ordinance. [Para 22]

Just as the Penal Code does not prevent the creation of additional offences, so also the Criminal Procedure Code does not prevent the creation of additional procedures. As the Penal Code is not exhaustive of offences, so also Chap. 8, Criminal P. C., is not exhaustive of preventive detention, and, therefore, no question of repugnancy arises. [Para 23]

The State Legislature and, consequently, the Governor by Ordinance has power to create offences, and, in any event, the portions of the Ordinance creating offences are severable from the portions providing for detention. The Ordinance, therefore, cannot be attacked on this ground. [Para 26]

Although under Art. 213 (2), an Ordinance framed by the Governor ceases to operate on the expiration of six weeks from the re-assembly of the Legislature, the provision in the Ordinance in question for detention for 3 months and in certain circumstances for a longer period, is merely a case of *ex abundanti cautela*. If for any reason the Legislature did not meet, the Ordinance would not expire at the end of six weeks, but would continue and it was, therefore, only right and proper to frame it in such a way as to be suitable for its continuance in such circumstances. Even if there was in fact no justification for making provisions of this kind, that would not make the Ordinance invalid or void so long as the Governor was satisfied, however mistakenly, that the circumstances required such provisions, and said so. [Para 38]

Nor is the Ordinance void on the ground of *mala fides* or as a colourable device to evade constitutional provisions. [Para 39]

In considering the question of *bona fides* or *mala fides* the Court is only concerned with the motive and not the results. [Para 39]

(b) Constitution of India, Art. 19 — Scope — If concerned with personal liberty.

Per *Meredith C. J.*—Article 19 is not concerned with personal liberty at all. It is not concerned with the right of every one to personal liberty, which is separately laid down for every person in Art. 21. It is concerned only with the additional rights of citizens — rights described on the presupposition that they are at liberty. It is describing the rights of citizens who are legally at liberty, and not of those who may be imprisoned under a procedure established by law. Article 21 does not say that no person shall be deprived of his personal liberty except according to procedure established by a reasonable law. The limitation is in respect of laws, meaning all valid laws validly enacted and not merely such laws as the Courts decide to be, in their opinion, reasonable. [Para 9]

(c) Constitution of India, Art. 166 (2)—Order by Governor — Authentication — Signature of Under Secretary—If sufficient.

Under the rules for authentication under Art. 166, an order of detention made in the name of the Governor, if signed by an Under-Secretary, is properly authenticated. [Para 38]

(d) Interpretation of Statutes — Constitution — Construction.

If there are two interpretations possible of a provision in the Constitution Act, the one which leans in favour of the liberty of the people should be adopted in preference to the one which purports to curtail that liberty. [Para 46]

Annotation : ('44-Com) Civil P. C., Pre. N. 7.

(e) Interpretation of Statutes — Emergency Legislation.

In cases of emergency legislations the safety of the State is the primary consideration and a construction should be given to the legislation which may have the effect of carrying out the purpose of the legislation and not defeating that purpose. [Para 47]

Annotation : ('44-Com) Civil P. C., Pre. N. 7.

✠(f) Constitution of India, Art. 213 — "Satisfied" —Meaning—Words and phrases.

Per *Sarjoo Prasad J.*—Wherever a legislation uses the word "satisfied" it must mean reasonably satisfied. It cannot import an arbitrary or irrational state of being satisfied. It is, therefore, obvious that if it is found on the very face of an Ordinance that it is an irrational and an unreasonable piece of legislation, a Court of law would certainly be entitled to hold that the legislation is invalid and pronounce against it being enforceable. [Para 51]

✠(g) Constitution of India, Arts. 22 (7), 246, Sch. 7 List. III, Item 3 — Preventive detention legislation —Powers of State—Successive legislations.

Per *Sarjoo Prasad J.* — It is not open to any State to play with the life and liberty of its citizens and in providing legislation for preventive detention. It must always pay due care and attention so that the legislation so enacted or promulgated is beyond exceptions. A State must, therefore, exercise due care and attention in framing all such law and legislations lest it may be accused of bad faith on account of any hasty or ill-advised move taken in that direction. Successive legislations and orders of detention passed under legislations which have ultimately to be abandoned as found to be defective and void on technical grounds may in most cases lead to the unfortunate result of detaining a person for a period much beyond that contemplated by Art. 22 of the Constitution of India. A State must, therefore, guard against any such unfortunate action. [Para 53]

(h) Constitution of India, Art. 246, Sch. 7, List III Items 1 and 3 —Rule of pith and substance—Applicability.

Per *Sarjoo Prasad J.* — The term "pith and substance" is not a term of art but a term of convenience, and there is no reason why the rule cannot be applied to a case where the two fields of legislations such as criminal law and preventive detention though distinct and separate, yet come under the same list (viz. the concurrent list), though in regard to certain incidental matters a legislation which in pith and substance deals with a particular field may casually encroach upon a different subject-matter. [Para 54]

B. C. Ghosh, D. K. Sinha and R. K. Bagchi — for Petitioner.

Advocate-General, Government Advocate and S. C. Chakravarty—for Opposite Party.

Meredith C. J. — This rule has been issued upon an application under Art. 226 of the Constitution of India for a writ of *habeas corpus* in favour of one Ratan Roy, who was in detention under an order dated 19th January 1950, made under the provisions of Bihar Act III [3] of 1950. This Bench held recently in the case of *Brahmeshwar Prasad*, (Cri. Misc. No. 977 of 1949, decided on 14th February 1950) : (A. I. R. (37) 1950 Pat 265) that the detention provisions of Act III [3] of 1950 had become void from 26th January 1950, on the coming into force of the New Constitution. Consequently, if the matter had rested there, we would, without more, have had to pass an order for the release of the petitioner. But it appears that on the day following that judgment, namely, 15th February 1950, an Ordinance (Bihar Ordinance No. II [2] of 1950—The Bihar Preventive Detention Ordinance, 1950) was made and promulgated by the Governor of Bihar under cl. (1) of Art. 213 of the Constitution, and a fresh detention order was made under this Ordinance on 16th and served on the petitioner the same day.

[2] Mr. Basanta Chandra Ghosh on behalf of the petitioner objected that the promulgation of the Ordinance had not been established before us on the ground that he, and, he said, some other subscribers to the Gazette, had not received the Gazette notification. But the Bihar Gazette (Extraordinary) of 15th February containing the Ordinance has been placed before us, and it has, therefore, been properly proved under S. 78, Evidence Act. Whether or not all the subscribers received their copies can make no difference.

[3] The position, therefore, is that we have to examine whether the detention of the petitioner is legal under the order made under this Ordinance. It is satisfactory to note that the Ordinance does not contain the various objectionable features which we pointed out in Act III [3] of 1950 and held were inconsistent with the provisions of Art. 22 of the Constitution. Under this Ordinance, no person is to be detained for a longer period than three months unless an Advisory Board has reported, before the expiration of that period, that there is, in its opinion, sufficient cause for such detention. The Government is to place the case before the Advisory Board within six weeks of the date of detention, and the Board is to report to the Government within ten weeks of the date of detention. The Government cannot ignore that report, but must pass orders in accordance therewith. The provision preventing the Court from calling for and examining the report is gone, and the provision that the detention shall not become illegal by failure adequately to communicate the grounds has disappeared. Nevertheless Mr. Ghosh has very strenuously attacked both the Ordinance and the order thereunder on a number of grounds. We have been sensible of the immense responsibility resting upon us in making first interpretations of the new constitution and deciding points of first impression, and we have, therefore, examined the arguments on both sides with the utmost care and anxiety.

[4] Mr. Ghosh's arguments fall under three heads: (A) those directed to showing that the Ordinance is void; (B) those directed to showing that the order is illegal; and (C) those directed to showing that both the Ordinance and the order have been made in bad faith as devices to circumvent the order of this Court and to deprive the petitioner of the fundamental rights guaranteed by the constitution. I shall deal with these heads of argument one by one.

[5] (A)—(1). An Order of the President under cl. (7) of Art. 22 of the Constitution, made and issued on 26th January 1950, by the President, was placed before us in *Brahmeswar Prasad's case*: (A.I.R. (37) 1950 Pat. 265) and is in the following terms:

"MINISTRY OF LAW

New Delhi, 26th January 1950

No. C. O. 8—The following Order made by the President is published for general information:

THE PREVENTIVE DETENSION (EXTENSION OF DURATION) ORDER, 1950.

In exercise of the powers conferred by sub-cls. (a) and (b) of cl. (7) of Art. 22 of the Constitution of India read with Art. 373 thereof and of all other powers enabling him in that behalf, the President is pleased to make the following Order, namely:

1. (1) This Order may be called the Preventive Detention (Extension of Duration) Order, 1950.

(2) It shall come into force at once.

2. Where in any class of cases or under any circumstances specified in any law providing for preventive detention in force at the commencement of the Constitution of India (hereinafter referred to as 'the Constitution') any person was, immediately before such commencement, or is at any time thereafter, in detention in pursuance of an order made under such law, such person may be detained for a period longer than three months under such law without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-cl. (a) of cl. (4) of Art. 22 of the Constitution.

3. The maximum period for which any such person, as is referred to in para. 2 may be detained, shall, in the case of a person in detention immediately before the commencement of the Constitution, be three months from such commencement, and in the case of a person

detained in pursuance of an order made after such commencement, be three months from the date of such order.

RAJENDRA PRASAD,
President."

[6] Mr. Ghosh's first argument is that the Ordinance should have been made consistent with the terms of this Order, and not with the terms of Art. 22 (4) unmodified by this Order, and the Ordinance, not being in accord with Art. 22 (4) as modified by the Order, is void under Art. 13 (2) of the Constitution. In his Order the President said that the maximum period for which "any such person" may be detained shall, in the case of a person in detention immediately before the commencement of the Constitution, be three months from such commencement, and, in the case of a person detained in pursuance of an order made after such commencement, three months from the date of such order. The petitioner was in detention before the Constitution came into force, but under the Ordinance he is to be detained for three months from the date of the order (16th February) which exceeds three months from the date of the Constitution coming into force by 21 days. Under Art. 22 (4), proviso to sub-cl. (a), nothing in the sub-clause is to authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-cl. (b) of cl. (7), and the President acting for Parliament, as he was entitled, has in his Order fixed a maximum period which in a case like this is three months from 26th January. Therefore, Art. 22 (4) (a) does not authorise a law providing for three months' detention from the date of the order.

[7] The answer to this contention is, in my opinion very clear. The President has not made an Order modifying Art. 22 (4) or fixing a maximum period of detention in all cases. He has made an Order governing only a very limited class of cases. It is quite apparent from the wording of cl. 2 of his order that he is dealing only with cases and circumstances where a person is in detention under a law in force at the commencement of the Constitution. He speaks of any person who was immediately before the commencement of the Constitution or at any time thereafter in detention in pursuance of an order made under a law pre-existing the Constitution. He is dealing with only such persons as were or are detained under a pre-Constitution law, as one might put it and he says in cl. 2 that such person may be detained for a period longer than three months *under such law* without obtaining the opinion of an Advisory Board. Clause 3 expressly relates only to such persons, the words used being "any such person as is referred to in para. 2," and, therefore, a maximum is fixed only in the case of persons detained under a pre-Constitution law. He is not dealing at all with post Constitution laws or persons detained thereunder, and he does not purport to fix any maximum for such cases. Therefore, in my opinion, the Government was quite clearly right in framing the Ordinance in accordance with Art. 22 (4), and not in accordance with the President's Order. The petitioner is not now a person detained under Act III [3] of 1950.

[8] Mr. Ghosh's next point under this head is one of great importance. His argument may be briefly put like this. Article 19 of the Constitution lays down the fundamental rights of citizens to freedom. It says that all citizens shall have the right, (d) to move freely throughout the territory of India, and (e) to reside and settle in any part of the territory of India. These rights involve personal liberty. The only limitation placed before them is that specified in Art. 19 (5) which says that nothing in sub-cls. (d), (e) and (f) of cl. (1) shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, *reasonable* restrictions on the exercise of any of the rights conferred by any of the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe. Therefore, these are the only restrictions on personal liberty. There may be such restrictions in the interests of the general public, but they must be reasonable. Therefore, any law which restricts the liberty of the subject must be a reasonable law, and it is open to the Courts in every case to apply the test of reasonableness and to hold the law void if they find it unreasonable. Judged by this test, the Ordinance is unreasonable and void because it provides for detention, not in reasonable circumstances, but when the Government is satisfied, and the Government may be either reasonably or unreasonably satisfied. If the Government expresses that it is satisfied, then that is the end of the matter. A person may be unreasonably detained under the Ordinance if the Government is unreasonably satisfied, and, therefore, the Ordinance is inconsistent with the fundamental rights laid down in Art. 19.

[9] It will be seen that the claim made is very sweeping indeed. It would mean that every law under which a person may be imprisoned, including all the provisions of the Penal Code, is open to examination by the Courts on the ground of reasonableness. It makes the Courts supreme arbiters in regard to any such legislation, and they can reject it or accept it in accordance with their ideas of whether it appeals

to their reason. But ideas of reasonableness or otherwise are apt to vary widely. Take, for example, laws relating to prohibition ; or take such a matter as adultery which the Indian law regards as a crime punishable with imprisonment, but the English law does not. It is difficult to believe the framers of the Constitution ever intended to place so enormous a power in the hands of the Courts, and, in my opinion, if we read the Constitution as a whole, that is not the correct interpretation of Art. 19 (f). I do not consider that Art. 19 is concerned with personal liberty at all. It is not concerned with the right of every one to personal liberty, which is separately laid down for every person in Art. 21. It is concerned only with the additional rights of citizens—rights described on the presupposition that they are at liberty. It is describing the rights of citizens who are legally at liberty, and not of those who may be imprisoned under a procedure established by law. Article 21 does not say that no person shall be deprived of his personal liberty except according to procedure established by a reasonable law. The limitation is in respect of laws, meaning all valid laws validly enacted, and not, in my opinion, merely such laws as the Courts decide to be in their opinion, reasonable. The various provisions of the Constitution must be read consistently, if possible. If we do not read Art. 19 in the way I suggest, there are quite clear inconsistencies between it and the provisions in the Constitution which make certain laws non-justiciable. The power of the President to make Ordinances under Art. 123 is not made to depend on reasonable necessity but on the President's satisfaction. Similarly with regard to the power of the Governor under Art. 213. Or take Art. 22 (4) : the criterion for the validity of detention for more than three months is not the existence of sufficient cause but the opinion of an Advisory Board that there is sufficient cause. It makes no difference under this Article whether that opinion is in the view of the Court reasonable or unreasonable. Article 19 (f) gives a fundamental right to acquire, hold and dispose of property, and the only restrictions on this are reasonable restrictions under Art. 19 (5). But Art. 31 (4) in certain cases makes laws non-justiciable in regard to acquisition of property without compensation, and similarly with regard to Art. 31 (6). Again under Art. 372 (2) the President may *inter alia* adopt and modify the existing laws which curtail personal liberty and such adoptions and modifications have been made non-justiciable. On Mr. Ghosh's interpretation there are clearly inconsistencies in the Constitution, but on the interpretation I prefer those inconsistencies all disappear.

[10] Mr. Ghosh's interpretation would involve another rather extraordinary result. Since the right to personal liberty for everyone is guaranteed by Art. 21, with only a qualification that deprivation of it must be according to law, and, according to Mr. Ghosh, personal liberty is guaranteed to citizens under Art. 19, with no restrictions save such as are held to be reasonable in the interests of the general public, it would follow that the reasonableness of a detention order can be challenged in the Courts in the case of a citizen but not in the case of anyone who is not a citizen. Could the framers of the Constitution have intended to qualify the jurisdiction of the Court in such a manner so as to make the powers of the Court depend on the character of the person before it ? I repeat, that, in my opinion, on a true construction Art. 19 was not intended to deal with personal liberty but only with certain additional freedoms of citizens on the pre-supposition that they are legally at large and I do not think the Ordinance can be successfully challenged on the ground put forward.

[11] Mr. Ghosh's next argument is equally plausible and has equally required our anxious consideration. Under the Government of India Act 1935, the subject of preventive detention was in the Provincial List and though provisions in various Ordinances were frequently challenged on the score of being repugnant to provisions of the Criminal Procedure Code, the challenge always failed on this ground. But in the Indian Constitution preventive detention for reasons connected with the security of a State, maintenance of public Order, or the maintenance of supplies and services essential to the community and persons subjected to such detention, has been removed from the State List to Concurrent List, and criminal law is also in the Concurrent List. The result is that when questions of repugnancy arise they have to be considered, not in the light of Art. 246, which permits of the application of the rule of pith and substance, but under Art. 254, which corresponds to Section 107, Government of India Act and is in similar terms It was well settled that in cases of repugnancy falling under S. 107 the doctrine of pith and substance could not be utilised to validate a Provincial legislation conflicting with a Central legislation. The Privy Council in *Prafulla Kumar* v. *Bank of Commerce, Ltd., Khulna*, 74 I. A. 23 at p. 38 : (A. I. R. (34) 1947 P. C. 60) held that the pith and substance rule has no application to S. 107. That also was pointed out by a Calcutta Full Bench in *Jnan Prosanna* v. *Province of West Bengal*, A. I. R. (36) 1949 Cal. 1 Para. 45 at p. 10 (50 Cr. L. J. 1 F. B.). See also *Megh Raj* v. *Allah Rakhia*, 1942 F. C. R. 53 at page 58

(A.I.R. (29) 1942 F. C. 27) in deed the wording of Art. 254, as was that of S. 107, is quite inconsistent with the application of the pith and substance rule. Article 254 (1) says in the clearest terms that if any provision of a law made by a state is repugnant to any provision of a law made by Parliament or any provision of an existing law with respect to one of the matters enumerated in the concurrent list, then, subject to the provisions of cl. (2), the law made by Parliament, whether passed before or after the said law shall prevail, and the state law shall be void to the extent of the repugnancy. It deals not with laws as a whole but with particular provisions, and says in the plainest language that where any provisions conflict the provision in the state law shall be void. When the restriction is as to particular provisions, there is obviously no room for the doctrine of pith and substance which relates to the general purpose of the law. Moreover, there is no need for any such rule because Art. 254, like S. 107, itself provides the means of avoiding the conflict. Under Art. 254 (2) the state law is to be reserved for the consideration of the President, and, if and when the President gives his assent, it will prevail in the state, notwithstanding conflict with the central law or pre-existing law.

[12] The learned Government-Advocate has sought to escape from the position by pointing out that in the Concurrent List (List III) criminal procedure is Item 2, and preventive detention is Item 3, so that the framers of the constitution wish the two to be regarded as separate subjects. These, he says, are different fields of legislation and therefore, conflict between legislation in one field and legislation in the other can be dealt with on the pith and substance rule. But, in the first place, we have to decide for ourselves whether they are really different fields. They are not made different fields merely by the fact that they have been placed under separate headings. In point of fact, the Criminal Procedure Code also in Chap. 8 deals with preventive detention in certain circumstances. In the second place, having regard to the wording of Art. 254, it makes, in my opinion, absolutely no difference whether the two laws fall under the same item or under separate items so long as they are both in the Concurrent List.

[13] Mr. Ghosh next points out that wherever a state law or provision therein would be void under Art. 254 for not having been reserved for for the President's assent, so also would an Ordinance made by the Governor in the same circumstances if it is made without instructions from the President. There is a proviso to Art. 213 (1) which says that the Governor shall not, without instructions from the President, promulgate any such Ordinance if (a) a bill containing the same provisions would under this constitution have required the previous sanction of the President for the introduction thereof into the legislature; or (b) he would have deemed it necessary to reserve a bill containing the same provisions for the consideration of the President; or (c) an Act of the legislature of the State containing the same provisions would under this constitution have been invalid unless, having been reserved for the consideration of the President, it had received the assent of the President.

[14] It is quite apparent that, since it is not claimed that this Ordinance was made under instructions from the President, it would be void if it contains provisions repugnant to the Criminal Procedure Code. Mr. Ghosh confidently claims that there are repugnancies. The ordinance provides for arrest in circumstances other than those in which a police officer is entitled to arrest under S. 54 or S. 55 of the Criminal P. C. and it also conflicts with the provisions of Ss. 60 and 61, under which a police officer making arrest without warrant has to produce the person arrested before a Magistrate within twenty-four hours. It also provides for preventive detention in circumstances other than those allowable under Ss. 117 and 123 of Chap. 8 of the Code. Mr. Ghose has the support of a Full Bench of the Calcutta High Court in *Jnan Prosanna* v. *Province of West Bengal*, A. I. R. (36) 1949 Cal. 1: (50 Cr. L. J. 1 F. B.), where at p. 8, para. 34, the learned Sir Trevor Harries C. J., has expressed the opinion that not only is there repugnancy but it would be impossible to frame a preventive detention ordinance without repugnancy.

[15] The learned Government Advocate replies, in the first instance that, with regard to Ss. 60 and 61, they must be taken to be overridden by the provisions of the constitution itself, which abrogate these safeguards in the case of a person detained under a law for preventive detention. Therefore, the repugnancy, if any, does not matter, because Ss. 60 and 61 must be read as qualified by the constitution. The provision in the constitution is Art. 22 (3). Clauses (1) and (2) of Art. 22 give an arrested person the right to be informed as soon as may be of the grounds of his arrest, the right to consult and be defended by a lawyer of his choice, and the right to be produced before the nearest Magistrate within twenty-four hours and not to be detained in custody beyond that period without the authority of a Magistrate. But cl. (3) says that nothing in these clauses shall apply '(b) to any person

who is arrested or detained under any law providing for preventive detention."

[16] This argument is, in my opinion, correct, so we need not concern ourselves with any apparent repugnancy between the ordinance and Ss. 60 and 61.

[17] Next, with regard to S. 54, he points out that the ordinance contains no provision for arrest of persons to be detained. There may be a lacuna in the Ordinance in this regard. But, as it stands, it is perfectly consistent with the provisions regarding arrest in the Criminal Procedure Code. It may be that owing to the lacuna the arrest of a detenu by a police officer would be illegal as contravening S. 54, but the Ordinance provides for no such arrest and the illegality of the arrest would not make the subsequent detention under the Ordinance illegal.

[18] I consider this argument unsound, because a provision for detention contains, by necessary implication, a provision for arrest on the grounds for which detention has been provided. I apprehend that the only reason why there are not specific provisions for arrest of the detenu in the Ordinance is because that has been left to be settled by order under S. 2 (3) of the Ordinance, which says that so long as there is in force in respect of any person such an order as aforesaid directing that he be detained, he shall be liable to be removed to and detained in such place and under such conditions, including conditions as to maintenance, discipline and the punishment of offences and breaches of discipline, as the State Government may, from time to time, by general or special order, specify. For all practical purposes this is a provision for arrest of everyone against whom a detention order has been made. Moreover, sub-s. (4) contains provisions for dealing with such a person who absconds or conceals himself, and provides for the application to him of the processes of proclamation and attachment under Ss. 87, 88 and 89, Criminal P. C., despite the fact that under the Criminal Procedure Code such processes can only be used where a warrant has previously been lawfully issued and cannot be served. Therefore, in my opinion, this answer to Mr. Ghosh must be rejected.

[19] But thirdly the learned Government Advocate suggests that there is actually no repugnancy, that the provisions of the Criminal Procedure Code were never intended to be exhaustive with regard to procedure for arrest, just as the Penal Code was never intended to be exhaustive with regard to offences, and numerous additional offences have been created under local or special laws. Therefore, the provisions in the Ordinance are to be regarded not as repugnant to those in the Criminal Procedure Code but as supplemental.

[20] I must naturally attach the greatest weight to the opinion of the learned Chief Justice of the Calcutta High Court. But, nevertheless, with all respect to that opinion, I have after the most anxious consideration, come to the conclusion that it is not correct, and that, in the true view, there is (no?) repugnancy and, consequently, that this attack on the Ordinance must also fail.

[21] It is to be noticed that S. 7 of the Ordinance says that its provisions shall be in addition to and not in derogation of, any other law for the time being in force. In view of this, the Government clearly does not contemplate or intend anything repugnant to the Criminal Procedure Code, and this might almost be called a provision that, if any repugnancy does inadvertently creep in, the Ordinance will automatically give way to the Criminal Procedure Code in this respect.

[22] Repugnancy can arise only when one law says "shall" and the other says "shall not." It does not arise when one law says "may in certain circumstances" and the other says "may also in certain other circumstances." The latter, in my opinion, is the true position as between the Criminal Procedure Code and the Ordinance. Section 5 (2), to my mind, clearly shows that just as the Penal Code was never intended to be exhaustive of offences, so the Criminal Procedure Code was never intended to be exhaustive of criminal procedure; for, it says that all offences under any law other than the Penal Code shall be investigated, enquired into, tried and otherwise dealt with according to the provisions of the Criminal Procedure Code, but subject to any enactment for the time being in force regulating the manner or place of investigating, enquiring into, trying or otherwise dealing with such offences. It is clear that under this provision a special law creating offences may also create special procedure for dealing with them, and I see no reason why the same principle should not be applied in regard to the procedure for preventive action contained in Chap. 8. Criminal P. C. Section 114 empowers a Magistrate in certain cases to issue a warrant for the immediate arrest of a person who has not committed or is not suspected of having committed any offence. It relates only to cases where there is a danger of a breach of the peace. But it neither suggests nor implies that there can be no other law providing for such action upon additional grounds. The same remarks apply to the provision for detention in custody contained in S. 117 (3) and the provisions for detention in S. 123. Section 55 enables a police officer to arrest for preventive

purposes, and does not forbid such arrest in other circumstances under the provisions of some other law for preventive detention. Section 54 says that a police officer may arrest without warrant in certain circumstances. No doubt by implication it forbids him to arrest in other circumstances, though it does not expressly say so. But that is obviously only if and so long as there is no special or local law laying down additional circumstances in which he may arrest.

[23] I am of opinion, that, just as the Penal Code does not prevent the creation of additional offences, so also the Criminal Procedure Code does not prevent the creation of additional procedures. As the Penal Code is not exhaustive of offences, so also Chap. 8, Criminal P. C. is not exhaustive of preventive detention, and, therefore, no question of repugnancy arises.

[24] (4) Mr. Ghosh's next argument is based on the provisions in the Ordinance which create offences. He says that these are an integral part of the scheme of the Ordinance, and they have to go because the State Government has got no power to create offences against laws in respect of preventive detention. Therefore, the entire Ordinance has to go. Why has the State Government no such power? Because both the Central and the State Lists contain an item covering offences against laws with respect to any of the matters in the respective Lists, but there is no such item in the Concurrent List. The item in List I (Union List) is item 93. The item in List II (State List) is item 64. Why, Mr. Ghosh argues, is there no corresponding item in the Concurrent List? Its omission shows that the framers of the Constitution did not intend that the State should be entitled to create offences under the Concurrent List. The idea was that these should be dealt with by the Centre under the residuary Article (Art. 97 of List I) and Art. 248 of the Constitution which reserves the residuary legislative powers to Parliament.

[25] This argument, plausible as it is at first sight, is, in my opinion, unsound. I think it is sufficiently clear that items 64 and 93 were only inserted *ex abundante cautela*. The reason is that a number of the items in the Concurrent List are such that they obviously contemplate the creation of offences; for example item 14 (Contempt of Court), item 17 (Prevention of cruelty to animals), item 18 (Adulteration of foodstuffs and other goods). How can these items in the Concurrent List be dealt with at all without the creation of offences? The items in the Lists are to be given a broad and liberal interpretation and each item regarded as including ancillary matters: *see United Provinces* v. *Mt. Atiqa Begum*, A. I. R. (28) 1941 F. C. 16 : (I.L.R. (1941) Kar. F. C. 72). Item 1 of the Concurrent List is Criminal Law. Surely, that must mean the creation of offences? Moreover, a second feature about this item 1 is that it includes the Indian Penal Code, but excluding offences against laws with respect to any of the matters specified in List I or List II. Why is there is no provision excluding also offences against laws with respect to any of the matters specified in List III? If Mr. Ghosh is correct, one would except those to have been excluded also.

[26] I am unable to accept Mr. Ghosh's argument that the State Legislature and, consequently the Governor by Ordinance has no power to create offences, and, in any event, I am of opinion that the portions of the Ordinance creating offences are severable from the portions providing for detention.

[27] (5) Mr. Ghosh next attacks the Ordinance because it provides for detention for three months, and in certain circumstances for a longer period, if the Advisory Council so recommends. But, he says, such provisions are not only unnecessary, but also illusory, because the Ordinance could, in any event, last only for six weeks. Under Art. 213 (2), an Ordinance like this ceases to operate on the expiration of six weeks from the reassembly of the Legislature. The Governor framed the Ordinance on 15th February. He knew then that the Legislature would meet next day, the 16th, for he had already summoned both Houses to meet. He knew, therefore, that the Ordinance would lapse after six weeks. What was the good of making provisions for three months or more?

[28] Here again, in my opinion, it is merely a case of *ex abundante cautela*. Some unexpected crisis might conceivably prevent the Legislature from meeting. Mr. Ghosh replies that the Governor can always frame another Ordinance at the end of six weeks; but difficulties might arise with regard to successive Ordinances. This argument ignores the fact that, if for any reason the Legislature did not meet, the Ordinance would not expire at the end of six weeks, but would continue and it was, therefore, only right and proper to frame it in such a way as to be suitable for its continuance in such circumstances. Even if we hold that there was in fact no justification for making provisions of this kind, that would not make the Ordinance invalid or void so long as the Governor was satisfied, however mistakenly, that the circumstances required such provisions, and said so.

[29] (6) I now come to the ground of attack which has caused me personally most difficulty and anxiety. It is that the Preamble to the Ordinance does not show that the necessary conditions for its promulgation, as required by

Art. 213, really existed. The conditions for the promulgation of an Ordinance as set out in Art. 213 (1) are:

> "If at any time, except when the Legislative Assembly of a State is in session, or where there is a Legislative Council in a State, except when both Houses of the Legislature are in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require."

[30] The Preamble to the Ordinance is in these terms:

> "Whereas the Houses of the Legislature of the State of Bihar are not in session;
>
> And whereas the Governor of Bihar is satisfied that circumstances exist which render it necessary for him to take immediate action to provide for the preventive detention in connection with the public safety .... and maintenance of public order is in the State of Bihar:
>
> Now, therefore, in exercise of the powers conferred by cl. (1) of Art. 213 of the Constitution of India, the Governor is pleased to make and promulgate the following Ordinance."

[31] For a valid Ordinance, two conditions are necessary under Art. 213; (1) that the Governor is satisfied that circumstances exist which require immediate action, and (2) that in his opinion the circumstances require such an Ordinance as he promulgates. The preamble makes it clear that the first of these conditions is satisfied. It is stated that the Governor is satisfied of the necessity of immediate action. But the second condition is not satisfied. The Governor has not stated, as he should have done, that in his opinion the circumstances required an Ordinance in these terms The preamble should have been: "And whereas the Governor of Bihar is satisfied that circumstances exist which render it necessary for him to take immediate action to provide for preventive detention in connection with the public safety and maintenance of public order in the State of Bihar; and whereas these circumstances, in the opinion of the Governor, requires the promulgation of an Ordinance in the following terms; now, therefore etc., etc."

[32] This point at first glance may appear highly technical or even trivial. Yet, in my opinion, this is the rock upon which this Ordinance must founder. A slender pinnacle of rock is sometimes the sharpest and most effective in sinking the ship. We are apt to lose sight of the importance of the point simply because we almost inevitably think of the matter in the light of the existing circumstances and the existing Ordinance, and find it difficult to ignore the fact that the present Ordinance is quite clearly one appropriate to the circumstances. That, however, is a wrong line of approach. We have to consider the question in the light of all possible circumstances and all possible Ordinances, for we have to give an interpretation of the Constitution which is equally valid for all circumstances.

[33] The Courts are the guardians of the fundamental rights of the people. Where a Constitution contains provisions curtailing the fundamental rights previously set out therein in general terms, it is absolutely vital for the Courts to see that any law embodying the curtailment is most strictly in accord with the constitutional provisions for such curtailment, and that every safeguard which the constitution does contain is most rigidly insisted upon and enforced. That is all the more so when the Court is debarred from examining the reasonableness of the law, and is allowed only to apply formal safeguards within a rigidly limited field. Such is the case here. Quite certainly the framers of the constitution did not contemplate under Art. 213 that in certain circumstances of emergency the Governor, that is to say the Government should be at liberty to frame any sort of Ordinance he pleased. For example, suppose an emergency arises owing to flood, and taking advantage of the existence of this emergency the Governor frames an ordinance to the effect that all blue-eyed babies shall be strangled at birth. Such an ordinance would be wholly unreasonable, but the Courts are debarred from declaring it void on the ground of unreasonableness. Yet the Courts are not wholly debarred from questioning it. A slender safeguard is provided for the existence of the emergency, and a second slender safeguard is provided to ensure that the ordinance will be appropriate to that emergency; to ensure that the Governor shall not take advantage of the existence of an emergency of one kind to issue an ordinance which the circumstances do not at all require. The safeguard in each case is that the Governor, that is again to say, the Government the Governor being constitutional shall have honestly applied his mind in both respects, and shall say so, so that the Courts may have some means of varifying that the mind of the Governor has in fact been applied. In other words, there must be a certificate by the Governor—a certificate which shows that he has applied his mind to the matter and has honestly formed an opinion—a *bona fide* opinion, that not only do the circumstances require immediate action, but the circumstances also require such an ordinance as he promulgates.

[34] It may be said that the Government will be composed of reasonable beings, and would not be likely to frame an ordinance irrelevant to the circumstances. We can make no such assumption. The fact that we may have at this particular time or at any time a Government composed of reasonable men is no warrant

for assuming that that always will be so. We have to bear in mind the possible case of a Government of unreasonable tyrants which might take advantage of the existence of an emergency to issue a tyrannical and unjust ordinance, not at all required. But then, it may be said in such circumstances there is no safeguard for such a Government might falsely say that in its opinion the circumstances required the action taken. The safeguard may be slender, but it is not nugatory because the Courts can always enquire if *mala fides* have become apparent, and it might well be that a Government unscrupulous enough to make an emergency an excuse for unjust action might yet hesitate and the Governor at the head of it, however constitutional, might even more hesitate, to give a formal certificate implying honest examination of the circumstances and the formation of an honest opinion. Moreover, the more slender the safeguard, the more rigorously must the Courts examine it and apply it.

[35] To all this the learned Government Advocate replies that the preamble in this case does embody the second safeguard also because the Governor says that he is satisfied not only that circumstances exist requiring immediate action, but requiring immediate action to provide for preventive detention in connection with the public safety and maintenance of public order. That, in my opinion, is not enough and is not a compliance with Art. 213. It shows that the Governor is satisfied that a preventive detention Ordinance is necessary, but not that he is satisfied that this particular preventive detention Ordinance is necessary—that an Ordinance in these particular terms is required; for example, that provisions for three months' detention are required rather than six weeks.

[36] An example will make this clear, if we are to test the validity of the preamble. We must clearly consider below if not this particular preventive detention Ordinance, but any possible preventive detention Ordinance we can think of. Suppose the preamble had been followed by an Ordinance to the effect that all persons wearing beards would be detained. This is by no means so absurd as it sounds. Such a measure has not always been too ridiculous for Government to contemplate; for example, Peter the Great of Russia put a tax upon beards, and every bearded man in his dominions had to wear a disc attached to the beard to show that he had paid his tax. If this is the Ordinance before us, must we uphold it on the terms of this particular preamble? Quite obviously not. It would be a proper case for declaring the Ordinance void because the certificate was not there that in the opinion of the Governor the circumstances required it. If that is so, we must reject the present Ordinance, however reasonable it may appear, upon the very same grounds. As I have said, it is our duty to give an interpretation of the Constitution in most general terms. In the light of all possible cases, and in my opinion, it is vital when the safeguards are so slender that we should adopt the interpretation I have indicated, it is vital in the interests of the preservation of the fundamental liberties of the people, and the Courts must not swerve from their duty merely because it may involve nullifying provisions which in the particular case before them may happen to be reasonable and proper.

[37] As I have now held the Ordinance is void as not satisfying the conditions laid down in Art. 213 for its promulgation, it will suffice to deal very briefly with Mr. Ghosh's remaining points.

[38] (b) Mr. Ghosh has argued that the order has not been properly authenticated because it is only signed by an under-Secretary and under Art. 166 (2) of the Constitution, orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor. When Mr. Ghosh made this point no such rules had been placed before us and we were asked to rely upon the old rules under S. 59, Government of India Act. But during the hearing, a gazette notification of 26th January, containing new rules for authentication under Art. 166 was placed before us and under those new rules the authentication is in order, so there is nothing in this point.

[39] (c) Mr. Ghosh attacks both the Ordinance and the order on the ground of *mala fides*. He argues that the State of Bihar cannot by the device of making successive laws or orders, each lasting three months, deprive a citizen of the right given under Art. 22 (4) (a). I am prepared to hold that in some circumstances successive laws or orders might have to be declared illegal as colourable devices to evade constitutional provisions, but I am clearly of opinion that there is nothing of the sort in the present case. It is quite patent that this Ordinance was framed in view of the fact that this Court had just declared that Act III [3] of 1950 had become void. Had such action not been taken, a large number of persons might have had to be released whom Government considered it necessary to detain in the interest of public order and safety. Such being the object of the Ordinance, its effects are irrelevant. For in considering the question of *bona fides* or *mala fides* we are concerned only with the motive and not the results. It is necessary also to point out that in framing an Ordinance or a detention law

it has to be made suitable for dealing with fresh detenus. So far as the law is concerned, there is another aspect of the matter. There is no question here of successive laws or successive Ordinances because this is the first occasion on which an Ordinance has been issued under the new Constitution. Article 22 (4) embodies a substantive right; it is not only a matter of procedure. Therefore, it is not retrospective in the absence of any express provision, to that effect. Therefore, anything which may have happened before the Constitution came into force is irrelevant. There is, therefore, no question of any *mala fides* so far as the Ordinance is concerned.

[39a] As for the order it is true that the petitioner has been in detention under successive orders for a long time. But it would be too much to hold that all that has occurred in his case is the result of dishonest machinations to deprive him the benefit of consideration of his case by the Advisory Council. From an affidavit filed by Government it appears that his case was referred to an Advisory Council. The Council submitted a report which was certainly not a proper one. Instead of expressing a specific opinion on his case, it merely laid down a general rule, suggesting that the Government should deal with his and other cases in accordance with the rule in the light of the materials they had in each case. The Government then sent the case back for a definite report regarding each detenu. There was nothing at all wrong with that. Before a fresh report could be submitted, the Advisory Council ceased to exist, either by resignation of some of its members :becoming ineligible under the new provisions of Act III [3] of 1950. There is no reason to suppose that Government was not taking steps to form a new Advisory Board as quickly as possible and to refer his case to it, and it may be assumed that Government would under the new Ordinance have taken steps as promptly as possible to see that his case was again referred to an Advisory Council. It seems to me that the petitioner has merely been a victim of circumstances. Circumstances mainly resulting from the facts that the original Act was declared ultra vires by the Federal Court, then an Ordinance was declared invalid and had to be replaced, and finally Act III [3] of 1950 was declared void. There is nothing in the case sufficient to establish any bad faith on the part of Government.

[40] Mr. Ghosh argues that from the point of view of Criminal law, under S. 52, Penal Code, nothing can be said to be done in good faith which is not done with due care and attention. Admitting that to be so, I am still of opinion that bad faith has not been established. I do not think it shows want of due care and attention in the sense of bad faith that Government did not foresee the fate of the various Acts and Ordinances. In the case of Act III [3] of 1950 it was not for anything done by the local Government but for a defect in the procedure adopted by the Centre that we declared it void.

[41] The fact that in this Ordinance Government took steps to remove all the objectionable features pointed out by this Court in Act III [3] of 1950 is itself indicative of *bona fides* and not of anything to the contrary.

[42] Holding however as I do that the detention is under an invalid Ordinance, I would order the immediate release of the petitioner.

[43] **Sarjoo Prashad J.** — I have examined the judgment prepared by my Lord the Chief Justice with all the care and attention which his judgment pre-eminently deserves. I am glad to find myself in complete agreement with him on all the other points discussed in that judgment except one, on the basis of which his Lordship has held that the Ordinance is invalid, and, in consequence, the order of detention passed thereunder is illegal. It is hardly necessary for me to mention that all the various lines of argument advanced at the Bar or arising in course of our discussion have been lucidly formulated, comprehensively examined and satisfactorily answered, and I feel that I cannot improve upon the discussions contained in the judgment of my learned brother on these points. I will, therefore, content myself with a consideration of the point on which the difference has arisen, namely, the point of promulgation of the Ordinance, that is, Bihar Ordinance II [2] of 1950, under which the present order of detention has been passed against the petitioner. I regret to have to say that I cannot persuade myself to hold that the Ordinance is invalid because it has not been properly promulgated.

[44] The Ordinance in question has been promulgated by the Governor of the State of Bihar in the exercise of the powers conferred on him by cl. (1) of Art. 213 of the Constitution of India. Article 213 provides that when the Legislative Assembly of a State is not in session, or where there is a Legislative Council in a State when neither of the Houses of the Legislature are in session, the Governor is entitled to promulgate Ordinance; but before he does so, there are two conditions necessary: first is that the Governor should be satisfied that circumstances exist which render it necessary for him to take immediate action, and second is that he may promulgate such Ordinances as the circumstances appear to him to require. It is argued that in order that this promulgating power be exercised by the Governor both the circumstances must be found to exist. He should be satisfied not only

that the circumstances render it necessary for him to take immediate action but also that the Ordinances promulgated by him are such as the circumstances appear to him to require. A reference is accordingly made to the preamble of the Ordinance in question and it is argued that the preamble does not fulfil both the aforesaid requirements of S. 213 of the Constitution Act. The argument is that the preamble only mentions that the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action" to provide for preventive detention but the preamble does not show that the Governor considered that the circumstances appeared to him to require the promulgation of this Ordinance. I am afraid this argument does not commend itself to me. Reading the preamble as a whole, it is quite clear that it fulfils the requirements of Art. 213 of the Constitution of India. It says, in the first place, that the Governor of Bihar is satisfied that circumstances exist which render it necessary for him to take immediate action. If it had only stopped with this observation, and thereafter proceeded to say that in exercise of the powers conferred under Art. 213 of the Constitution of India, the Governor is pleased to make and promulgate the Ordinance, there might have been something to be said in support of the argument. But it does not stop there; it proceeds to say in the second place that the immediate action is necessary "to provide for preventive detention in connextion with the public safety and maintenance of public order in the State of Bihar" and then it goes on to say that the Governor is pleased to make and promulgate the following Ordinance,—the terms whereof are for preventive detention. From this it is quite clear that the Governor was satisfied in regard to both the factors and considered that the circumstances appeared to him to require the promulgation of this Ordinance. Even if something more is to be added to the preamble in question, it would not, in my opinion, improve the situation or make any substantial difference. On the other hand, it might lead to tautological inaccuracies. Considering the preamble in its entirety, it appears to me that both the requirements of Art. 213 have thus been completely fulfilled.

[45] It must be, however, remembered that even if the preamble had been defectively worded, it could not be said that the terms of the Ordinance would be rendered nugatory, provided always that the conditions required by Art. 213 existed for the promulgation of the Ordinance. Article 213 does not require that the conditions which render it necessary for the Governor to act in promulgating the Ordinance must be specifically stated in the preamble, or that it must be incorporated in the body of the Ordinance itself. The preamble might have only mentioned that in promulgating the ordinance the Governor purported to act under Art. 213 of the Constitution of India, and thereafter the terms of the Ordinance may have been mentioned. Even then, in my opinion, it could not be said that the legislation was invalid, or that the promulgation of the Ordinance was illegal provided as I have said the circumstances which rendered it necessary for the Governor to act did exist. The Judicial Committee of the Privy Council when dealing with an ordinance promulgated by the Governor-General under para. 72 of Sch. IX, Government of India Act, 1935 observed that

> " the paragraph does not require the Governor-General to state that there is an emergency or what the emergency is, either in the text of the Ordinance or at all and assuming that he acts bona fide and in accordance with his statutory powers, it cannot rest with the Courts to challenge his view that the emergency exists." See *Emperor* v. *Banaori Lal*, A. I. R. (32) 1945 P. C. 48 : 72 I. A. 57 : (46 Cr. L. J. 589).

The power which is vouchsafed to the head of the State to act for purposes of emergency in promulgating an Ordinance cannot be affected merely because he does not state in clear terms in the Ordinance itself the circumstances which have rendered it necessary for him to act in the exercise of that power. In all such cases it is for the Governor alone to decide in the forum of his conscience whether he has reasonable cause to be satisfied of the necessity of promulgating an Ordinance of the nature promulgated by him. I may refer in this connexion to a passage in the judgment of the then Chief Justice Sir Clifford Agarwala where he says: "The true meaning of the observation relied upon by the learned Advocate is that when an enactment requires an officer to be satisfied about the existence of a particular state of things before taking action, his satisfaction i. e. his mental state, must be accompanied by an element of reasonableness, determined however by himself i. e. the officer's mind to him a kingdom is *Roma locuta causa finita est.*" *Basanata Chandra* v. *Emperor*, 23 Pat 968 at p. 980 : (A. I. R. (32) 1945 Pat. 44 FB). The circumstances which are required to exist within the meaning of Art. 213 might, if necessary, properly be considered in determining whether an emergency has arisen. But as it has been pointed out, in several cases the question whether an emergency exists at the time when an Ordinance is made or promulgated is a matter of which the Governor-General is the sole judge. This proposition was laid down by the Judicial Committee in *Bhagat Singh* v. *King-Emperor*, 58 I. A. 169 : (A.I.R. (18) 1931 P. C. 111 : 32 Cr. L. J. 727) and has been affirmed and reiterated in subsequent decisions.

[46] I have approached the problem purely from the legal stand point, and I have also purported to act upon the assumption that if there are two interpretations possible of a provision in the Constitution Act, the one which leans in favour of the liberty of the people should be adopted in preference to the one which purports to curtail that liberty I am not forgetful of the fact that Courts are guardians of the fundamental rights of the people, and that the fundamental rights guaranteed to the people under the Constitution must be scrupulously upheld and safeguarded. But it must be remembered that Art. 213, Constitution Act is intended to deal with emergency legislations where the Governor finds immediate action is necessary. In such cases of emergency, where the security of the State is in danger and the maintenance of public order is essential the head of the executive in every country has been allowed a certain amount of latitude, and the ordinary rules of interpretation which apply to legislations in general are not so freely applied. I may in this connexion quote from a decision of Viscount Maugham of the House of Lords in the famous case of *Liversidge* v *Anderson*, 1942 A. C. 206 : (1941-3 ALL E. R. 338). The quotation runs as follows :

> "Before dealing with the consideration of the regulation it is desirable to consider how the matter should be approached. The appellant's counsel truly say that the liberty of the subject is involved. They refer in emphatic terms to the Magna Carta and the Bill of Rights and they contend that legislation dealing with the liberty of the subject must be construed, if possible, in favour of the subject and against the Crown. Adopting the language of Lord Finlay L. C. in this House in *Rex* v. *Halliday*, (1917 App. Cas. 260, 271) I hold that the suggested rule has no relevance in dealing with an executive measure by way of preventing a public danger when the safety of the State is invovled. My Lords, I think we should approach the construction of Regulation 18B of the General Regulations without any general presumption as to its meaning except the universal presumption, applicable to orders in council and other like instruments that, if there is a reasonable doubt as to the meaning of the words used, we should prefer a construcion which will carry into effect the plain intention of those responsible for the Order in Council rather than one which will defeat that intention."

[47] This shows that (in?) the cases of such emergency legislations the safety of the State is the primary consideration and a construction should be given to the legislation which may have the effect of carrying out the purpose of the legislation and not defeating that purpose.

[48] There is no presumption against the bona fides of the head of the State. On the contrary the Constitution Act itself has vested him with these emergency powers, and by reason of his position he is entitled to public confidence in his capacity and integrity. Besides, as my learned brother has himself pointed out the Governor is not a despotic Governor, he has to act upon the advice of his ministers who in turn are the representatives of the people. He is, in promulgating this legislation, answerable to the legislature. In fact the Ordinance has no effect and shall cease to operate at the expiration of six weeks from the re-assembly of the Legislature, or if before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council *vide* Art 213 (2) (a). That being so, as Lord Wright stated in the same famous case of *Liversidge* v. *Anderson* (1942 A. C. 206 : 1941-3 ALL E. R. 338) already mentioned above,

> "If the sense of the country was outraged by the system or practice of making detention orders or indeed, by any particular order, it could make itself sufficiently felt in the Press and Parliament to put an end to any abuse and Parliament can always amend the Regulation"

in my opinion, this argument applies with equal force to the powers exercisable by the Governor under Art. 213 of the Constitution of India, and I do not see how the Governor can act as a despot even if he intended to do so.

[49] The Constitution appears to have provided a further safeguard in that it has placed preventive detention for reasons connected with the security of the State and maintenance of public order, etc., in the Concurrent List. The Indian Parliament, therefore, or the President of the Indian Union may also act to frame laws in connection with this matter and may continue to exercise wholesome check upon the Governor of the State or States concerned. In any case it seems to me that even if a particular Governor exercising his powers under Art. 213 chose to act as a despot and if the checks suggested above are ineffective, there would be nothing to prevent him from falsely asserting in the preamble that in his opinion he was satisfied that circumstances appear to him to require the promulgation of an Ordinance of a particular character. I do realise that the interpretation which we are giving to Art. 213 has a far reaching effect, and in giving our interpretation we are not to consider whether a particular Governor or a particular Government is reasonable or unreasonable. But speaking for myself, I have absolutely no misgivings on the point that if the Governor happens to act grossly and manifestly in an unreasonable and unjust manner. Courts would be so powerless as not to check the wrong or to protect the liberty of the people.

[50] I have of course held that under Art. 213 it is for the Governor to be satisfied that circumstances exist which render it necessary for him to act immediately, and that the circumstances

require the promulgation of a certain kind of Ordinance. It is true that where the Governor is so satisfied, it may not be open to a Court of law to examine the basis of such satisfaction. In other words, it may be true that Courts could not apply any objective test to the reasonableness of the cause, and it may not be open to us, therefore, to examine the sufficiency of the Governor's reasons but only the fact of his satisfaction. The object of precluding Courts from applying an objective test is quite obvious. In many cases the Governor may be acting on information of the most confidential character which may not be disclosed on grounds of public policy. This privilege of Government cannot be doubted and in fact such a privilege has always been conceded and must be conceded to high officers of State when they are acting in public interest. As I have said there is certainly no presumption in favour of bad faith, dishonesty or fraud, least of all when they are attributed to an Officer of the State, and above all the head of the State as in the present case. The law presumes that ordinary standards of truth and honesty have been observed until the contrary is shown by evidence incompatible with such standards.

[51] But it must also be remembered at the same time that wherever a legislation uses the word "satisfied," it must mean reasonably satisfied. I again quote for my authority the decision of the House of Lords in *Liversidge* v. *Anderson*, 1942 A. C. 206: (1941-3 ALL. E. R. 338). In that case Lord Wright pointed out "satisfied" must mean "reasonably satisfied." It cannot import an arbitrary or irrational state of being satisfied. It is, therefore, quite obvious that if it is found on the very face of an Ordinance that it is an irrational and an unreasonable piece of legislation, a Court of law would certainly be entitled to hold that the legislation is invalid and pronounce against its being enforceable. My learned brother himself points out: "Courts can always enquire if *mala fides* have become apparent." It might well be that a Government may be unscrupulous enough to make an emergency an excuse for unjust action and may promulgate an Ordinance which may be on the very face of it inconsistent and unwarranted by the emergency in question and may be on the face of it so unreasonable as not to appeal to any rational individual. In those cases, in my opinion, the Court would be always entitled to declare that the Ordinance is illegal. The illustrations, therefore, suggested in the judgment of my learned brother do not cause me any embarrassment as I am not prepared to go to the length of holding that even though a particular Governor may act quite unreasonably and in complete violation of the terms of Art. 213 of the Constitution, the Court of law may yet sit quietly over it and see that injustice being done. In my opinion, that is never the purpose of Art. 213 of the Constitution. Such a legislation would be declared void on the ground of *mala fides* and as being wholly unreasonable on the very face of it.

[52] For these reasons I cannot bring myself to hold that the promulgation of the Ordinance is illegal, and in my opinion, therefore, the Ordinance is not void.

[53] I have already said that I respectfully agree with the decision on all the other points referred to in the judgment of my learned brother. I would only wish to add just a few words on the attack made against the Ordinance and the order of detention on the ground of *mala fides* which rested on the contention that the making of successive laws or orders was a device to defeat the fundamental rights guaranteed under Part III of the Constitution of India. I am doing so because I hold rather stronger views on the question. I consider that it is not open to any State to play with the life and liberty of its citizens and in providing legislation for preventive detention it must always pay due care and attention so that the legislation so enacted or promulgated is beyond exceptions. A State must, therefore, exercise due care and attention in framing all such laws and legislations lest it may be accused of bad faith on account of any hasty or ill-advised move taken in that direction. Successive legislations and orders of detention passed under legislations which have ultimately to be abandoned as found to be defective and void on technical grounds may in most cases lead to the unfortunate result of detaining a person for a period much beyond that contemplated by Art. 22 of the Constitution of India. A state must, therefore, guard against any such unfortunate action. I am, however, satisfied that in the present case for the reasons assigned in the judgment of my learned brother, there are no *mala fides* at all, either in regard to the promulgation of the Ordinance or in regard to the order of detention passed against the petitioner.

[54] There is only one other fact to which I think I must refer before I conclude my judgment. It has been pointed out that criminal law including all matters included in the Penal Code is item 1 in the concurrent list, whereas preventive detention for reasons connected with the security of the State and the maintenance of public order, etc., is item 3 in the concurrent list. Both these items, therefore, are in one and the same list. A question arose whether the rule of pith and substance could be applied to such a case where the fields of legislations ar

undoubtedly distinct and separate, yet they come under the same list, namely the concurrent list. The term "pith and substance" is not a term of art but a term of convenience, and speaking for myself, I do not see why this rule cannot be applied to a case where the two fields of legislation are distinct and separate though in regard to certain incidental matters a legislation which in pith and substance deals with a particular field may casually encroach upon a different subject-matter. It is however unnecessary to decide the matter for the purposes of this case. We find here that S. 5, Penal Code shows that it is not exhaustive and it makes a saving in respect of any special or local law; so is the case with the Code of Criminal Procedure under S. 5 (2). The Ordinance itself under S. 7 provides that it shall be in addition to, and not in derogation of, any other law for the time being in force. In my opinion, therefore, as it has been already held by my learned brother, there is no scope for the application of Art. 254, Constitution Act in this case.

[55] In the result, I find that the Ordinance has been validly promulgated. I also find, in agreement with the decision of my learned brother, that there is no other illegality in the Ordinance or in the order of detention passed against the petitioner. That being so, in my opinion, this application fails, and the rule issued in favour of the petitioner must be discharged.

[On a difference of opinion between Meredith C. J. and Sarjoo Prasad J. on the question whether the Bihar Ordinance II [2] of 1950 was validly promulgated, the matter was placed before Sinha J.]

[56] **Sinha J.**—The Bench consisting of the Chief Justice and Sarjoo Prasad J. which heard the application, a writ of *habeas corpus*, having differed on the question whether, in promulgating the Bihar Preventive Detention Ordinance (Bihar Ordinance II [2] of 1950), the Governor had complied with the terms of cl. (1) of Art. 213 of the Constitution of India, the matter has been placed before me as the third Judge. His Lordship the Chief Justice is of the opinion that the conditions laid down in the said article had not been satisfied, and that, therefore, the Ordinance was void. His Lordship Sarjoo Prasad J., on the other hand, is of the contrary opinion. On all other questions raised on behalf of the petitioner, their Lordships agreed. Hence, the only question which was referred to me is "whether the Ordinance has been validly promulgated."

[57] Mr. B. C. Ghosh, appearing on behalf of the petitioner, expressed his intention of arguing the whole case before me, and not only the particular question on which their Lordships had differed. I stopped him from doing so, and informed the counsel for the parties that I proposed to hear them only on the question referred to me. Hence the arguments before me have been confined to the question of the validity of the Ordinance with reference to the preamble.

[58] The terms of the preamble to the Ordinance have been quoted in extenso in the judgment of his Lordship the Chief Justice. Hence, it is not necessary to repeat them here. The learned Chief Justice has held that the preamble is defective in so far as it does not state that, in the Governor's opinion, the circumstances require the Ordinance to be promulgated in the particular terms in which it has actually been made. Sarjoo Prasad J., on the other hand, has taken the view that the preamble, read as a whole, was enough to satisfy the conditions laid down in Art. 213 (1) of the Constitution of India. I have gone through the judgments of their Lordships more than once, and, in my opinion, the view taken by Sarjoo Prasad J., is the correct one. In the first place, the article does not require that the Ordinance to be promulgated by the Governor has to state in so many words that the Governor was satisfied as to a certain state of affairs. In the second place, all the paragraphs of the preamble read together would show that the Governor was satisfied in terms of Art. 213 (1) of the Constitution of India. In my opinion, his Lordship the Chief Justice omitted to consider the full force of the word "therefore" in para. 3 of the preamble, which word incorporate the matters on which the Governor was satisfied, namely, (1) the existence of circumstances necessitating immediate action, and (2) provision for preventive detention leading up to the making of the Ordinance, in exercise of the powers conferred by cl. (1) of Art. 213 of the Constitution of India. If the word "therefore" were given its full force, it becomes absolutely clear beyond a shadow of doubt that the Governor was promulgating the Ordinance in question being compelled by the necessity of the circumstances to do so. As I agree generally with the reasons given by his Lordships Sarjoo Prasad J., it is not necessary for me to repeat them over again.

V.B.B. *Rules discharged.*

A. I. R. (37) 1950 Patna 346 *[C. N. 89.]*

DAS AND SARJOO PRASAD JJ.

Bir Singh—Appellant v. *Budhu Ram and others—Respondents.*

A. F. A. D. No. 775 of 1948, D/- 22-3-1950, from decision of Addl. Sub-J., Motihari, D/- 5-4-1948.

Civil P. C. (1908), O. 41, R. 33—Scope and applicability.

Though O. 41, R. 33 is in very wide terms, it must not be interpreted in such a way as to abrogate the other provisions in the Code with regard to the filing of appeals, cross-objections, etc. As an ordinary rule, an appellate Court must not reverse or vary a decree in favour of a party who has not preferred any appeal or cross-objection against it and this general rule should hold good notwithstanding the enactment of R. 33. The illustration to the rule gives some indication of the class of cases in which R. 33 will apply; for example, it applies to cases where, as a result of interference in favour of the appellant, further interference with the decree of the lower Court is rendered necessary in order to adjust the rights of the parties according to justice, equity and good conscience. [Para 3]

Annotation: ('44-Com.) Civil P. C., O. 41 R. 33 N. 6 Pts. 1 to 5.

H. P. Sinha and P. Jha — for Appellant.
J. C. Sanyal — for Respondents.

Das J. — The main question for decision in this second appeal is if the Court of appeal below was justified under the provisions of O. 41, R. 33, Civil P. C., in modifying a part of the decree passed by the Court of first instance, on an appeal by the defendant-appellant, but without any appeal or cross-objection having been preferred by the plaintiffs-respondents against that part of the decree which was against them.

[2] The facts relevant to the aforesaid question are the following. The plaintiffs-respondents brought a suit for a declaration of title and recovery of possession in respect of 14 kathas and 17 dhurs of land comprised in plot No. 390 situated in village Banuchapra. They alleged that the fruits of some trees on the land were settled with the defendant-appellant for five years. After the expiry of the period of the lease in 1939, the plaintiffs-respondents got back possession. It was further alleged that there were some structures on the land, namely, a pacca house, a hut, a latrine and a nad. According to the plaintiffs-respondents they constructed the aforesaid structures except the nad, which was made by the appellant with the permission of the respondents. In 1943, the appellant again wanted to take settlement of the fruits, but the respondents refused. This led to a proceeding under S. 144, Criminal P. C., as a result of which the respondents were dispossessed by the appellant on 15th September 1944. The case of the appellant was that he had taken settlement of the land in batai from the father of plaintiff-respondent 1 in the year 1928. The appellant alleged that by reason of the said settlement and his continued possession since then, he had acquired a right of occupancy in the land. It was alleged by the appellant that he constructed the pacca house, the hut, the latrine and the nad. The latrine and the nad were alleged to have been constructed some 8 or 9 years ago but the other structures were alleged to have been constructed more than 12 years ago. It may be stated here that no question of adverse possession arose in the case because the appellant himself admitted that the structures were constructed with the permission of the respondents. The questions which were considered and decided by the Courts below were (1) whether the story of batai settlement in 1928, set up by the present appellant, was true; (2) whether the appellant had acquired any right of occupancy as an under-raiyat under the provisions of S. 48A, Bihar Tenancy Act, and (3) whether the structures in question were built and constructed by the appellant or the respondents. The first two questions were answered against the present appellant, and the third in his favour. The Court of first instance held that there was no settlement of the land, and the appellant was a trespasser in respect of the land, but a licensee or tenant at will in respect of the structures, he having made those structures with the permission of the respondents for temporary occupation. On these findings, the first Court, that is, the learned Munsif, passed a decree in favour of the plaintiff-respondents with regard to the land, but ground (found?) that the respondents were not entitled to recover possession of the land on which the structures stood without asking the appellant to quit the structures or remove them. In other words, the learned Munsif passed a modified decree in favour of the respondents giving them possession of the land other than the land on which the structures stood, as also mesne profits, etc. An appeal was preferred by the present appellant, who was defendant in the action, against that part of the decree of the learned Munsif which allowed possession of the land minus the structures. This appeal was heard by the learned Subordinate Judge of Motihari. He affirmed the three main findings of the learned Munsif, but he held that the learned Munsif was wrong in thinking that a notice to quit or a demand was necessary before the respondents could succeed in respect of the land on which the structures stood. This part of the decree of the learned Munsif was against the respondents. The respondents had not preferred any appeal or cross-objection. The learned Subordinate Judge then expressed himself as follows:

> "No doubt, there is no cross-appeal or objection on the side of the plaintiffs, but under O. 41, R. 33, Civil P. C., I think the appellate Court has power to pass proper order on the facts of the case."

On this view, the learned Subordinate Judge passed a decree directing the appellant to remove the structures and restore the land to its original condition within a month, failing which he directed, the structures would be removed at his cost. The learned Subordinate Judge dismissed the appeal of the appellant, but modified the decree in so far as it was against the respondents, though the latter had not preferred any appeal or cross-objection.

[3] Learned counsel for the appellant has contended before us that the learned Subordinate Judge had no jurisdiction to interfere with that part of the decree against which no appeal nor any cross objection had been preferred by the party aggrieved. Secondly, he has contended that even if the learned Subordinate Judge had jurisdiction under the provisions of O. 41, R. 33, Civil P. C., this was not a proper case in which the jurisdiction should have been exercised. There is a large volume of case law on the purpose and scope of O. 41, R. 33, Civil P. C. with particular reference to the illustration given under the rule. Some decisions have held that the illustration is not meant to be exhaustive of the class of cases in which the rule applies; other decisions have held that the illustration indicates the principle underlying the purpose and scope of the rule. I do not think that it is necessary in this case to examine, in detail, the entire case law on the subject, because the decision in this case need not be rested on the higher plane of absence of jurisdiction. It is, I think, beyond dispute that the general principle is that a decree is binding on the parties to it unless it is set aside in appropriate proceedings, if a party wishes to have a decree against him modified or reversed, he must comply with certain requirements as to filing of appeals, objections and so forth. Therefore, though O. 41, R. 33, Civil P. C., is in very wide terms, it must not be interpreted in such a way as to abrogate the other provisions in the Code with regard to the filing of appeals, cross-objections, etc. It follows, therefore, that as an ordinary rule an appellate Court must not reverse or vary a decree in favour of a party who has not preferred any appeal or cross-objection against it and this general rule should hold good notwithstanding the enactment of R. 33 which enables an appellate Court, in exceptional cases to pass such decree as ought to have been passed, or as the nature of the case may require, although the party in whose favour the decree is being made, may not have filed an appeal or cross-objection. The illustration gives some indication of the class of cases in which R. 33 will apply; for example, it applies to cases where, as a result of interference in favour of the appellant, further interference with the decree of the lower Court is rendered necessary in order to adjust the rights of the parties according to justice, equity and good conscience.

[4] Keeping the aforesaid general principles in mind, I propose to examine some of the decisions of this Court to which our attention has been drawn. The earliest decision of this Court, to which our attention has been drawn, is ***Ram Chander* v. *Dwarka Nath*, 5 Pat. L. W. 213: (A. I. R. (4) 1917 Pat. 52).** That was a case in which the first Court decreed the suit against one Ambika Charan on his confession, and as against another person Madho Prasad, he decreed the suit for Rs. 49, (the two suits being suits for rent). Against these decrees, the landlord appealed, but neither defendant filed any cross-appeal against the decree made against him. The learned Subordinate Judge, while upholding the findings of the learned Munsif, said that on those findings the suits must be dismissed in toto for they were each suits for rent for a partition of a holding and not for a whole holding. The landlord then came in second appeal to this Court, and one of the questions raised was whether the lower appellate Court had power to set aside decrees which were not appealed from. With regard to the decree against Ambia Chandra, it was held that the decree was obtained by consent, and no appeal lay; therefore, the learned Subordinate Judge was wrong in interfering with that decree. In respect to the decree against Madho Prasad, the learned Subordinate Judge was right in his interpretation of the rights of the parties; their Lordships then expressed themeselves as follows with regard to O 41, R. 33, Civil P. C.:

> "As we read that section it applies only to cases in which for the ends of justice and for the equitable execution of a decree the appellate Court considers it necessary to make a material variation in the decree. It does not seem to us that where there has been no cross-appeal the whole amount decreed should be wiped off on considerations which may commend themselves to the appellate Court. If it were so, there would be an end of all cross-appeals. A litigant has no desire to pay court fees upon a relief which he can obtain in the appellate Court without a fee. We are of opinion that the setting aside of the decree against Madho Prasad was without jurisdiction and must be declared void."

The decision, no doubt, put the matter on the higher plane of jurisdiction; but as I have already said, it is not necessary to go to that extent. One can say, that, speaking generally it would be wrong for the appellate Court to interfere with that part of the decree against which the aggrieved party has neither come up in appeal nor by way of a cross-objection. In *Panchu* v. *Anand Thakur*, 2 Pat. 712: (A. I. R. (11) 1924 Pat. 160), the real question was one of limitation, but certain observations were made with regard to O. 41, R. 33. The observations were to the following effect:

> "It is contended by the learned Vakil that the High Court had no such power under O. 41, R. 33. The question is not whether the High Court would have exercised the power; the question is whether there was a possibility of the High Court in the appeal of the plaintiff dismissing the plaintiff's entire suit. In my opinion, the case of the plaintiff being that all the

> defendants were joint tort-feasors and had jointly taken possession of the plaintiff's land, it was open to the High Court, under the provisions of O. 41, R. 33, to dismiss the plaintiff's entire suit if it came to the conclusion that his appeal, as against defendants 3, 7 and 15 could not succeed. I do not say that the High Court would, in the particular case, or in fact in any case, take that course, but the possibility was always there, and in my opinion, the plaintiff was entitled to wait till the appeal was disposed of in the High Court before proceeding with his execution as against those defendants against whom his suit had succeeded in the Court of first instance."

It is clear that their Lordships were considering a theoretical possibility only, and thought that O. 41, R. 33, was sufficiently wide in terms to admit of the theoretical possibility of interference, even though the party aggrieved had preferred no appeal or cross-objection. With regard to the theoretical possibility, their Lordships took a wide view. The next decision is *Kesho Prasad Singh* v. *Narayan Dayal*, 4 Pat. 37 : (A. I. R. (12) 1925 Pat. 285). There Dawson Miller C. J. expressed himself as follows with regard to O. 41, R. 33 :

> "In my opinion, O. 41, R. 33 has no application to a case like this. The plaintiff succeeds in that suit in part, that is to say, although he claimed a higher rent, he in fact succeeded in obtaining the smaller rent. He obtained a part of that which he claimed and that was the result of certain findings of the Munsif that the holdings had in fact been split up and that the plaintiff was entitled to sue for rent in the one case in respect of a holding of 6.94 acres, and although he had claimed a greater rent than he was entitled to he was certainly entitled to the rent proportionate to that area. The defendants, after that decision was given and the decree passed against them, were content and remained satisfied with that decree. They made no attempt to appeal and even when the plaintiff appealed they entered no cross-appeal or cross-objection, and in my opinion, it was not competent to the learned Judge, when the only question before him was whether the plaintiff was entitled to the extra rent which had been refused him, to enter into the question whether or not he was entitled to any rent. This matter was not before the learned Judge and although the wording of O. 41, R. 33, may be very wide and give a large discretion to the Court, it is in my view, clearly not meant to apply to a case like the present. The object of that order is, speaking generally, to enable the appellate Court, where its decision interferes with or modifies or extends the decision of the lower Court, to give effect to that decision by interfering, if necessary, even with the rights and liabilities of those who are not in fact appealing from the decision of the trial Court. Unless it is necessary in the interest of justice to give effect to the appellate Court's decision by interfering in some way or other with the rights of those parties which are not the subject of appeal before us then it seems to me that the appellate Court has no right whatever to interfere."

I think that the facts of this decision are the nearest approach to the facts of the case under our present consideration. In a much later decision in *Mohan Bikram* v. *Deonarain*, A. I. R. (32) 1945 Pat. 453 : (24 Pat. 379), the same view was expressed. In a still more recent decision in *Sant Prasad Singh* v. *Charitar Singh*, 30 P.L.T. 359, the main decision was whether it was open to a defendant respondent to file a cross objection against a co-respondent under the provisions of R. 22 of O. 41. Incidentally, it was observed that the language of R. 33 of O. 41 was very wide and under that rule, the Court had power to make a proper decree and such power could be exercised in favour of all or any of the parties, even though they might not have filed an appeal or objection. The decision can hardly be taken as a decision on the scope of R. 33 of O. 41.

[5] Our attention has been drawn to some decisions of the Privy Council. In *Nobin Chandra* v. *Chandra Madhab*, 44 Cal. 1 : (A. I. R. (3) 1916 P. C. 148), their Lordships referred to S. 561, Civil P. C., 1882, corresponding to O. 41, R. 22, and said that in the absence of any cross appeal or any memorandum of appeal under O. 41, R. 22, it was not competent for the appellant to get any further remedy than the restoration of the order of the Subordinate Judge. What happened was that in a suit for rendering accounts, the claim was for rendering accounts for a period of about eight years. The Subordinate Judge ordered an account for about five years only. On appeal, the High Court reduced the period to five months. It was against that order that an appeal was taken to the Privy Council by the plaintiff, and their Lordships observed that as the appellants had not preferred any cross-appeal or memorandum of appeal to the High Court, they could not ask that the accounts should be ordered for the whole period of the agency. In *Muhammad Khaleef Shirazi & Sons* v. *Les Tanneries Lyonnaises*, A. I. R. (13) 1926 P. C. 34 : (49 Mad. 435), their Lordships said that O. 41, R. 33, Civil P. C., was not intended to apply to cases in which an appeal was being preferred direct to His Majesty in Council, which was not allowable under the Code of Civil Procedure, or under the Letters Patent of the High Court. In *Anath Nath* v. *Dwarka Nath*, A. I. R. (26) 1939 P. C. 86 : (I. L. R. (1939) Kar. 149), their Lordships said as follows with regard to O. 41, R. 33 :

> "It was contended, however, that the language of R. 33 of the same order was wide enough to cover the case. Even if their Lordships assume that the High Court was not wholly without power to entertain this ground of appeal—an assumption to which they do not commit themselves—they are clearly of opinion that R. 33 could not rightly be used in the present case so as to abrogate the important condition which prevents an independent appeal from being in effect brought without any notice of the grounds of appeal being given to the parties who succeeded in the Court below."

[6] Learned counsel for the respondents has placed very great reliance on two decisions, *Subramanian Chettiar* v. *Sinnammal*, 53 Mad. 881 : (A. I. R. (17) 1930 Mad. 801 (F. B.)) and a single Judge decision of Lahore, *Dayal Ram*

v. *Ladha Ram*, A. I. R. (20) 1933 Lah. 40: (140 I. C. 22). In the Madras Full Bench decision, it was held that the powers given to an appellate Court by O. 41, R. 33, Civil P. C., were very wide, and could be exercised in a proper case even in favour of a respondent who had neither appealed nor filed a memorandum of cross-objection. It was pointed out, however, that the exercise of such extraordinary power was a matter of discretion with the appellate Court on the circumstances of the case. In the Madras case, it appears that the defendant conceded that the plaintiff, an attaching decree-holder, had the right to redeem. The concession was made on the basis of a decision which was subsequently overruled. In those circumstances, it was held that the defendant could raise the point again. The Lahore decision purports to follow the Madras decision.

[7] If we look at the case before us, not from the extreme point of view of absence of jurisdiction, but from the limited point of view of the proper exercise of the jurisdiction under O. 41, R. 33, Civil P. C., it seems clear to me that the learned Subordinate Judge was wrong in modifying the decree of the learned Munsif with regard to the structures, when the respondents, the aggrieved party, had apparently accepted that decree and made no grievance of it. In the course of the argument before us, the question arose as to whether there would be any difficulty in giving effect to the decree of the learned Munsif for part of land. There are no materials before us from which it can be said that the decree of the learned Munsif for part of the land cannot be given effect to. Another question that has been canvassed before us on behalf of the respondents is that in order to avoid multiplicity of suits, the decree of the learned Munsif was properly modified by the learned Subordinate Judge. It is contended that the learned Munsif was wrong in thinking that a notice to quit was necessary; furthermore the respondents can easily bring another action after giving such notice, if necessary. Speaking for myself, I think the learned Munsif was wrong in thinking that a notice to quit was necessary; but if a party accepts a wrong decision, and does not file any appeal or cross-appeal, I doubt whether he can be heard to say that justice requires that the decision should be altered. To hold that he is so entitled without any exception, would be to abrogate the provisions as to the filing of appeals and cross-appeals.

[8] For these reasons, I am of the view that the learned Subordinate Judge wrongly exercised his jurisdiction under O. 41, R. 33, Civil P. C, in interfering with that part of the decree of the learned Munsif against which the rerpondents had neither preferred any appeal nor any cross appeal.

[9] Learned counsel for the appellant faintly contended before us that his client had taken settlement of the land in 1928 and acquired occupancy right by continued possession. The concurrent finding of the Courts below is that the story of settlement was false. The appellant did not, therefore, hold as an under-raiyat, nor did he acquire occupancy right. It was further admitted that the possession of the appellant was permissive possession so far as the structures were concerned. In that view of the matter, no question of adverse possession arose. On merits, I think, the appellant has no case of remaining on the land against the wish of the rightful owners.

[10] I would accordingly allow this appeal only in part to the extent indicated below. The decree of the learned Subordinate Judge, so far as it modifies the decree of the learned Munsif with regard to the land on which the structures stand, will be set aside, and the decree of the learned Munsif restored. The plaintiff respondents will get their costs of the first Court, and also mesne profits decreed by the learned Munsif and affirmed by the learned Subordinate Judge. There will be no order for costs in the Court of appeal below nor of this Court.

Sarjoo Prasad J.—I entirely agree.

G.M.J. *Appeal partly allowed.*

A. I. R. (37) 1950 Patna 350 *[C. N. 90.]*

RAMASWAMI AND NARAYAN JJ.

Ram Swarup Singh and others—Petitioners v. *Kamala Prasad Singh and others—Opposite Party.*

Civil Revn. No. 808 of 1949, D/- 23-3-1950, against order of Addl. Sub-J., 3rd Court, Gaya, D/- 6-7-1949.

(a) Civil P. C. (1908), S. 151 — Principle and object of section.

It is the duty of a Court to relieve parties against injustice occasioned by its own acts and oversights, a principle which finds expression in S. 151. The Code of Civil Procedure has never been regarded to be so exhaustive as to cover cases of all character, and, therefore, S. 151 was enacted which enables the Court to act upon the assumption of the possession of inherent powers for doing real and substantial justice between the parties, and for preventing any injustice being done on account of its own careless acts. [Para 2]

Annotation : ('44-Com.) C. P. C., S. 151, N. 1.

(b) Civil P. C. (1908), S. 151—Revival of suit.

Where in a suit to enforce several mortgage bonds, there were two sets of defendants, one set being the members of the joint family of the mortgagors and the other set being the subsequent transferees with regard to the mortgaged properties and the suit was decreed in terms of a compromise against only some of the defendants who were parties to the compromise and it was neither decreed nor dismissed against the other defen-

dants among whom were the minor members of the joint family :

***Held,* that under S. 151 the suit should be revived and should be re-tried and re-heard against all the defendants.** [Para 4]

Annotation : ('44-Com.) C. P. C., S. 151, N. 4. Pt. 4.

Lalnarain Sinha and Lakshman Saran Sinha — **for Petitioners.**

Balbhadra Prasad Singh and Bhagirathi Rai — **for Opposite Party.**

Narayan J. — This application is directed against an order of Mr. R. P. Sinha, Subordinate Judge, Gaya, by which he refused to re-hear Mortgage Suit No. 9 of 1945 against some of the defendants. The situation which has arisen in this case is a somewhat peculiar one, and such a situation would not have arisen if the Subordinate Judge who passed the preliminary decree in the suit would have acted with care and circumspection. The suit was a suit to enforce several mortgage bonds, and there were two sets of defendants, the first set being the members of the mortgagors' family and the second set being the subsequent transferees with regard to the mortgaged properties. Defendants 6, 7 and 10 out of the defendants first party were minors, and while defendants 6 and 7 were described as minors under the guardianship of their respective fathers who also were the defendants in the suit, defendant 10 was described as a minor under the guardianship of his brother who was defendant 9 in the suit. On 12th November 1946, the plaintiffs and the major defendants 2 to 5 filed a petition of compromise with a prayer that the suit be disposed of in terms of the compromise petition. Before that date, one Mr. Abdul Heyat, Pleader, had been appointed as the guardian *ad litem* of the minors defendants 6, 7 and 10, as their natural guardians had not appeared on their behalf, and hence after the petition of compromise had been filed the Court drew the attention of the plaintiffs and the defendants who had appeared, to the fact that the pleader who had been appointed as the guardian of the minor defendants had not signed the compromise petition on their behalf. The parties were directed "to remove the defects." Thereafter on 17th December 1946, defendant 2 filed a petition for permission to compromise on behalf of the minor defendants 6, 7 and 10 as their natural guardian, but this petition was not allowed, and it was noted in the order dated 7th December 1946 that defendant 2 had not been described in the plaint as the natural guardian of these minor defendants. On 7th January 1947, however, another petition was filed by defendants 2 to 5 in which it was stated that the pleader who had been appointed as the guardian of the minor defendants was not available as he had accepted service under the Government as a Munsif, and the prayer in this petition was that defendant 2 be permitted to sign the compromise petition as the guardian of the aforesaid minor defendants. The following order was passed on this date, and this is the order on the basis of which the preliminary decree for the sale of the mortgaged property was drawn up :

> ' Let the suit be decreed in terms of the compromise petition which will form part of the decree. Permission to enter into compromise is granted to the natural guardian of the minors as prayed, pleader guardian is discharged. In the circumstances of the case, I am satisfied that the compromise is for the benefit of the minor defendants."

The preliminary decree for the sale of the mortgaged property was then drawn up, and it says that

> "the suit is decreed in terms of the compromise petition for Rs. 5000 as mentioned in the compromise petition which will form part of the decree."

On 1st June 1948, the plaintiffs filed a petition for passing a final decree in the suit, but this petition was opposed by some of the defendants whose contention was that the decree could not be made absolute against all the defendants inasmuch as the preliminary decree had been passed only against defendants 2 to 5 who had entered into the compromise. This contention found favour with the learned Subordinate Judge who by an order dated 27th January 1949 directed that a "final decree be prepared only against defendants 2 to 5 per terms of compromise." Thereafter in March 1949 the plaintiffs filed a petition for rehearing the suit as against the defendants who had not joined in the compromise, and this petition was disposed of by the learned Subordinate Judge by the order dated 6th July 1949 against which order the present application in revision has been filed by the plaintiffs. The learned Subordinate Judge refused to rehear the suit, but modified the final decree already passed by directing that the final decree would be deemed to be a decree not only against defendants 2 to 5 but also against defendants 1, 8 and 9. The operative portion of the judgment of the learned Subordinate Judge runs as follows :

> "I am also of the opinion that this Court has inherent powers to rectify a mistake in the judgment and the decree. It is not necessary to call for a petition from the plaintiffs under S. 151, Civil P. C. The Court can *suo motu* act under the provision of Ss. 151 and 152, Civil P. C. The petition for rehearing cannot be entertained. But in exercise of the inherent powers, I hereby direct that order No. 50, dated 7th January 1947 be modified only to this extent, namely, that the suit be ordered to [be?] decreed *ex parte* against defendants 1, 8 and 9. In view of this modification in the order dated 7th January 1947, the preliminary decree prepared in the suit is also ordered to be modified accordingly. A note will have to be made in the decree showing that the suit had been decreed *ex parte* against defendants 1, 8 and 9. No mistake will be deemed to [have?] crept in the order, dated 7th January 1947 as also in the decree

in view of the non-mention therein of the minor defendants as also of defendants second party."

[2] The contention on behalf of the applicants before us is that the Court below has failed to exercise a jurisdiction vested in it by law because it has not disposed of the suit finally against the minor defendants and the defendants second party by either decreeing the suit or dismissing it as against them, and, in my opinion, this contention is well founded. The claim in this suit was for Rs. 10,886 and according to the compromise the defendants were liable to pay only Rs. 8,000 out of which they paid Rs. 3,000 at the time of the compromise. Paragraph (1) of the compromise petition says that the decree would be deemed to be a final decree and that the plaintiffs will not be under the necessity of filing an application for making the decree final. The prayer portion of the compromise petition clearly shows that the decree was to be passed only in terms of the compromise petition. Now admittedly, it is only defendants 2 to 5 who were parties to the compromise and though the order dated 7th January 1947 shows that defendant 2 was permitted to enter into the compromise on behalf of the minor defendants as their natural guardian, he was not their natural guardian. In his order dated 17th December 1946, it was distinctly pointed out by the learned Subordinate Judge that defendant 2 had not been described as the natural guardian of these minor defendants, and in his order dated 6th July 1949 also against which this present application has been preferred the learned Subordinate Judge says that defendant 2 who wanted to sign the compromise petition on behalf of the minor defendants was not their natural guardian. It was, therefore, an obvious mistake on the part of the learned Subordinate Judge to have permitted defendant 2 on 7th January 1947 to enter into the compromise on behalf of the minor defendants 6, 7 and 10 as their natural guardian. The learned Subordinate Judge has rightly pointed out that he was not only not their natural guardian, but even after the permission had been accorded, he did not sign the compromise petition as their guardian. The compromise petition, as already pointed out, had been filed on 12th November 1946, and it underwent no change even after the aforesaid permission had been granted. In other words, even after this permission had been granted, defendant 2 did not sign the compromise pettition as the natural guardian of the minor defendants 6, 7 and 10. Certainly, he had signed the compromise petition on 12th November 1946 in his personal capacity, and he never thereafter signed it on behalf of the minor defendants. The learned Subordinate Judge, therefore, rightly held that the compromise decree could not be treated as a decree against the minor defendants. If on the facts he found that it could not be treated as a decree even against the defendants second party who were said to be transferees with regard to a portion of or the entire mortgaged property, we have to take it that no valid decree was passed even against the transferee defendants. I need not repeat that the compromise decree most clearly and distinctly shows that the suit had been decreed only on the basis of the compromise to which the transferee defendants were no parties. The question, therefore, arises whether the suit should be revived from the stage at which it was left when the compromise petition was filed or acted upon and should be continued as against the defendants against whom it has neither been decreed nor dismissed. The position certainly is that the suit has neither been decreed nor dismissed as against the other defendants, and for this position the Court is greatly responsible. It is the duty of a Court to relieve parties against injustice occasioned by its own acts and oversights, and this principle has been recognised in several authorities and finds expression in S. 151, Civil P. C. Section 151, Civil P. C, can certainly be applied in contingencies of this character, and its terms are wide enough to include a case of this nature. The Code of Civil Procedure has never been regarded to be so exhaustive as to cover cases of all character, and, therefore, a section was enacted which enables the Court to act upon the assumption of the possession of inherent powers for doing real and substantial justice between the parties, and for preventing any injustice being done on account of its own careless acts. It was held by the Allahabad High Court in *Bhagwan Dayal* v. *Param Sukh Das*, 39 ALL. 8 : (A. I. R. (4) 1917 ALL. 477), that where proceedings relating to the appointment of a guardian-*ad litem* for a minor in a suit were declared to be invalid and a decree passed against a minor had been set aside, because the minor was not properly represented in the suit, the Court whose duty it ultimately is to appoint a guardian has inherent power under S. 151, Civil P. C. to revive the suit under O. 9, R. 13 of the Code. This is a much better case for the plaintiffs than the one which their Lordships of the Allahabad High Court had to decide, because in this present case the decree has not been declared to be invalid in any regular suit, and, in fact, the preliminary decree as prepared by the learned Subordinate Judge looks like a decree against all the defendants including the minors who did not join the compromise. If proceedings can be revived after they are declared invalid in a regular suit, there is no reason why the proceeding in this case should not be revived

The case of the plaintiffs as based on the mortgages has not been tried against all the defendants, and simply, by oversight, a decree in terms of the compromise was passed even against the defendants who did not join in the compromise. In *Kripa Kishan* v. *Babu Lal*, 45 ALL. 606 : (A. I. R. (11) 1924 ALL. 225), a decree in a suit against a minor had been set aside upon the ground that the minor defendant was not properly represented, and an application was thereafter made for the continuance of the suit after proper appointment of a guardian. This application having been rejected by the Court, the High Court of Allahabad was moved in revision, and their Lordships held that the suit should be deemed to be revived from the point at which the application for appointment of the guardian was to be made. I think the following observation of their Lordships is important for our purpose :

> "The *ratio decidendi* is that the previous suit having failed for want of a lawful guardian, the proceedings in it, including the decision, are a nullity from the point when the improper appointment of the guardian was made. It is not, therefore, a commencement of a fresh suit. It is not an application for re-hearing, because in the eyes of the law there has been none; It is not an application to restore. It is an application to revive it by the appointment of a proper guardian, so that from the date of such appointment it becomes a properly constituted suit in which the difference between the parties can be decided."

[3] These two decisions were followed by the same Court in a very recent case *Talib Ali* v. *Piarey Lal*, 52 ALL. 924 : (A.I.R. (17) 1930 ALL. 814), and according to the view taken in this case also the Court in the exercise of its inherent jurisdiction under S. 151, Civil P. C. can continue the suit against those defendants who had not joined in the compromise. The English case, *Henry William Hatton* v. *Hugh Harris*, 1895 A. C. 547: (62 L. J. P. C. 24), also appears to me to be an authority in point and it supports the principle that mistakes in judgments and errors arising from such slips or omissions may at any time be corrected by the Court or a Judge on motion or summons without appeal. A Full Bench of this Court held in *Nirsan Singh* v. *Kishuni Singh*, 10 Pat. 516 : (A. I. R. (18) 1931 Pat. 204 F. B.) that if, upon an issue raised and tried in a subsequent suit, it is held that the claim in the original suit was false and fraudulent, the effect of such a decision is to put an end to that suit which cannot be revived and retried, but that if on the other hand the *ex parte* decree is set aside on the ground that it was obtained by suppression of summons and the defendant in the original suit was prevented from appearing in the suit and defending it by reason of fraud committed by the plaintiff, the original suit is revived and the plaintiff of that suit is entitled to have it tried and disposed of in accordance with law. This should be regarded as a much better case, because here the undisputed position is that the suit was neither decreed nor dismissed against the defendants other than defendants 2 to 5. The plaintiffs and their lawyers may not be free from blame inasmuch as they also did not act with perfect care in this case, but certainly they can reasonably contend that they were misled by the view which the Court had taken. It would appear from the order of the learned Subordinate Judge dated 27th January 1949 that the plaintiffs, because of the order passed by the learned Subordinate Judge on 7th January 1947 on the basis of which the preliminary decree had been prepared, pressed for a final decree in the suit against all the defendants. But the Subordinate Judge could not accede to the prayer of the plaintiffs which rested upon a judgment which was obviously erroneous and thus perpetuate the error which had been committed by his predecessor. This is a case in which the order on the basis of which the preliminary decree was passed against all the defendants is on the face of it defective, irregular, and inoperative against all the defendants of the suit, and the Court has to relieve the plaintiffs against the injustice done to them by its own acts, mistakes or oversights. The Bombay High Court in *Karim Mohammad Jamal* v. *Rajooma*, 12 Bom. 174 held that the Court had inherent powers over its own records so long as those records were within its powers and that it could set right any mistake in them. Sargent C. J., quoted the following passages from the judgments of Lindley L. J., and Bowen L. J., which is to be found at p. 183 of the report :

> "Lindley L. J., says, 'There is no such magic in passing and entering an order as to deprive the Court of jurisdiction to make its own records true, and if an order as passed as entered does not express the real order of the Court, it would as it appears to me, be shocking to say that the party aggrieved cannot come here to have the record set right . . . . . . It appears to me, therefore, that if it is once made out that the order, whether passed and entered or not, does not express the order actually made, the Court has ample jurisdiction to set that right, whether it arises from a clerical slip or not'. And Bowen L. J. says, 'Every Court has inherent power over its own records as long as those records are within its power, and it can set right any mistake in them. It seems to me that it would be perfectly shocking if the Court could not rectify an error which is really the error of its own minister. An order, as it seems to me even when passed and entered may be amended by the Court so as to carry out the intention and express the meaning of the Court at the time when the order was made, provided the amendment be made without injustice, or on terms which preclude injustice."

[4] A Division Bench of this Court in *Abhayanand Singh* v. *Rameshwar Singh*, 9 Pat. 314 : (A. I. R. (17) 1930 Pat. 395) held that

although under O. 23, R. 3, Civil P. C., it is obligatory on the Court to pass a decree in terms of the compromise after it has been recorded, it is not essential that the passing of the decree should be simultaneous with the recording of the compromise and that there is nothing in the rule to prevent a Court from postponing the passing of the decree so long as the proper guardian of the minor defendants had not joined in the compromise on their behalf, and if it found that the guardian was not joining in the compromise on behalf of the minor defendants it should have proceeded to try the case as against those who could not be deemed to have validly entered into the compromise But the Court most erroneously and without exercising the least care made a decree in terms of the compromise against all the defendants as if all the defendants had entered into the compromise, and this was done even though in its order dated 17th December 1946 it had pointed out that defendant 2 was not the natural guardian of the minor defendants 6, 7 and 10 and could not, therefore, enter into any compromise on their behalf. I am, therefore, of the opinion that this suit must be revived and the plaintiffs should be allowed to prosecute it against those defendants who have not entered into the compromise. The learned Subordinate Judge Mr. R P. Sinha, obviously fell into an error when he refused to rehear the suit against the defendants other than defendants 2 to 5, though he seems to have appreciated that he had inherent powers to rectify a mistake in the judgment, and though under his inherent powers he directed that the order dated 7th January 1947 should be taken to be an order decreeing the suit against defendants 1, 8 and 9 as well. But a question still arises as to whether the suit should be revived against all the defendants or only against the defendants who have not joined in the compromise. I have already pointed out that all the defendants first party belong to one joint Hindu family, and on a perusal of the plaint I have found that the plaintiffs sought to make all of them liable on the ground of legal necessity and benefit to the joint family. The family being a Mitakshara family and the mortgage being indivisible the interest of the minor defendants cannot be separated from the interest of the remaining defendants, first party, and, therefore, it seems essential that the suit should now be heard against all the defendants first party. And so far as the defendants second party are concerned they never joined in the compromise and after they are held to be subsequent transferees of the mortgaged property, they would certainly be liable for the amount which is found to be payable on the basis of the mortgage bond, in suit, and hence, I am of the opinion, that the entire suit should be reheard and retried. The learned Subordinate Judge will dispose of the suit according to law, and at the final hearing it will be open to him to deal with the compromise petition in a proper and legal manner.

[5] This application is allowed with costs and the order of the learned Subordinate Judge dated 6th July 1949 is set aside. The suit will be revived and will be disposed of by the learned Subordinate Judge according to law. Hearing fee two gold mohurs.

Ramaswami J. — I agree.

V.R.B. *Revision allowed.*

A. I. R. (37) 1950 Patna 354 *[C. N. 91.]*

SINHA AND RAI JJ.

Bhagwati Prasad Sah—Appellant v. *Radha Kishun Sah and others—Respondents.*

A. F. A. O. No. 204 of 1949, D/- 13-2-1950, from order of Dist. Judge, Saran, D/- 28-5-1949.

(a) Houses and Rents—Bihar Buildings (Lease, Rent and Eviction) Control Act (*III [3] of 1947*), S. 11—Ejectment suit — Decree — Objection under section raised in execution proceedings — Res judicata—Civil P.C. (1908), S. 11, Expl. 4—Evidence Act (1872), S. 115.

Section 11 of the Act has secured a very valuable right to a tenant to continue in occupation of his tenancy until a Court specially constituted under the Act has exercised its powers to order eviction of the tenant on certain grounds specified in the section itself. So long as that condition precedent has not been fulfilled it is not open to the landlord to put his decree for eviction into execution. Even if, therefore, objection under the section is not raised by the tenant in the ejectment suit, he will not be debarred, by constructive *res judicata*, from raising the same objection in execution proceedings. There can be no estoppel against a statute. [Paras 4, 8 and 9]

Annotation : ('44-Com.) Civil P. C., S. 11, N 4, 11, 23 and 33; ('46--Man.) Evidence Act, S. 115, N. 50.

(b) Civil P. C. (1908), S. 11—Execution proceedings—Objection petition of judgment-debtor dismissed for default—Hearing on merits of same objection on second objection — Petition is not barred. [Paras 5 & 8]

Annotation : ('44-Com.) Civil P. C., S. 11 N. 23 Pt. 54.

B.B. Saran and Rameshwar Misra—for Appellant.
P. B. Gupta—for Respondents.

Rai J.—This is an appeal by the decree-holder against the order passed by the District Judge of Saran reversing that of the Munsif First Court, Chapra.

[2] The appellant as plaintiff obtained a decree for ejectment against the defendants who were tenants of the premises in question. The decree has been executed, and, in the execution proceedings, the tenant-respondents have taken up a plea that S. 11, Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, is a bar to the decree-holder evicting them by these proceedings.

[3] The trial Court dismissed the objection of the tenants-respondents on the ground of their having not taken such objection in the suit itself which would disentitle them from raising such objection in the execution proceedings by virtue of the principles of constructive *res judicata*, as contemplated by S. 11, Expl. 4, Civil P. C. The executing Court was also of opinion that the provisions of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, do not apply to the facts of this case, as the notice to quit had been served before Act III [3] of 1947 came in force.

[4] On appeal, the lower appellate Court has taken another view of the matter. It has held that the provisions of S. 11, Bihar Act (III [3] of 1947) are wide enough to entitle the tenants to raise this objection during the execution proceedings. It has held that there is no bar against statute. In arriving at the judgment, the lower appellate Court has referred to the cases of *Mrs. Dharamshila Lall* v. *Bibi Amna*, A. I. R. (35) 1948 Pat. 269: (26 Pat. 693) and *Sant Kuer* v. *Ganesh*, A. I. R. (36) 1949 Pat. 137 : (27 Pat. 695). Their Lordships have held in those cases that the tenants have a statutory right to remain in possession of the premises unless the landlord takes recourse to proper proceedings as enjoined by Bihar Act (III [3] of 1947) for their eviction, and, unless that is done, no Court had jurisdiction to evict them. Mr. Saran, appearing for the appellant, has raised the point that, as this plea was not granted to the tenants in the suit in ejectment itself, they are not entitled to raise this plea at the execution stage, and their right, if any, is barred by *res judicata*. Section 11, Bihar Act (III [3] of 1947), runs as follows :

> "Notwithstanding anything contained in any agreement or law to the contrary and subject to the provisions of S. 12, where a tenant is in possession of any building, he shall not be liable to be evicted therefrom, whether in execution of a decree or otherwise, except . . . . ."

Then there are certain exceptions noted in that section. Now, this S. 11, in very clear terms lays down that a tenant cannot be evicted even during the execution proceedings until steps are taken under that Act for his eviction, and, in spite of the fact that in the title suit this objection was not pressed on behalf of the tenants, the tenants will not be debarred from raising this objection in the execution proceedings. In my judgment, S. 11, Bihar Act (III [3] of 1947) is effective enough to grant relief to the tenants. It steers clear of any bar of constructive *res judicata*, as raised by the learned counsel for the appellant.

[5] Mr. Saran, further, raised a point that, during the execution proceedings, the tenants filed an objection that they were not liable to be evicted by virtue of the provisions of S. 11, Bihar Act (III [3] of 1947), on which objection a miscellaneous case was started which was ultimately dismissed for default on 5th February 1949. The tenants respondents filed another objection petition on 9th February 1949, which has ultimately succeeded. Dismissal of the first objection petition is a further bar, according to him, in the way of the tenants raising the same objection over again. From the order sheet of the executing Court, it appears that the previous miscellaneous case that was filed by the tenants objecting to their eviction had been stayed by an order from this Court, and, on the ground of such stay, the miscellaneous case was postponed from date to date. On 5th February 1949, the decree-holder produced a certified copy of the judgment of this Court passed in the second appeal arising out of the title suit. The executing Court, thereupon, called out the case and, as the tenants were not present, dismissed the miscellaneous case for default. When the tenants-respondent came to know of this dismissal, they filed another application on 9th February 1949. The second application might be considered as one in continuation of the previous application. It was in respect of the same relief about which the executing Court had not adjudicated. Under the circumstances of the present case, there would not arise any bar of *res judicata* while giving relief to the tenants on the application dated 9th February 1949.

[6] As I have said above, there is no estoppel against statute. The contention of the learned counsel for the appellant, therefore, that the tenants-respondents are not entitled to raise this objection, because the same is barred by constructive *res judicata*, has no force, and must be rejected.

[7] The result is that the appeal fails, and is dismissed with costs.

[8] **Sinha J.**—I agree. I wish to add some observations of my own. Assuming for the sake of argument that the previous application of the judgment-debtors objecting to the execution was dismissed for default, that dismissal could not bar the hearing on merits of a second objection, if the statute conferred a substantive right on a tenant who had been ordered to be evicted from his tenancy as a result of a decree of a Civil Court. Section 11 of the Act has secured a very valuable right to a tenant to continue in occupation of his tenancy until a Court specially constituted under the Act has exercised its powers to order eviction of the tenant on certain grounds specified in the section itself. So long as that condition precedent has not been fulfilled, it is not open to the landlord to put his decree for eviction into execution. The

civil Court, acting as the Court of execution, can only execute the orders of the special Court constituted under the Act if that Court directs that the tenant should be evicted. In the present case it is common ground that such an order has not been obtained by the landlord.

[9] Another reason why the plea of *res judicata* is not available to the decree-holder is that there can be no estoppel against the provisions of a statute. *Res judicata* is a species of estoppel, that is to say, it is an estoppel by judgment. Hence, even *res judicata* cannot bar the rights of a tenant to avail of the special protection given to him by the statute. It must, therefore, be held that the orders of the lower appellate Court giving effect to the provisions of the Act and refusing execution of the decree of the civil Court are perfectly justified in law.

G.M.J. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 356 [*C. N. 92.*]

IMAM AND NARAYAN JJ.

Province of Bihar — Appellant v. *Choudhary Balam Singh and others — Respondents.*

A. F. O. D. No. 290 of 1945, D/- 14-2-1950, from decision of A. Sub-J., Arrah, D/- 29-9-1945.

Civil P. C. (1908), O. 41, R. 23 — Remand — Conflicting findings and failure to frame essential issues by lower Court — Case is fit for remand. [Paras 7 & 8]

Annotation : ('44-Com.) Civil P. C. O. 41 R. 23 N. 11.

Government Pleader — for Appellant.
Harinandan Singh — for Respondents.

Imam J.—The defendant is the appellant. The plaintiffs-respondents had instituted a suit for demarcation of boundaries of two villages. They are the proprietors of village Sabalpur Babura, tauzi Nos. 817, 818, 733 and 744. Adjacent to this village is village Shankarpur Todar *alias* Kutubur, tauzi No. 3748. The proprietor of village Shankarpur Todar is the khas Mahal. There was a revenue survey in 1845, and Ex. A(5), is the map prepared in that survey of village Shankarpur. There was a default of revenue, and the estate was purchased by Government in 1837. Thereafter there was a certain temporary settlement, but a permanent settlement took place in 1873. There was again default of Government revenue and the estate was purchased in December 1903 by the Government. Thereafter, settlement was made under Regulation VII [7] of 1822, and the map (Ex. A), was prepared. The Cadastral Survey proceedings commenced in 1907 and the final publication of the record of rights was made in 1912. The maps prepared in this cadastral survey are Ex. 1 (c) and J to J (2). According to the appellant, the maps Exs. A (5) and A would clearly show the true boundaries between the two villages Shankarpur and Sabalpur Babura. On the other hand, the maps prepared during the cadastral survey clearly show that the boundaries between the two villages are according to the case of the plaintiffs.

[2] Various contentions had been raised before the Court below namely, that a suit for demarcation of boundaries between two legal estates does not lie in a civil Court, that since proceedings for demarcation had been taken under the Bengal Survey Act (Act V [5] of 1875) and having regard to the provisions of S. 62 of that Act, no civil suit lay, that all the landlords of the village had not been impleaded in the suit, and that the plaintiffs ought to sue for a declaration of title to the lands in question and for recovery of possession. In the written statement, a specific plea had been taken that the suit was barred by limitation. Unfortunately, the Subordinate Judge did not frame an issue on this point. The Subordinate Judge was of the opinion that the question of possession did not arise in the suit and as such it was not necessary for the plaintiffs to seek for a declaration of title and confirmation of possession, or in the alternative for recovery of possession. Section 42, Specific Relief Act was, therefore, no bar to the suit. The suit was accordingly decreed and the Subordinate Judge directed that a preliminary decree for demarcation of the boundaries and appointment of a commissioner who will measure the lands on the basis of 1909-1910 maps by fixing pillars be passed. Against this decision, the present appeal has been preferred.

[3] When the appeal came on for hearing on 6th December 1949, the Bench by its order No. 31 of that date decided that the plaintiffs should pay *ad valorem* court-fees on the plaint and the appellant should pay *ad valorem* cour-fees on the memorandum of appeal, being of the opinion that the plaint did seek consequential relief.

[4] The Government Pleader on behalf of the appellant has mainly contended that the decision of the Subordinate Judge is defective in the sense that he had failed to decide on the question of possession and title which must obviously arise for consideration having regard to the state of the pleadings and the evidence in the case. He further contended that the question of limitation was of the utmost importance, and the Subordinate Judge should have framed an issue in this regard. He further contended that the Subordinate Judge had completely misunderstood the decisions in *Kavasji* v. *Hormasji Nassarvanjishet*, 29 Bom. 73 : (6 Bom. L. R. 782) and *Appayya* v *Koraga*, A. I. R. (18) 1931 Mad. 19 :(129 I. C. 451). *Kavasji* v. *Hormasji Nassarvanjishet*, 29 Bom. 73 : (6 Bom. L. R. 782) makes specific reference to the decision in the case of *Wake* v. *Conyers* (1759) 1 W. & T. L. C. (7Ed.) 170

where Lord Northington made the following observation:

> "The Court has, in my opinion (and if the parties are not satisfied, they have resort elsewhere), no power to fix the boundaries of legal estates, unless some equity is superinduced by the act of the parties, as some particular circumstances of fraud, or confusion, where one party has ploughed too near the other, or the like, nor has this Court a power to issue such commissions of course, as here prayed."

The Government Pleader, therefore, contended that the decision of the Subordinate Judge should be set aside and the entire case remanded to the Court below for re-trial. He conceded that in the circumstances if it was necessary for the plaintiffs to amend their plaint, they would be entitled to do so and to lead any fresh evidence which may be necessary in the circumstances. It follows, of course, when the entire case is being remanded for re-consideration, that the defendant will also be entitled to make such amendment to the written statement as may be necessary and to lead any further evidence which may become necessary in the circumstance of the case.

[5] Mr. Harinandan Singh on behalf of the respondents, has pointed out that in fact after the decision of the Subordinate Judge, execution was taken out and the boundary pillars have been erected in accordance with the decision of the Subordinate Judge. In the circumstances, it was not necessary to remand this particular case as no harm would be done to the defendant if there was merely a map showing the true boundary between the two villages. He further strongly relied upon the maps, Exs. 1 (c) and J to J (2), to show that really the lands in question appertain to village Sabalpur Babura and that the true boundary line between Sabalpur Babura and Shankarpur was as shown in these maps and not the map Ex. A or Ex. A (5). He contended that it was not necessary for the plaintiffs to seek for a declaration of their title or for recovery of possession in a suit where they merely asked for demarcating the boundaries between the two villages and for the erection of pillars in accordance with the decision of the Court.

[6] Having looked into the matter, I am satisfied that the decision of the Subordinate Judge as it stands cannot be sustained. It seems to me having regard to the pleadings as a whole, that it was essential for the Court below to decide on the evidence the question of possession as well as the question of title, as also the question of limitation. It was pointed out by the Government Pleader that the estate was permanently settled with the plaintiffs or their predecessors in interest by the Khas Mahal and that the map in connection with this settlement is Ex. A, that is to say, the basis of the title of the plaintiffs is practically derived from the map Ex. A, the correctness of which they ought not to be allowed to question now. The Government Pleader did not go into the question as to whether the maps prepared in the cadastral survey were more accurate than the maps, Exs. A and A (5), as he was merely asking for a remand. It should be made quite clear, however, that at no time did he concede that the maps in the cadastral survey were at all correct.

[7] I think it is well settled that no suit is entertainable in a civil Court which is purely for demarcation of boundaries between two estates. There are statutory provisions in the Bengal Survey Act (Act V [5] of 1875) which authorise the Collector to determine such questions. There may be circumstances however in which the question of demarcation of boundaries between two estates may arise for decision by a civil Court in connection with the reliefs claimed in the pleadings by the parties. The expression used by Lord Northington in *Wake* v. *Conyers*, (1759) 1 W. & T. L. C. (7th Ed) 170 cited by Jenkins C. J. in *Kavasji* v. *Hormasji*, 29 Bom. 73: (6 Bom. L. R. 782) should not be misunderstood. His Lordship was perfectly clear in the first instance that a Court has no power to fix the boundaries of legal estates unless some equity is superinduced by the act of the parties, that is to say, certain acts of the parties resulting in certain equities arising which give the Court jurisdiction to put matters right. Lord Northington pointed out such as fraud, confusion or the like. In this connection the decision of the Subordinate Judge is not to my mind satisfactory. After referring to a certain Order sheet, Ex. K (1), of the year 1940, he came to the conclusion that there had been some confusion of boundaries created by the defendant. Then he goes on to say:

> "From all these the conclusion is that there is a confusion on boundary between the parties, due to the fact that the plaintiff relies on 1909 map while the defendant on 1907 map. As the equity is superintroduced the suit for demarcation is maintainable."

I may point out that the Subordinate Judge has used the expression "equity is superintroduced," whereas the expression used by Northington was "equity is superinduced." Finally the Subordinate Judge observed: "There is a confusion of boundaries which is created due two surveys of 1907 and 1909-10. As such the plaintiffs are entitled to a decree for demarcation." To my mind, there are conflicting findings here. At one stage, the learned Subordinate Judge seems to think that there was some confusion of boundaries created by the defendant, but later on seems to think that there was confusion because there are two conflicting maps. As to the finding that the confusion of boundaries was created at the instance of the defendant, he has not indicated as to what the evidence is in this connection. Reference to Ex. K (1) can in no circumstance, from what appears in the judgment of the Subordinate Judge, establish that the confusion of the boundaries was created by the defendant. Mr. Harinandan Singh, however, did contend that Ex. K (1) is the order sheet of the Khas Mahal Officer and from the order sheet it would be apparent that he had taken steps to interfere with the possession of the plaintiffs by erection of pillars. Consequently, the confusion of boundary as was to be found in the case was the creation of the defendant. It was, however, pointed out on behalf of the defendant that Ex. K (1) is the order sheet of the Collector acting under the provisions of the Bengal Survey Act (Act v [5] of 1875). The Subordinate Judge has indeed nowhere suggested that Ex. K (1) is the order sheet of the Khas Mahal Officer. All that he held in connection with this order was concerning the objection made by the defendant that having regard to the provisions of S. 62, Bengal Survey Act, no civil suit lay unless there was an appeal against the decision of the Collector. As to this, the Subordinate Judge said that there was nothing to show in the order sheet that notices were issued and consequently there was no regular proceeding under the Act and as such he did not think it necessary to comply with its provisions. If boundary pillars were about to be erected in consequence of an order made by the Collector while proceeding under the Bengal Survey Act. 1875, one can hardly say that some confusion of boundaries was being created by the defendant. However it is not necessary for me to go into this or to give any final opinion. These are matters which no doubt the Court below will take into consideration when the occasion arises, if any submission is made I have merely referred to these matters to show that the decision of the Subordinate Judge is not one which can be sustained.

[8] In the net result, the appeal is allowed, the decision of the Subordinate Judge is set aside, and the case is remanded to the Court below for fresh trial and disposal according to law. Both the parties will be entitled to amend their pleadings if it becomes necessary, and will be entitled to lead additional evidence the evidence already recorded will form part of the record. I have merely pointed out some of the grounds on which the remand is being made, but as the case would be tried afresh the hands of the Subordinate Judge will not in the least be tied to merely the points referred to in this judgment. He will be free to decide the case according to law and on the evidence which is before him on all the points which may arise for consideration. He will also consider the question of framing an issue on the question of limitation. Costs will abide the result.

Narayan J.—I agree.

V.B.B. *Case remanded.*

A. I. R. (37) 1950 Patna 358 *[C. N. 93.]*

REUBEN AND JAMUAR JJ.

Mt. Bibi Aliqunnissa and others — Petitioners v. Sk. Md. Shafique and others — Opposite Party.

M. J. C. No. 248 of 1949, D/- 7-2-1950.

(a) Civil P. C. (1908), S. 151—Deficit court-fee in Courts below—Order in second appeal to pay deficit court-fee within certain period, otherwise appeal to stand dismisssd—Order becoming final on failure to pay deficit court-fee—Order held not one of dismissal of suit under S. 10 (ii) read with S. 12 (ii), Court-fees Act, but order of dismissal for default in respect of which application for restoration was maintainable under S. 151. [Para 4]

Annotation : ('44 Com.) Civil P. C, S. 151 N. 2.

(b) Court-fees Act (1872), Ss. 10 (ii) and 12 (ii)—Deficit court-fee in Courts below—Order in second appeal to pay deficit court-fee within certain time otherwise appeal to stand dismissed—Correct order held should have been an order of dismissal of suit and not appeal. (*Obiter.*) [Para 4]

[Editorial note : See, however, the case reported in A.I.R. (37) 1950 Pat. 239.]

Annotation : ('49 Com.) Court-fees Act, S. 12 N. 15.

Syed Hassan — for Petitioners.

Order. — The question raised in this case is whether this application for the restoration of Second Appeal No. 254 of 1949, which stood dismissed for failure to deposit deficit court-fees, is maintainable under S. 151, Civil P. C., or can only be entertained as a petition in review.

[2] The petitioners are the plaintiffs in a suit for partition. Their suit was decreed in part. The decree was upheld by the Court of first appeal. They then came in appeal to this Court. In the Courts below they paid merely a declaratory court-fee. The Stamp Reporter in this Court objected that, as regards a portion of the property forming the subject-matter of the suit, the suit was of the nature of a title suit, and therefore an *ad valorem* court-fee was payable. The report was accepted by the Taxing Officer, and the necessary court-fees on the memorandum of appeal was paid. When the appeal came before the Bench, the stamp report as to the liability to pay the deficit court-fee in the Courts below being accepted by the learned advocate for the appellants, a direction was made that, failing deposit of the deficit court-fee within two months the appeal would stand dismissed. This order has become final. Hence, the present application.

[3] The maintainability of this application under S. 151 is challenged on the authority of *Rameshwardhari Singh* v. *Sadhu Saran Singh*, 2 Pat. 504 : (A. I. R. (10) 1923 Pat. 354), *Ganga Prasad* v. *Sm. Girja Devi*, A. I. R. (36) 1949 Pat 366 : (29 P. L. T. 354) and certain unreported cases. The learned advocate for the petitioners has rightly distinguished these cases, on the ground that the two reported cases are cases in which a plaint was dismissed for default in paying the deficit court-fee on the plaint itself and, in Miscellaneous Judicial Case No. 178 of 1948 and Second Appeal No. 503 of 1947, the deficit in court-fee was on the memorandum of appeal. First Appeal No. 102 of 1948 was decided on its own peculiar facts, namely, that the petitioner by his conduct had accepted his petition as one in review.

[4] It has been contended that the order of this Court should be read, under S. 12, cl. (ii), Court-fees Act, read with S. 10, cl. (ii) of that Act as an order dismissing the suit. Clause (ii) of S. 12 empowers an appellate Court to consider the question of the court-fee payable on a plaint or memorandum of appeal in the subordinate Court, when it thinks that the question has been decided to the detriment of the revenue and, if the additional court-fee which it finds to be payable is not paid within the time fixed by it, cl. (ii) of S. 10 directs the appellate Court to dismiss the suit. It is contended that, when this Court passed the order directing that the appeal shall stand dismissed for default, it must be taken to have intended the order to operate as an order of dismissal of the suit and that the appeal itself should be dismissed as having become infructuous in consequence. It appears to us that this would certainly have been the correct order to pass in the circumstances of the case. But, since the order actually passed has not taken that form, we would interpret it on its own terms as an order of dismissal for default in respect of which applications for restoration are entertained by this Court under S. 151. Let there be an order accordingly.

G.M.J. *Order accordingly.*

A. I R. (37) 1950 Patna 359 [*C. N. 94.*]

REUBEN AND JAMUAR JJ.

Madhusudan Lal — Appellant v. *Sailendra Kishore — Respondent.*

A. F. A. D. No. 41 of 1945, D/- 21-2-1950, from decision of Addl. D. J., Patna, D/- 30-11-1944.

(a) Civil P. C. (1908), O. 22, Rr. 4 (3), 9 —Death of sole respondent — *Bona fide* action of appellant— Setting aside of abatement.

In an appeal on the death of the sole respondent, the appellant first sought to substitute his widow and also made an application to add the legatee under the will of the deceased respondent as a party respondent under the guardianship of his father who was the executor under the will. The applications in both cases were made within time. When thereafter the executor obtained probate of the will and the widow died, the appellant filed an application to implead the executor :

Held that the action of the appellant was *bona fide*; that there was no abatement and that even if there was abatement the appellant was entitled to have the abatement set aside and to have the name of the executor substituted in place of the deceased respondent. [Para 2]

Annotation : ('44-Com.) Civil P. C., O. 22, R. 4 N. 10, R. 9 N. 5.

(b) Suits Valuation Act (1887), S. 11 (1) (b)— Appeal to lower appellate Court on incorrect valuation — Judgment given, if nullity — Prejudicial disposal — What amounts to — Civil P. C. (1908), S. 99

A judgment rendered by the lower appellate Court which had jurisdiction on the valuation given, though incorrectly given, is not a complete nullity and is binding on the parties unless set aside. When, therefore, a second appeal is preferred to the High Court, the appeal cannot automatically be treated as a first appeal. The High Court has to examine whether by reason of the lower appellate Court dealing with the matter, the appellant has suffered prejudice. Simply because the lower appellate Court had no jurisdiction over the appeal which should have been heard as first appeal in the High Court, that would not by itself amount to prejudice in the disposal of the case on merits. The crucial test in disposing of the appeal is whether prejudice has been caused in the disposal of the appeal in the lower appellate Court on its merits. If that test is fulfilled, then the objection as to jurisdiction is entertainable, otherwise the defect of jurisdiction may be ignored. [Para 3]

Annotation : ('49-Com.) Suits Valuation Act, S. 11 N 12; ('44-Com.) Civil P. C., S 99 N 6.

(c) Evidence Act (1872), S. 110—Suit in ejectment —Burden of proof.

In a suit in ejectment the onus lies upon the plaintiff to prove his title and he cannot succeed merely on the weakness of the defence. [Paras 8 and 16]

Annotation : ('46-Man.) Evidence Act, S. 110, N. 2 Pt. 1.

G. P. Das and Shambhu Nath — for Appellant.

Mahabir prasad and P. Srivastava — for Respondent.

Jamuar J. — A preliminary objection was raised on behalf of the respondent in this appeal that the appeal had abated. The appeal was filed on 23rd January 1945, and the respondent was one Ram Babu. It appears that on 28th March 1947, Ram Babu executed a will leaving his entire estate to one Sailendra Kishore, his sister's daughter's son, and appointing his father Nand Kishore Chand as the executor. Ram Babu died on 12 September 1947. On 10th October 1947, an application for probate of the will was filed. On 20th November 1947, an application was made in this Court for the substitution of Ram Babu's widow, Mt. Annapurna Devi, in place of Ram Babu, and on 8th December 1947, another application was filed to add Sailendra Kishore as a party respondent under the guardianship of his father Nand Kishore Chand in addition to Mt. Annapurna Devi. In answer to the two petitions filed by the appellant for substitution, on 21st January 1948, Nand Kishore Chand filed an application informing the Court that he had been appointed the sole executor in the will of Ram Babu and thus he was the only legal representative and as he had not been brought on record till then, the appeal had abated. Notices were issued to Mt. Annapurna Devi and upon Sailendra Kishore. On 12th May 1948, probate of the will was granted. It then appears that on 16th October 1948, Mt. Annapurna Devi died, and on 14th December 1948, the appellant filed an application stating that he had come to learn that Nand Kishore Chand had obtained probate with a copy of the will annexed from the Court of the District Judge, as exector, and hence in order to avoid future difficulties he had been advised to make the said Nand Kishore Chand a party respondent and made a prayer to the effect that the name of Mt. Annapurna Devi be struck off and that the name of Nand Kishore Chand be added as a party respondent to the appeal. It was contended that in the circumcumstances as the appellant had failed to substitute Nand Kishore Chand, the executor, who was the only legal representative, within the prescribed period, his appeal should be held to have abated, and reliance was placed on the case of *Devji Narayanji* v. *Ratanshi Hirji*, A.I.R. (24) 1937 Pat. 612 : (172 I. C. 741). In that case the facts were that the suit had been filed by the appellant against three brothers. Before the trial began the Court was informed that the eldest of the three brothers named Keshabji had died and he was accordingly struck out from the suit. The trial Court ultimately dismissed the suit as against remaining two brothers. An appeal was preferred to the District Judge. In the course of the appeal the appellant informed the Court that the younger of the two surviving brothers named Nanji had died and made an application for the substitution of his widow as his heir. The Court ordered that the widow should be substituted. Later, the surviving brother Ratanshi filed a petition to the effect that he was joint with Nanji, that the widow was not the heir and that the real heirs were six surviving members of the joint family, namely, himself, his two minor sons, the two minor sons of the deceased and an adult nephew of the deceased. He claimed, therefore, that the appeal had abated for want of substitution, the period of ninety days having expired. Then the appellant filed an application for setting aside the abatement after substituting the persons named in the petition filed by Ratanshi. The District Judge rejected this application on the ground that the appellant had shown no sufficient cause for failing to substitute the legal heir within the statutory period and, therefore, he held that the appeal had abated as a whole. On a second appeal to this Court it was observed that although there did not appear that the appellant had any motive for applying to substitute a wrong person, but yet it had not been explained either before the District Judge or in this Court what reason he had for doing so. On the facts of that case it was held that the appellant had not acted in a *bona fide* manner, and, therefore, he could derive no benefit from his application to substitute a wrong person, when he had not shown that he had made any inquiries as to who the real heirs were. On these grounds the finding of the District Judge that the appeal had abated was upheld. Learned counsel for the respondent in the present appeal before us has relied upon this case for his contention that the present appeal should also be held to have abated. As in the case just cited so also in the present appeal before us reliance was placed on the case of *Shib Dutta Singh* v. *Karim Buksh*, 4 Pat. 320 : (A. I. R. (12) 1925 Pat. 551). This case was distinguished in the case of *Devji Narayanji* v. *Ratanshi Hirji Bhojraj*, A.I.R. (24) 1937 Pat. 612 : (172 I. C. 741) on the ground that in the former case the appellant had applied *bona fide* and within time for the substitution of two heirs of the deceased respondent in ignorance of the fact that there were other heirs.

[2] On behalf of the appellant, it was argued on the authority of the case of *Shib Dutta Singh* v. *Karim Buksh*, 4 Pat. 320 : (A.I.R. (12) 1925 Pat. 551) that the appellant should be held to have made an application for substitution of such of the heirs of the deceased respondent as he *bona fide* believed to be in existence and that, therefore, the appeal should not abate. The learned Judges, who decided the case of *Devji Narayanji* v. *Ratanshi Hirji Bhojraj*, A. I. R. (24) 1937 Pat. 612 : (172 I. C. 741), distinguished the case of *Shib Dutta Singh* v. *Karim Buksh*, 4 Pat 320 : (A. I. R. (12) 1925 Pat. 551) on the ground that while in the latter case the appellant had acted *bona fide*, in the former case the appellant had not so acted. I am of the opinion that in the appeal before us the action of the appellant was *bona fide* and, therefore, the decision in the case of *Shib Dutta Singh* v. *Karim Buksh*, 4 Pat. 320 : (A.I.R. (12) 1925 Pat. 551) should govern the present appeal. For, in the appeal before us, on the death of the sole respondent, Ram Babu, the appellant first sought to substitute his widow Mt. Annapurna Devi and also made an application to add Sailendra Kishore the legatee as a party respondent under the guardianship of his father. When thereafter

Nand Kishore Chand obtained probate of the will and Mt. Annapurna Devi died, then the appellant filed an application to implead Nand Kishore, the executor, as a party respondent. It is clear that the appellant before us *bona fide* made his application for substitution of the widow Mt. Annapurna Devi and thereafter another application to add Sailendra Kishore the legatee as a party respondent, though the proper person to be substituted was the sole executor Nand Kishore Chand. It was after Nand Kishore Chand obtained probate of the will and Mt Annapurna Devi died that the appellant sought to implead Nand Kishore Chand as a party respondent. I have no doubt as to the *bona fides* of the appellant. Clause (3) of R. 4 of O. 22, Civil P. C., directs that the appeal shall abate where within the time limited by law no application is made under sub-r. (1). In the present appeal an application had been made within time for substitution in place of Ram Babu. The appeal, therefore, did not abate as against the deceased respondent. As was held in the case of *Shib Dutta Singh* v. *Karim Buksh*, 4 Pat. 210 : (A. I. R. (12) 1925 Pat. 551) so also in the present appeal I would hold that even if there was abatement, the appellant is entitled upon the facts of the present case to have the abatement set aside and to have the name of Nand Kishore Chand substituted in place of the deceased respondent. In this view of the matter, before the appeal was heard on merits, we ordered that Nand Kishore Chand be added as a party respondent in place of Mt. Annapurna Devi.

[3] Before I deal with the appeal on merits, there is another matter to which a reference must first be made. The suit was instituted by the plaintiff as a pauper. The suit was valued at Rs. 4650. It was decreed by the trial Court but dismissed by the lower appellate Court. The plaintiff, accordingly has come up to this Court in second appeal, valuing his memorandum of appeal at Rs. 1494-14-0 and praying that the decree of the trial Court be restored. The plaintiff appellant has paid court-fee on that amount. The Stamp Reporter took exception to the valuation given by the appellant on the memorandum of his appeal as also to the amount of court-fee paid thereon. According to the Stamp Reporter, the memorandum of appeal should have been valued at the total sum of Rs. 7138 and should have been stamped with the appropriate court-fee on that amount. The Taxing Officer accepted the report of the Stamp Reporter and directed the appellant to correct the valuation to Rs. 7194-14-0 and to make good the deficit court-fee. This the appellant has done. On this valuation the appeal from the judgment and decree of the trial Court lay to this Court and not to the lower appellate Court. But as the appeal had been filed before the lower appellate Court, the lower appellate Court passed its judgment and decree dismissing the suit. In these circumstances, as has been held in the Full Bench case of *Ramdeo Singh* v. *Raj Narain Singh*, A. I. R. (36) 1949 Pat. 278 (F.B.), although a judgment rendered by the Court which had jurisdiction on the valuation given, though incorrectly given, is not a complete nullity and is binding on the parties unless set aside. When therefore a second appeal is preferred to the High Court, the appeal cannot automatically be treated as a first appeal. This Court has to examine whether by reason of the lower appellate Court dealing with the matter, the appellant has suffered prejudice. Simply because the lower appellate Court had no jurisdiction over the appeal, which should have been heard as first appeal in the High Court, that would not by itself amount to prejudice in the disposal of the case on merits. The crucial test in disposing of this appeal is whether prejudice has been caused in the disposal of the appeal in the lower appellate Court on its merits. If that test is fulfilled, then the objection as to jurisdiction is entertainable, otherwise the defect of jurisdiction may be ignored.

[4] I now come to the merit of the appeal itself. The appellant, who was the plaintiff, is Madhusudan Lal, a resident of Mohalla Chowk, Patna City, and the original respondent, who was the defendant, was Ram Babu (since deceased) of village Hilsa. The appellant's case was that Ram Babu approached him to instal a mill of *chanti*, flour and oil at Hilsa, his native village, and for this purpose made an offer to him for a plot of land rent-free and free of cost, while the appellant agreed to render such work as '*pisai perai*' for his domestic purposes free of charges. The appellant having accepted the offer filed an application in the year 1928 to the Director of Industries, Bihar, under the State Aid to Industries Act, 1923, for advancing a sum of money for the purchase of machineries. His application was accepted. Thereafter the appellant constructed a building under the supervision of Government officials on that plot of land which had been given to him by Ram Babu and installed certain machineries which had been obtained through the Government. It was the appellant's case that he had paid all charges in respect of the construction of the building as also for the purchase of the machineries. Sometime at the end of the year 1936 the mill closed down due to loss. The appellant's case then was that Ram Babu suggested to him to purchase a bigger machinery and

offered pecuniary help to develop and improve the business provided the management and control of the mill were left to him and the appellant agreed. Accordingly, in the beginning of the year 1937, the appellant handed over to Ram Babu the entire building together with all the machineries, and Ram Babu agreed to pay him a sum of Rs. 25 per month as rent for the building and Ram Babu had also agreed to render accounts in respect of the machineries and other establishment materials. It is alleged that Ram Babu had also agreed to pay 6 per cent. per annum as interest on the value assessed in respect of the machineries, the value assessed being a sum of Rs. 3550. The appellant then alleged that Ram Babu never paid anything. He also alleged that he had sold some machineries relating to Dal Mill for Rs 2250 which sum he made over to Ram Babu in order to purchase some bigger machinery. Ram Babu, accordingly should have been in possession and occupation of the building and the premises constructed by the appellant since 1937. But as Ram Babu was unwilling, in spite of the service of notice to him, to give up possession of the building and as he also denied the title of the plaintiff over the building and as he paid no rent since January 1939, to August 1941, the appellant had to bring his suit for (1) a declaration of his title to the building and machineries as detailed in the two schedules attached to his plaint and for recovery of possession by evicting the defendant Ram Babu therefrom; (2) recovery of a sum of Rs. 3550 as the price of the machineries; and (3) for recovery of another sum of Rs. 800 due to him as rent for 32 months, that is, from January 1939, to 31st August 1941, at the rate of Rs. 25 per month.

[5] The main defence to the suit was that the defendant Ram Babu had never offered to make a free gift of his plot of land for the construction of the mill but that the plaintiff himself had requested him to give him some land and to advance money for the construction of the building for starting a mill and that the defendant agreed to do so on condition that the plaintiff would construct the building on his land with the money advanced by him (the defendant) and the building would become the property of the defendant while the plaintiff would carrry on business of the mill for three years after the completion of the building free of rent and after that period the plaintiff would have to pay rent at the rate of Rs 20 per month to the defendant. It was also alleged by the defendant that in pursuance of this agreement he advanced an aggregate sum of Rs. 3664 from time to time to the plaintiff for the construction of the building so that the building belonged to him and not to the plaintiff. It was further alleged that in addition to that advance the plaintiff took further loans up to Rs. 1171-13-3 on different occasions for the purpose of carrying on business of the mill thus bringing up the total advances to the sum of Rs. 4835-13-3. The business of the plaintiff, however, failed in 1936 and the plaintiff himself sold certain machineries to different persons and took away some of the moveables. The defendant denied to have agreed to pay a monthly rent of Rs. 25 per month for the building, as he had never been in possession of it as a tenant. In these circumstances, the defendant claimed that when the business failed the plaintiff gave *khas* possession of the building to the defendant in 1937 as this building had been constructed at the cost of the defendant and upon the land of the defendant.

[6] As already stated the trial Court decreed the plaintiff's suit holding that the building had been constructed by him and at his own expense. But the plaintiff's claim regarding recovery of arrears of rent was disallowed. The plaintiff was however found entitled to recover a sum of Rs. 1,138 being the price of some machineries, which the defendant had sold to different persons.

[7] On appeal to the lower appellate Court by the defendant, the plaintiff's suit was dismissed altogether.

[8] The suit being in ejectment, the onus lay upon the plaintiff to prove his title. [His Lordship discussed the evidence and observed that there was no good reason to disturb the conclusions arrived at by the lower appellate Court. His Lordship proceeded :]

[9-12] In the view which I have taken the plaintiff cannot complain of any prejudice in the disposal of his appeal in the Court below, and having examined the evidence in the case I am of the opinion that the appeal must fail.

[13] The appeal is accordingly dismissed with costs.

[14] **Reuben J.**—I agree.

[15] There is no reason to doubt the *bona fides* of the appellant in the matter of the substitution.

[16] On the merits the appellant must fail. The onus of proof is on him and he cannot succeed merely on the weakness of the defence. His story is an improbable one and I do not find it possible to accept it on the evidence adduced by him in support of it.

V.R.B. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 363 *[C. N. 95.]*

DAS AND SARJOO PRASAD JJ.

Baso Beldar and others—Petitioners v. Parmeshwar Narayan Singh and others—Opposite Party.

Civil Revns. Nos. 350, 596 and 618 of 1949, D/- 27-2-1950.

Civil P. C. (1908), Ss. 151 and 10—Rent suit in civil Court—Application under S. 40, Bihar Tenancy Act pending—Stay of rent suit—Tenancy laws—Bihar Tenancy Act (VIII [8] of 1885), S. 40.

An application for stay of rent suit instituted in civil Court on the ground that proceedings under S. 40, Bihar Tenancy Act, are pending before the Revenue Officer in respect of the lands in suit can be entertained only under S. 151 and not S. 10, Civil P. C. In applications for stay of this character, no hard and fast rule can be laid down that the applicant is necessarily entitled to a stay of the rent suit. It would all depend upon the facts and circumstances of each case whether the stay should or should not be granted. [Para 1]

Annotation : ('44-Com.) Civil P. C., S. 151 N. 2 ; S. 10, N. 2.

Rameshwar Pd. and Gokulandan Pd. —for Petitioners.

L. S. Sinha and Ramdeo Pd. Singh —for Opposite Party.

Sarjoo Prasad J. —These are three applications in revision arising out of a decision given by the 1st Additional Munsif of Bihar refusing to stay certain rent suits instituted in his Court. Civil Revision No. 596 of 1949 is directed against his order, dated 11th July 1949, while Civil Revision No. 350 of 1949 is directed against his order, dated 29th April 1949 and Civil Revision No. 618 of 1949 is against his order, dated 25th July 1949. As all these applications involve a common point for decision, they have been made analogous, and they were placed for hearing before a Single Judge of this Court, who has eventually referred the matter for decision to a Division Bench, and it has accordingly been placed before us for decision. The defendants, who are the petitioners in all these applications, applied for stay on the ground that there were commutation proceedings pending under S. 40, Bihar Tenancy Act, before the learned Revenue Officer in respect of the lands to which the rent suits relate. In Civil Revision No. 596 of 1949 it is stated that an application under S. 40, Bihar Tenancy Act was filed on 4th December 1947. The learned Revenue Officer passed an order for commutation on 27th May 1948, directing that the order should take effect from 1355 FS. There was an appeal against that order, and in appeal, the Collector set aside the order in question. In the meantime, it appears that the rent suit to which this application relates, was instituted in the Court of the lerrned Munsif on 30th September 1948, relating to a claim for a *bhauli* rent for 1354 to 1355 FS. It is contended by the defendants petitioners that the hearing of this suit should be stayed until the application for commutation has been finally heard and decided by the learned Revenue Officer before whom the proceedings are pending. The facts of the other two applications, Civil Revision No. 350 of 1949 and Civil Revision No. 618 of 1949, are identical. In those cases the petitions for commutation were filed on 14th September 1946. The applications were heard and allowed by the learned Revenue Officer on 20th May 1948, directing that the commutated rent should come into operation from 1355 FS. There was an appeal against this to the Collector who set aside the order of commutation as being void, and the case, accordingly, went back to the learned Revenue Officer for reconsideration of the matter. In the meantime, the rent suits to which these applications relate, were filed before the learned Munsif on 30th September 1948. The claim in these suits also is in respect of the years 1354 and 1355 FS. The learned Munsif has considered the applications for stay and has rejected the applications on the grounds given in his judgment. He has unnecessarily encumbered his order with reference to S. 10, Civil P. C., which has no application to the cases at all. The application for stay, if at all, can be entertained only under S. 151, Civil P. C., and in exercising his discretion under S. 151, Civil P. C., the Court was perfectly justified in rejecting the applications. In revision it would not be open to this Court to interfere unless it holds that there was any material irregularity or illegality in the exercise of that jurisdiction, or there was any serious miscarriage of justice. In applications for stay of this character, no hard and fast rule can be laid down that the applicant is necessarily entitled to a stay of the rent suit pending before the civil Court merely because there is an application under S. 40, Bihar Tenancy Act pending before the Revenue Officer. It would all depend upon the facts and circumstances of each case whether the stay should or should not be granted. It is true that our attention has been drawn to several cases in which applications for stay had been allowed by this Court as well as by subordinate Courts. But there are also decisions to the contrary, and I do not see that there is any real point of principle involved in this matter. It is true that the tenant is entitled to make an application for commutation of rent under S. 40, Bihar Tenancy Act, and if that application is allowed, it may well be within the discretion of the Revenue Officer to direct as to the period from which that commutation has to take effect. But there is no reason why the landlord, who has instituted his (suit?) for rent because of the tenant's failure to divide the produce as required by the law, should be compelled to wait until those S. 40-proceedings are decided. The proceedings under S. 40, Bihar Tenancy Act may be held up for various reasons. In that case it would be useless to hold up the decision of the rent suits pending in the civil Courts, which ought to be expeditiously disposed of. I do not find that in these cases there has been any material illegality or irregularity in the exercise of his discretion by the learned Munsif, nor do I find that there is any case of miscarriage of justice. That being so, I see no reason to interfere with the orders in revision. These applications must be, accordingly, dismissed but in the circumstances, there will be no order for costs.

Das J.—I agree.

G.M.J. *Revision applications dismissed.*

A.I.R. (37) 1950 Patna 364 *[C. N. 96.]*

RAMASWAMI AND NARAYAN JJ.

Mt. Bibi Khudai Jatul Kubra—Petitioner* v. *Mt. Bhagalan and others—Opposite-Party.

Civil Revn. No. 671 of 1949, D/-13th March 1950, from order of Sub-J., Patna, D/- 19th July 1949.

Civil P. C. (1908), S. 115, O. 33, R. 1, Explanation — "Is not possessed of sufficient means"—Failure to give finding on value of property.

The possession that is spoken of in the first portion of the explanation is not possession of property but of sufficient means and the Court has to enquire into the capacity to raise money necessary to pay the court-fee and not actual possession. Where the Court holds that the applicant has got property but does not give a finding on the value of the property, the Court does not properly exercise jurisdiction in holding that the applicant should not be permitted to sue in *forma pauperis.* [Paras 2, 3]

Annotation : ('44-Com.),Civil P. C., S. 115, N. 12; O. 33, R. 1, N. 3.

Khaleel Ahmed — for Petitioner.
S. Anwar Ahmed — for Opposite Party.

Ramaswami J. — This rule is directed against an order of the Subordinate Judge of Patna refusing to permit the applicant to sue in *forma pauperis.*

[2] The applicant brought a suit against the the opposite party claiming a sum of Rs. 13,000 odd being her dower debt against the estate of her deceased husband. The court-fee payable was Rs. 1,200 odd. The applicant alleged that she was not possessed of sufficient means to pay the court-fee. For the opposite party a survey khatian (Ex. A) was filed to show that about 3 bighas of raiyati land stood recorded in the name of Tasaduk Hussain in khatas 411 and 654 in village Kolawan. It is conceded that Tasaduk Hussain died leaving behind a son and two daughters, one of whom is the applicant. It was alleged that Tasaduk Hussain has a house, area .27 acre, Plot No. 2186 of Khata No. 411. For the applicant it was stated that the properties were included in a wakfnama executed by Iltaf Hussain who was the real owner thereof. It was objected also that the survey entry was incorrect. The learned Subordinate Judge held upon evidence that the applicant had 1/4th share in the raiyati land of khatas 411 and 654 and also a share of the house over Plot No. 2186, Khata No. 411. But it is unfortunate that he has not examined the evidence as regards value of the share of the applicant nor has he given a finding thereon. In the absence of such evidence it is impossible to hold that the learned Subordinate Judge properly exercised his jurisdiction in holding that the applicant should not be permitted to sue in *forma pauperis.*

[3] Reference should be made to *Dhananjai Pd. Singh* v. *Rajkeshwar Singh*, A. I. R. (34) 1947 Pat. 34 : (25 Pat. 318) in which it was said that in an enquiry under O. 33, R. 1 the Court should always address itself to the ascertainment of the applicant's capacity to raise the necessary court-fee. The possession that is spoken of in the first portion of the explanation is not possession of property but "of sufficient means," and what the Court is concerned to enquire in to is not actual possession of property, but capacity to raise the money necessary to pay the court-fee.

[4] In *Ramanuja Ayyangar* v. *Gopalan*, A.I.R. (21) 1934 Mad. 561: (152 I. C. 938), Ramesam J. observed that the question whether the plaintiff is a pauper or not turns upon the circumstances of each case. The test is not whether he has the power of raising money in the abstract ,but whether in the concrete circumstances of the case he can succeed in raising anything substantial by exercising it. There is an observation to similar effect in *Sundarathammal* v. *Parmaswami Asari*, A.I.R. (20) 1933 Mad. 883 : (146 I. C. 566).

[5] For these reasons I would set aside the order of the learned Subordinate Judge and remand the case for being reheard. It will be open to the parties to adduce fresh evidence if they so choose. After taking such further evidence, if any, the learned Subordinate Judge should decide afresh whether the applicant has sufficient means to enable him to pay the court-fee within the meaning of O. 33, R. 1, Civil P. C.

[6] The application is accordingly allowed, but, in the circumstances, I do not propose to make any order as to costs.

Narayan J.—I agree.

D.H. *Application allowed.*

A. I. R. (37) 1950 Patna 365 *[C. N. 97.]*

IMAM AND NARAYAN JJ.

Kaulesari Singh and others—Appellants v. *Ambika Dutt Singh and others—Respondents.*

A. F. O. D. No. 252 of 1945, D/- 13-2-1950, from decision of Sub-Judge, Arrah, D/- 30-7-1945.

(a) Hindu law—Partition — Partial partition — Presumption—Some of property at previous partition left joint — Partition of such Property — Evidence Act (1872), S. 114.

Whenever a partial partition is proved or admitted to have taken place, the presumption arises that there has been an entire partition with reference to all the rights and all the properties. [Para 4]

Where, however, at a partition some of the properties were left joint and there is neither any satisfactory explanation on the record as to why these properties were left joint, nor any agreement keeping these properties as joint, the Court cannot reject the claim for partition with regard to these properties; A. I. R. (20) 1933 Cal. 892, *Disting.* [Para 5]

Annotation: ('46-Man.) Evidence Act, S. 114 N 20.

Harinandan Singh and Ugrah Singh —for Appellants.

B. C. De, Gorakhnath Singh, Chandra Sekhar Prasad and Brahmadeva Narain — for Respondents.

Narayan J. — This is a plaintiffs' appeal arising out of a suit for partition. One Bisun Singh had three sons, Kishun Singh, Narain Singh and Bharath Singh. Plaintiff 1 is the son of Kishun Singh, and plaintiffs 2 and 3 are the sons of plaintiff 1. Defendant 12 is the only surviving representative of the branch of Bharath Singh, he being Bharath's grandson. Defendant 4 is the widow of Narain Singh and defendants 1, 2 and 3 are the sons of Narain Singh. The other defendants are the grandsons of Narain Singh. The plaintiffs' case is that the family is still joint, that Narain was the karta of the family till his death which took place in the year 1938, and that after his death, defendant 1 has been the karta. It is further alleged that Narain was in Government service and acquired properties in the name of his wife but with funds belonging to the joint family and that as such the properties standing in the name of defendant 4 are liable to be partitioned.

[2] The defendants' main contentions are that there was a partition of the joint family properties in the year 1337, which coresponds to the English calendar year 1929, and that the properties standing in the name of defendant 4 are her khas properties with which the family has no concern. Some orchards and homestead lands are still admitted to be joint.

[3] The learned Subordinate Judge has dismissed the suit, his finding being that the properties standing in the name of defendant 4 are her khas properties and that there was a partition of the joint family properties in the year 1337.

[4] Mr. Harinandan Singh, who represented the appellants before us, has not challenged the findings of the Court below that there was a partition of the joint family properties in the year 1337 and that the properties standing in the name of defendant 4 are her personal properties with which the joint family has got no concern. But he has pressed for a partition of the properties, which have been shown in Sch. C of the written statement, as still joint between the parties. Among the properties mentioned in Sch. C of the written statement are a phulwari having an area of .51 acres and two orchards, the area of one of which is .31 acres and of the other .10 acres. There is no reason why these properties should not be partitioned, and Mr. De on behalf of the respondents has agreed to the partition of these properties. The controversy now narrows down to this as to whether the houses and the homestead lands should be partitioned or not. They are all described in Sch. C of the written statement, and along with the written statement the defendants have filed a map indicating the rooms in the possession of the different branches of the family and the joint sahan and khand lands. The argument of Mr. Singh has been that there was no partition of the houses and the homestead lands and that in this suit a partition of these properties should be ordered. We find it very difficult to agree with Mr. Singh that there was no partition of the houses. It would appear from a perusal of the plaint and the evidence adduced by the plaintiffs that the main contention of the plaintiffs in this suit has been that they are entitled to a share in the properties, standing in the name of defendant 4. If the plaintiffs' allegation on the most important question of fact involved in this case has been found to be untrue it is difficult to hold that though there was a partition of all the properties, specially the bakast and the kast lands, there has been no partition of the houses up till now. The principle is that whenever a partial partition is proved or admitted to have taken place, the presumption arises that there has been an entire partition with reference to all the rights and all the properties. It was held by a Division Bench of this Court in: *Mukhram Rai* v. *Chandradeep Rai*, A. I. R. (23) 1936 Pat. 68 : (159 I. C. 453), that where parties have been in possession of and exercising rights of ownership over separate blocks of land for a long time, the Court might well presume that the joint lands have already been divided and rights of parties defined in regard to them in such a manner as to preclude their being re-partitioned. The appellants' learned counsel, during the course of his argument, pointed out that the map filed with the written

statement shows that the plaintiffs have not got sufficient number of rooms and that at least one of the branches has been given four rooms instead of three. But another partition cannot be ordered merely on the ground that apparently each branch has not got an equal number of rooms. The presumption is very strong in this case that there was a partition of all the family properties which could be partitioned, and the evidence adduced by the defendants has been found to be distinctly preferable to that adduced by the plaintiffs. [After referring to certain evidence his Lordship proceeded:] We are, therefore, of the opinion that the houses were also partitioned in the year 1337 and that no fresh partition can be ordered of the house properties.

[5] But admittedly there are two sahans, one of which has been described as 'sahan angan pharikain' and the other as 'sahan Pharikain' which are still joint, besides, a khand and a dalan. There may be some force in the contention of Mr. De that 'sahan angan' cannot easily be divided. But on the record, we find no satisfactory explanation as to why these properties were left joint. Mr. De has cited an authority of the Calcutta High Court in *Jyotish Chandra* v. *Radhika Chandra*, 60 Cal. 1078 : (A. I. R. (20) 1933 Cal. 892), in which case on an agreement between the parties, some properties were left joint. It is not the defendants' case, and it is not at all established by evidence, that there was an express agreement entered into the parties for leaving these properties as joint. We, therefore, do not consider it proper to reject the plaintiffs' claim for partition with regard to the sahans, angan and the dalan. Of course, it will be seen at the time of the final decree whether a partition of all these sahans, angans, khands, and dalan is possible or not, and it will be open to the Subordinate Judge at the time of the passing of the final decree to adjust the equities between the parties by making one party pay compensation to the other in case it is not found possible to partition these properties. This appeal, therefore, succeeds in part and there will be a decree for partition of the properties which are admittedly still joint.

[6] The appeal is allowed in part and the decision of the Subordinate Judge is modified to this extent that there will be a partition of the sahan, angans, khands, dalan, orchards and phulwari mentioned in Sch. C of the written statement. There will be no order for the costs of this appeal.

Imam J.—I agree.

G.M.J. *Appeal allowed in part.*

A. I. R. (37) 1950 Patna 366 [*C. N. 98.*]

REUBEN AND JAMUAR JJ.

Province of Bihar — Appellant v. *Kamakshya Narain Singh — Respondent.*

A. F. O. O. No. 379 of 1949, D/- 1-2-1950, from order of Sub-Judge, Hazaribagh, D/- 20-12-1949.

(a) Civil P. C. (1908), S. 80—Object of.

The object of the notice under S. 80 is to give the Government an opportunity of considering their attitude and to give them a chance of making amends. [Para 7]

Annotation : ('44-Com.) Civil P. C., S. 80, N 2 Pt. 2.

(b) Civil P. C. (1908), S. 80—Suit in the nature of a bill *quia timet*—Sufficiency of notice.

Where the cause of action relied on by the plaintiff is not an individual act but the whole course of conduct of the Government, directed at depriving the plaintiff of his rights bit by bit, the suit is in the nature of a bill *quia timet* and the plaintiff's right of action arises as soon as the threat to his rights becomes imminent. In a suit of this kind notice given ought not to be construed with great strictness and is sufficient if it substantially informs the grounds of complaint to the Government. Thus, a notice and a draft plaint by the plaintiff specifying particular acts by the Government, so far as they were then complete and generally referring to subsequent action that might be taken in pursuance of the purpose complained of therein, is a substantial compliance with S 80, Civil P. C., and it does not matter if an act of the defendant subsequent to the notice is not mentioned in the notice but is included in the plaint. [Paras 7 & 10]

Annotation : ('44-Com.) Civil P. C., S. 80 N. 13 Pt. 4, 5.

(c) Civil P. C. (1908), S. 80—Waiver of notice.

The mandatory nature of S. 80 is not a bar to waiver of notice by the Government.

Where the cause of action against the Provincial Government is the passing of an Act which deprives the plaintiff of his rights to property and the Government, knowing that a notice under S. 80, Civil P. C., required a period of two months, give effect to the Act whereby the plaintiff is actually deprived of his rights to property within a month of the coming into operation of the Act, the Government must be held to have waived their right to notice under the section. [Paras 8 & 10]

Annotation : ('44-Com.) Civil P. C., S. 80 N. 15.

(d) Civil P. C. (1908), O. 39, Rr. 1, 2 — Powers of High Court.

In an appeal against an order granting an interim injunction the powers of the High Court are limited; it is not concerned to decide what is the correct answer to the questions involved in the suit but has merely to see whether there is a fair point for trial. [Para 3]

Annotation : ('44-Com.) Civil P. C., O. 39, R. 1 N. 22; R. 2 N. 2, 8.

Advocate-General and Bajrang Sahai — for Appellant.

N. C. Chatterji, S. K. Choudhury and Sambhu Prasad Singh — for Respondent.

Reuben J. — This is an appeal by the defendant, the Province of Bihar against an order of temporary injunction passed by the Subordinate Judge, Hazaribagh, in Title Suit No. 39 of 1949, which was then pending in his Court, restraining the defendant from taking over management of the estate of the plaintiff until the disposal of the suit.

[2] The plaintiff-respondent is the sole proprietor of a considerable property in the district of Hazaribagh known as the Ramgarh Estate. He has brought this suit to obtain a declaration that certain statutes passed by the Provincial legislature for the abolition of *zamindaris* and, pending this consummation, directed at taking over the management of the property of the *zamindars* is *ultra vires*. In particular, three pieces of legislation are referred to. Firstly, there is the Bihar Private Forests Act, 1948 (Bihar Act IX [9] of 1948) under which, it is stated, the Government has taken possession of the private forests of the plaintiff. Secondly, there is the Abolition of Zamindaris Act, 1948 (Bihar Act XVIII [18] of 1948) which has not yet been enforced. Thirdly, there is the Bihar State Management of Estates and Tenures Act, 1949 (Bihar Act XXI [21] of 1949) which came into force on 15th November 1949, and under which it is now proposed that Government will take over the management of the Ramgarh Estate. Among other reliefs, the plaintiff seeks for the restoration of his private forests and for a permanent injunction restraining the defendant from taking over the management of his estate. The present appeal is directed against an order of the Subordinate Judge granting a temporary injunction in respect of the relief last mentioned.

[3] A mere glance at the Bihar State Management of Estates and Tenures Act indicates that the proposed taking over the management of the Ramgarh Estate is a very serious inroad on the plaintiff's right of private property. The property will come under the charge of the Manager under the Act, who will be entitled to take into his possession such buildings, papers and other properties appertaining to the estate as are essential in his opinion for proper management. The plaintiff will lose his power of management including even his right to receive arrears of rents and profits payable to him on the date of the commencement of management (vide S. 4). Leases of mines and minerals given by the plaintiff will come under the power of review of the Manager, and in certain circumstances it will be open to the Manager to terminate a lease subject to the payment of compensation which may be determined by agreement between the Manager and the holder of the lease (Ss. 9 and 12). The Manager will be empowered to determine the secured and unsecured liabilities of the estate and to make arrangements for the satisfaction thereof (Chap. V and VI). The Manager will also represent the proprietor in pending litigation and, apparently, with the previous sanction of the Provincial Government, will be empowered to admit claims against the estate (S. 32). The power of the proprietor to sue for compensation will be very restricted (S. 31) and what he will receive out of the income of the estate will depend on what allowance is prescribed by rules under the Act, and how much of the surplus income the Manager, subject only to the control of the Provincial Government, may consider it necessary to retain (S. 25). In view of these circumstances there can be no doubt that there is danger of irreparable injury, and that the balance of convenience is entirely on the side of the plaintiff. These points, therefore, have not been urged by the learned Advocate-General who has confined himself to one point, namely, that the suit itself is bad for want of compliance with S. 80, Civil P. C. Section 80, he urges, is an imperative section *Bhagchand Dagadusa* v. *Secy. of State*, 54 I. A. 338 : (A. I. R. (14) 1927 P. C. 176): *Government of the Province of Bombay* v. *Pestonji Ardeshir Wadia*, 53 C. W. N. 489 : (A. I. R. (36) 1949 P. C. 143) and *Secy. of State* v. *Sagarmal*, 20 Pat. 394 : (A.I.R. (28) 1941 Pat. 517) and, therefore, the defect cannot be mended, and the order of injunction passed by the Subordinate Judge cannot be supported. The point raised by the learned Advocate-General is one that will properly form an issue for decision in the trial of the suit. Since the suit itself, subsequently to the admission of this appeal, has been transferred for trial by this Court in exercise of its extraordinary civil jurisdiction, we suggested that this appeal should be considered along with that issue by the Bench trying the suit. The learned Advocate General, however, being anxious for an early decision, we have heard the parties. But our powers in a proceeding of this kind are limited. We are not concerned to decide what is the correct answer to be given to the question in the hearing of the suit, but merely whether there is a fair point for trial *Walker* v. *Jones*, (1865) 16 E. R. 151 : (3 Moore N. S. 397); *Israil* v. *Shamser Rahman*, 41 Cal. 436 : (A.I.R. (1) 1914 Cal. 362); *Chandidat Jha* v. *Padmanand Singh Bahadur*, 22 Cal. 459 and *Brajendra* v. *Kashibai*, 24 Pat. 656 : (A. I. R. (33) 1946 Pat. 177.)

[4] Section 80, Civil P. C., provides for a notice of two months stating, among other things, the cause of action for the proposed suit. A notice purporting to be a notice under the section was given in this case on 19th June 1948. The suit was instituted on 13th December 1948. The learned Advocate-General attacks the sufficiency of the notice on three grounds; firstly, that the main relief sought in the suit, and the only relief relevant to the temporary injunction, relates to the State Management Act which is not mentioned at all in the notice; secondly, that no cause of action relevant to the State Manage-

ment Act arose until after it became law in September 1949 and, therefore, the notice given on 19th June 1948, was premature so far as this Act is concerned, and, thirdly, that the cause of action stated in the plaint is not supported by the notice in two particulars, namely, the giving of assent to the Zamindari Abolition Act and the issue of notification under S. 3 of the State Management Act.

[5] To understand what is the cause of action on which the present suit is based, it is necessary to read the plaint as a whole. To begin with, the plaint recites the action taken by the Government under the Bihar Private Forest Act of 1948 and its predecessor, the Bihar Forests Act of 1946; notice was issued under the earlier Act on 17th July 1946, and was renewed under the 1948 Act, and the management of the plaintiff's private forests was taken over under the later notification. In this connection, an agreement entered into between the Government of Bihar and the plaintiff in December 1947 relating to the plaintiff's rights in the forests is said to have been cancelled. The plaint urges that the plaintiff's status and legal character as a landlord of Bihar has been seriously denied, endangered and invaded by these two events. The plaint then goes on to allege a definite intention on the part of the defendant to make "further invasion of and encroachment upon" the rights of the plaintiff, and mentions as a means to this end the Zamindari Abolition Act and the State Management Act. It sums up all these events as being an attempt to deprive the plaintiff of his rights "step by step by different pieces of planned legislation" and asserts that the defendant

> "has unfairly, illegally and by various pieces of *ultra vires* legislation deprived the plaintiff of some of his age-old legitimate rights, such as rights to possess and manage his own property or portions thereof, and intends further to deprive him of his rights to his estate along various lines by various steps, both executive and legislative."

Attacking the legislation mentioned by him as *ultra vires* on various grounds, he asks for relief, stating the cause of action specifically to be 17th July 1946, when the first notification under the Forest Act of 1946 was issued, 6th July 1949, when the Zamindari Abolition Act received assent and 26th November 1949, when the notification under S. 3, State Management Act was published in the Bihar Gazette. It is further stated that the cause of action is "a continuing one in this estate, further action or illegal appropriation being in contemplation."

[6] Let us compare this now with the notice which is in two parts, the first part being the notice proper, and the second a draft plaint which was sent along with the notice. The notice tells the Government that it has "illegally denied, invaded and thrown clouds" on the status and rights of the plaintiff and intends

> "further to invade and attack and deny them with *ultra vires* pieces of legislation, being the Bihar Private Forests Act and the intended Bihar Abolition of Zamindaris Act."

It speaks of 17th July 1946, as the date when the cause of action accrued, but refers further to subsequent action taken under the 1948 Act relating to private forests, and adds that the cause of action is "a continuing one in this case, further action for illegal appropriation being in contemplation". The reliefs mentioned in the notice include (1) a declaration that "the intended Bihar State Abolition of Zamindaris Act and other Acts of the same nature or tenor" are *ultra vires*, (2) a declaration that certain specific provisions of "the various Acts or would be Acts which are hereinbefore mentioned" are *ultra vires*, and (3) an injunction against Government restraining it from enforcing "any of the Acts or proposed Acts or any provision or provisions thereof". The draft plaint is on the same line and corresponds substantially to the plaint which forms the basis of this suit, except as regards the reference to the State Management Act which came into being after the notice under S. 80 was given and as to the giving of assent to the Zamindari Abolition Act which also occurred subsequently to the giving of the notice. In para. 23 the draft plaint speaks of a definite intentention on the part of the Provincial Government "to throw clouds upon, to interfere with, to invade and even to annihilate" the right, title and interest of the plaintiff and his status and legal character as a landlord. It characterises the cause of action as "a continuing one in this case, further action for illegal appropriation being in contemplation" and includes among the reliefs an injunction against the enforcement of "the Acts or proposed Acts or any provision or provisions thereof."

[7] The documents, therefore, support the first answer which is given on behalf of the plaintiff-respondent to the Advocate-General's first contention, that the plaintiff, by his notice, warned Government that he was attacking the validity of the whole procedure by which he was, bit by bit, being deprived of his rights. The argument is that the cause of action on which the plaintiff relies is not an individual Act, but the whole course of conduct of the Government directed to this end. The suit, it is urged, is in the nature of a bill *quia timet*, and the plaintiff's right of action arose as soon as the threat to his rights became imminent [Story on Equity, Edn. 3, Chap. 20, Woodroffe on Injunctions, Edn. 5, p. 15, and *Shankar* v. *H. E. A. Cotton*,

40 C. L. J. 515 : (A. I. R. (12) 1925 Cal. 373).] It is pointed out that in the notice and the draft plaint the plaintiff specified the particular acts on which he relied, so far as those acts were then complete, and he included by a general reference the subsequent action that might be taken in pursuance of the purpose there complained of. The inclusion in his plaint of such subsequent action is, it is urged, justified in the circumstances, and reliance is placed for this contention on *Chandulal Vadilal* v. *Government of the Province of Bombay*, A. I. R. (30) 1943 Bom. 138 : (I. L. R. (1943) Bom. 128). In a suit of this kind, learned counsel urges, the notice given ought not to be construed with great strictness, its object being merely to inform the defendant substantially of the ground of the complaint (*Jones* v. *Bird*, (1822) 106 E. R. 1397: (5 B. & Ald. 837).) The object of the notice under S. 80, counsel argues, is to give the defendant an opportunity of considering his attitude and to give him a chance of making amends. Here, it is said, the notice has sufficiently informed the defendant of the nature and particulars of the plaintiff's complaint, and there has been a substantial compliance with S. 80.

[8] Secondly, it is argued in reply to the first contention of the learned Advocate-General that, even supposing it to be found that the absence of mention of the State Management Act is a defect affecting the validity of the notice under S. 80, it should be held in the circumstances of the present case that the service of notice under S. 80 has been waived. Our attention has been drawn to *Vellayan Chettiar* v. *Government of the Province of Madras*, 74 I. A. 223 : (A. I. R. (34) 1947 P. C. 197) as an authority that the mandatory nature of S. 80 is not a bar to such a waiver. It is pointed out that the State Management Act came into force on 15th November 1949, and that the notice under S. 3 was issued on the very next day, and that under the definition of the date of commencement of management (S. 2, cl. (b)) management would commence and the plaintiff would be deprived of his rights, within one month from that date. The contention is that when the Provincial Government, knowing that a notice under S. 80 requires a period of two months took action to give effect to the State Management Act, so that within a little over a month of the Act's coming into operation the management of the plaintiff's estate would commence and he would be deprived of his rights, it must be held to have waived its right to notice under S. 80.

[9] Learned counsel's answer to the second contention of the learned Advocate-General is contained in what I have said above about the suit being of the nature of a bill *quia timet*. A suit of this kind, it is said, does not require a completed act in order to give the plaintiff a right of relief. He is entitled to protection from a threatened act which, if completed, would give him a right of action: *Emperor of Austria* v. *Day*, (1861) 45 E. R. 861 : (30 L. J. Ch. 690); *Mulji Haridas* v. *Ibrahim Rahimtulla*, 56 Bom. 251 : (A. I. R. (19) 1932 Bom. 166) referred to by the learned Advocate-General was decided on its own peculiar facts. What was impugned there was not an Act of the Legislature, but merely a Bill proposed to be introduced in the Legislature, and an injunction was sought to prevent its introduction. Beaumont C. J. as he then was, pointed out that the Bill might not be passed in that form, and observed that it would be perfectly futile for the Court to declare that in the form in which it was proposed to be introduced it was *ultra vires*. *Kesoram Poddar & Co.* v. *Secy. of State*, 54 Cal. 969 : (A. I. R. (15) 1928 Cal. 74) is also distinguishable on the facts. There the suit was based on an alleged breach of contract. Chotzner J., held that the suit was barred, more than three years having elapsed between the breach and the institution of the suit. On an alternative case suggested on behalf of the plaintiff, his Lordship observed that on the case suggested there would be no breach at all, and so the cause of action for a suit would not yet have arisen.

[10] The answer to the third contention is also contained in the above argument, the contention being that what the learned Advocate General speaks of as new-causes of action not covered by the notice are merely individual facts in continuation of the cause of action stated in the notice, which facts have come into existence since the notice was given and can, therefore, legitimately be included in the plaint.

[11] Having given my careful consideration to the above contentions, I am satisfied that there is a fair case to be considered at the trial, and that the injunction granted by the Subordinate Judge is justified.

[12] On the above grounds, I would dismiss the appeal, but in the circumstances of the case, I consider it fair that the parties should bear their own costs in this Court.

[13] **Jamuar J.**—I agree. Service of notice as required under S. 80, Civil P. C. is mandatory. That a notice under that section has been served upon the defendant, the Province of Bihar, is common ground. The matter for enquiry is whether that notice is in sufficient compliance of the law; and, alternatively, whether in the particular circumstances of this case, the defendant can be said to have waived the right to

receive such a notice: there is no inconsistency between the propositions that the provisions of S. 80 of the Code are mandatory, and must be enforced by the Court and that they may be waived by the authority for whose benefit they are provided, and it is accordingly competent for the defendant in a suit to which S. 80 applies to waive his right to a proper notice *vide Vellayan Chettiar* v. *Government of the Province of Madras*, 74 I. A. 223 : (A. I. R. (34) 1947 P. C. 197). These are fair questions to be more properly determined at the hearing of the suit. For all these reasons, it is only right that the order of injunction passed by the learned Subordinate Judge ought to continue pending decision in the main suit.

D.R.R. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 370 *[C. N. 99.]*

REUBEN AND JAMUAR JJ.

Jogesh Prasad Singh and others—Appellants v. *Ramchandar Prasad Singh and others—Respondents.*

A. F. O. D. No. 129 of 1946, D/- 23-3-1950, from decision of Sub-J., Gaya, D/- 15-4-1946.

(a) Registration Act (1908), Section 35 — Execution — Admission of — Signing blank paper.

Execution consists in signing a document written out and read over and understood, and does not consist of merely signing a name upon a blank sheet of paper. To be executed a document must be in existence; where there is no document in existence there cannot be execution. Thus, where an executant clearly says that he signed on blank paper and that the document which he had authorised is not the document which he contemplated, the statement is a denial, not an admission, of execution: A. I. R. (3) 1916 Pat. 206, *Rel. on*; 6 C. W. N. 329, *Disting.* [Para 5]

Annotation: ('49 Com.) Reg. Act, S. 35 N. 4 Pt. 2.

(b) Registration Act (1908), Section 77—Suit for registration—Scope of inquiry.

In a suit under S. 77, the Court is only concerned with the genuineness of the document sought to be registered, that is, whether the document is executed by the person by whom it is alleged to be executed and not its validity: A. I. R. (33) 1946 Pat. 62, *Rel. on.* [Para 6]

Annotation: ('49-Com.) Reg. Act. S. 77 N. 14 Pt. 3.

(c) Registration Act (1908), Section 77— Suit for registration—Onus of proof— Evidence Act (1872), Ss. 101-103.

It is true that in a suit under Section 77, the initial onus is on the person who alleges that the document was executed by the persons whose names appear thereon as the executants. But where these persons admit their endorsements and allege that they made those endorsements on blank paper the onus is very easily shifted. [Para 8]

(d) Registration Act (1908), Section 35— Execution—Admission — Non-payment of consideration — Effect.

Whether the money was paid or not is immaterial so far as the due execution of the document is concerned. Whether the document so executed is legally operative or not and whether the consideration for it has been paid or not, are matters which are open to contest in a regularly constituted proceeding under the provisos to S. 92, Evidence Act. [Para 16]

Annotation: ('49-Com.) Reg. Act, S. 35 N. 2 pt 10.

Raj Kishore Prasad, Lakshmi Narayan Sinha and C. N. Singh—for Appellants.

Lal Narayan Sinha and Lakshman Saran Sinha—for Respondents.

Reuben J.—This is an appeal by the defendants first party against a decision of the Subordinate Judge of Gaya decreeing a suit under S. 77, Registration Act.

[2] The suit was brought for the compulsory registration of a sale-deed purporting to have been executed on 5th August 1943 by the defendants first party in favour of the plaintiffs transferring to them certain *milkiat* property in village Shamsarnagar, *pargana* Arwal, *thana* Daddnagar for a consideration of Rs. 64,000. The document recites that out of this amount Rs. 32,000 was received in cash and the balance was left with the purchasers for the redemption of encumbrances on the suit property. The document is said to have been executed at Gaya, but, as the defendants had some business at Jehanabad, and as there was a rush of work in the registration office at Gaya on the day when the document was executed, arrangements were made between the parties that the document would be registered at Aurangabad within the jurisdiction of which sub-registry office the property lay. When the plaintiffs, however, went to Aurangabad for the purpose, the executants did not turn up and the document could not be registered. Then, in proceedings for compulsory registration the defendants first party denied execution alleging that the endorsements of execution appearing on the document were made by them on blank sheets of paper for the execution of a sale-deed in favour of some other persons, and that the deed of sale under consideration was fraudulently engrossed upon these papers. Registration being refused, the present suit was filed with the result aforesaid.

[3] The defence is the defence that was taken before the Registrar. It is stated that through one Jaydeo Singh the defendants first party negotiated for the sale of the property to the defendants second party, and that Jaydeo Singh, having obtained the signed blank papers from the defendants first party, fraudulently got the deed in favour of the plaintiffs engrossed thereupon. According to the defendants, at the time when the sale-deed in question is said to have been executed at Gaya, Jogesh Prasad Singh, defendant 1, was actually ill at Patna and was being treated as an out-patient at the Patna General Hospital.

[4] The learned Subordinate Judge has disbelived the defence version of the facts and has accepted the sale-deed in suit as duly executed.

[5] The first point which arises in the case is the effect of the defence set up by the appellants. Our attention has been drawn to the decision in *David Yule* v. *Ram Khelawan*, 6 C. W. N. 329, where an admission of an endorsement of execution on blank sheets of paper on which the deed was said to have been subsequently engrossed was taken to be an admission of execution sufficient for the purposes of registration. On behalf of the appellants, we have on the other hand, been referred to *Ram Lakhan Singh* v. *Jog Singh*, 12 P. L. T. 233: (A. I. R. (18) 1931 Pat. 219) as to the meaning of the term "execution" of a document. It is unnecessary to discuss the plaint at length as it is covered by the decision of a Division Bench of this Court in *Ebadut Ali* v. *Muhammad Fareed*, A. I. R. (3) 1916 Pat. 206 : (35 I. C. 56) which is directly in point. Their Lordships observed:

> "In our view, execution consists in signing a document written out and read over and understood, and does not consist of merely signing a name upon a blank sheet of paper. To be executed a document must be in existence; where there is no document in existence, there cannot be execution . . . . . Where an executant clearly says that he signed on blank paper and that the document which he had authorised is not the document which he contemplated, the statement is a denial not an admission, of execution".

Their Lordships distinguished the case of David Yule (*ante*) which was clearly a case where their Lordships' observation as to the sufficiency of material for the registration of the document was merely *obiter*.

[6] The next point is the scpoe of a suit under S. 77. It is now well settled that in such a suit the Court is concerned with the genuineness of the deed and not its validity : *Kanhaya Lal* v. *Sardar Singh*, 29 ALL. 284: (4 A. L. J. 171); *Balambal Amal* v. *Arunachala Chetti*, 18 Mad. 255 and *Raj Lakhi Ghose* v. *Debendra Chandra*, 24 Cal. 668: (1 C. W. N. 444). In the words of Fazl Ali, C. J.

> "the Court is only concerned with the genuinoness of the document sought to be regiatered, that is, whether the document is executed by the person by whom it is alleged to be executed and not its validity" *Jhaman* v. *Amrit*, 24 Pat. 325: (A. I. R (33) 1946 Pat. 62.)

We have, therefore to see whether the document before us is a document which was executed by the defendants first party as alleged.

[7] The finding on the facts is challenged on three grounds *firstly* that the onus of proof was on the plaintiffs but the case was decided by the learned Subordinate Judge mainly on a consideration of the defence evidence, *secondly* that the subordinate Judge did not give sufficient weight to the inconsistency of his main finding with his finding on the question of the passing of consideration, namely, that Rs. 32,000 was not paid in cash as allaged, and *thirdly* that there are various improbabilities in the plaintiffs' version.

[8] As regards the first point, I would refer to the observation of their Lordships in *Ramlakhan Singh* v. *Gog Singh*, (12 P. L. T. 233: A. I. R. (18) 1931 Pat. 219) *ante* which was cited on behalf of the appellants themselves. It is true that in a case of this sort the initial onus is on the person who alleges that the document was executed by the persons whose names appear thereon as the executants. But where these persons admit their endorsements and allege that they made these endorsements on blank paper the onus is very easily shifted. It is not correct to say that the Subordinate Judge decided the case merely on a consideration of the defence evidence. Naturally, he concentrated on an examination of that evidence to see if there was any truth in it. He found it unbelievable and the effect of his finding was to make it easier for him to accept the plaintiff's case. In accepting the evidence of the plaintiffs, he placed particular reliance on Sarju Sing and Sitaram Singh, pleaders and the pleader's clerk Lachhandeo Singh, who was the scribe of the document in question.

[9] As regards the second point, it is not correct that there is a finding that Rs. 32,000 was not paid in cash. The learned Subordinate Judge considered that a finding on this point was not material in a suit under S. 77. It was merely in passing that he remarked that he was not prepared to believe this story. He has, however, given no reason for this opinion. The fact is that the parties do not appear to have regarded the establishment of the payment in question as essential in this case, and, although several witnesses were examined on behalf of the plaintiffs who would in the ordinary course have seen the alleged payment, only two of them spoke of it in examination-in-chief, namely- Sheonandan Singh and Chetman Pande. The real point for consideration was the genuineness of the sale-deed, its validity and the passing of consideration were immaterial. In these circumstances, no weight can attach to the opinion expressed by the learned Subordinate Judge and certainly it cannot be made the basis of an argument that it is extremely unlikely that without receiving this money the defendants first party would execute the document in question and allow it to pass into the hands of the plaintiffs.

[10] The most important evidence on behalf of the plaintiffs is the document itself. It is written on as many as fourteen separate sheets of

paper. The first three pages bear the endorsements respectively of the three alleged executants, each of which endorsements says :

"…. executed the sale-deed and received the sum of Rs. 64,000 and read the contents of the sale deed and understood the same, by my own pen. 5-8-43."

On the remaining eleven pages we have the signature of Jogesh Prasad Singh, who is the father of the other two alleged executants. In appearance, there is nothing whatever to suggest that these endorsements and the other signatures were not made on the document in due course, and the genuineness of the endorsements and of signatures — in the sense I mean that they are written by the persons by whom they purport to have been written — is not denied, but we are asked to believe that at the request of Jaydeo Singh these endorsements and signatures were made on blank sheets of paper. This is a story which on the face of it is difficult to believe. [His Lordship then discussed the evidence both for the plaintiff and the defendants and proceeded as follows:]

[11] On a review of all the evidence, I am not able to see any reason for thinking that the learned Subordinate Judge was wrong in his conclusion that the sale-deed in question was legally and validly executed by the defendants first party as alleged.

[12] It has been urged before us that, even so, the execution must be taken to be incomplete because on the terms of the document the payment of Rs. 32,000 in cash was a condition precedent. Our attention has not been drawn to any provision in the document which makes it a condition precedent to the execution. Whether the money was paid or not was immaterial so far as the due execution of the document was concerned. Whether the document so executed is legally operative or not, and, whether the consideration for it has been paid or not, are matters which are open to contest in a regularly constituted proceeding under the provisos to S. 92, Evidence Act.

[13] For the the reasons given by me above, I consider that this appeal has no merits and must be dismissed with costs.

[14] **Jamuar J.**—I agree.

D.R.R. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 372 *[C. N. 100.]*

DAS J.

Wazir Mahton and others — Applicants v. *Badri Mahton and another— Respondents.*

Criminal Ref. 122 of 1949, D/- 3-2-1950, reference made by S. J., Hazaribagh, D/- 5-12-1949.

(a) Criminal P. C. (1898), Ss. 145 and 537—Non-compliance with provisions of S. 145.

The mere failure to state the reasons why the Magistrate was satisfied that there was an apprehension of a breach of the peace is nothing more than an irregularity not sufficient to render subsequent proceedings void. [Para 5]

Failure to draw up a formal preliminary order in accordance with the provisions of S. 145 (1), is nothing more than a mere irregularity not sufficient to vitiate the subsequent proceedings where no prejudice is caused. [Para 8]

The failure to serve the order in accordance with S. 145 (3) is a mere irregularity. [Para 9]

Annotation : ('49-Com.) Criminal P. C., S. 145, N. 15.

(b) Criminal P. C. (1898), S. 145—Parties.

A person who has no claim to the lands in dispute is not a necessary party to the proceedings under S. 145. [Para 10]

Annotation : ('49-Com.) Criminal P. C., S. 145, N. 19.

T. K. Prasad in support of the reference.

Bajrang Sahay against the reference.

Order.—This is a reference by the learned Sessions Judge of Hazaribagh recommending that an order dated 13th August 1949 made by a Magistrate exercising first class powers at Hazaribagh in a proceeding under S. 145, Criminal P. C., be set aside. By the order in question the learned Magistrate found the first party to the proceeding in possession of the lands in dispute. He declared the possession of the first party and forbade the members of the second party from interfering with that possession until evicted in due course of law.

[2] I have heard Mr. T. K. Prasad appearing for the members of the second party in support of the reference. Mr. Bajrang Sahay has been heard against the reference.

[3] Before I state the reasons which the learned Sessions Judge has given in support of his recommendation, I should state the facts relevant to the points now in issue. The facts are these. On 19th October 1948, two persons, Badri Mahton and Ramkumar Mahton, first party in the subsequent proceeding under S. 145, Criminal P. C., filed a petition regarding certain lands detailed in Sch. A, appended to the petition. They alleged that the lands were the royaiti lands of one Lalo Mahton who died issueless. On his death Mt. Sanichari, widow of Puna Mahton, who was the brother of Lalo Mahton, and Raghu minor son of Puna Mahton, deceased, came in possession of the lands. Badri Mahton and Ramkumar Mahton claimed that they had purchased the lands by a registered sale-deed, dated 15th June 1936, from Mt. Sanichari for self and acting as guardian of Raghu. They further alleged that certain persons, who subsequently were made members of the second party to the proceeding, claiming themselves to be agnates of Lalo Mahton, were

likely to disturb their peaceful possession. They referred to certain acts which gave rise to an apprehension of a breach of the peace. This petition was sent to the local police for an enquiry and report. On 25th October 1948, the local Sub-Inspector of police submitted a report in which he stated that there was an immediate apprehension of a breach of the peace with regard to the lands and that actually the contending parties had gone to the lands on 23rd October 1948, and a breach of the peace was averted with difficulty. The Sub-Inspector of police mentioned the names of four persons including Badri Mahton and Ramkumar Mahton as members of the first party; and mentioned the names of thirteen persons as members of the second party. Amongst the members of the second party, two names are important to remember. They are Barhan Mahton and Genda Mahton, who claimed that their grandfather and the grandfather of Lalo Mahton were brothers. They further claimed that they were the nearest *gotias* and had succeeded to the estate of Lalo Mahton, and were in possession of the disputed lands. On receipt of the police report, the learned Subdivisional Magistrate drew up proceedings under S. 144, Criminal P. C. against both parties and restrained both parties from going upon the lands. The parties showed cause against the order under S. 144 and on 8th December 1948, the learned Sub-divisional Magistrate heard the parties. On that date he passed the following order:

> "Heard both parties. This case should be decided on evidence. Draw up proceedings under S. 145, Criminal P. C. against both parties asking them to show cause, if any, by 23rd December 1948. The land is attached."

On 23rd December 1948, and succeeding dates, the parties took time. Ultimately, both parties filed written statements, except some members of the second party to whom I shall presently make a reference, of their respective claims as regards the fact of actual possession of the lands in dispute. The case was then transferred to several Magistrates one after another and ultimately came to be dealt with by Mr. B. Ojha, a Magistrate exercising first class powers at Hazaribagh. He heard the evidence of both parties and the arguments of their lawyers. On 13th August 1949, he passed the order to which I have already made a reference.

[4] Now I come to the reasons which the learned Sessions Judge has given for his recommendation. The reasons are three in number: (1) that the learned Sub-divisional Magistrate directing the initiation of a proceeding under 145, Criminal P. C. on 8th December 1948, did not state that he was satisfied that there was a bona fide dispute with regard to the possession of immovable property, or that there was a likelihood of a breach of the peace: (2) that the learned Subdivisional Magistrate did not draw up a preliminary order, as contemplated by sub-s. (1) of S. 145 and (3) that there was a failure to comply with the provisions of sub-s. (3) of S. 145.

[5] As to the first reason, it seems clear to me that on the materials, which the Sub-divisional Magistrate had before him on 8th December 1948, he was satisfied that there was an immediate apprehension of a breach of the peace, and the dispute which gave rise to that apprehension was one which could be more satisfactorily dealt with in a proceeding under S. 145, Criminal P. C. The learned Sub-divisional Magistrate had before him not merely the petition of Badri Mahton and Ramkumar Mahton but also the report of the local Sub-Inspector of Police, dated 25th October 1948. The mere failure to state the reasons why he was satisfied that there was an apprehension of a breach of the peace was nothing more than an irregularity, in view of the materials which the learned Sub-Divisional Magistrate had before him and the order which he passed on 8th December 1948, which I have quoted in extenso.

[6] The second reason is more serious and, I must confess, has caused some difficuties to me. It appears that though the learned Sub-divisional Magistrate directed on 8th December 1948, that a proceeding under S. 145 be drawn up against both parties, no preliminary order, as contemplated by S. 145 (1), Criminal P. C., was formally drawn up. The learned Magistrate has pointed out that there are some marginal office notes against the order of 8th December 1948, which seem to indicate that some notices, presumably under S. 145 (1), Criminal P. C., were issued against the parties. On the materials in the record one cannot be certain however, that such notices were actually issued. In any view, it is clear that no preliminary order under S. 145 (1) is on the record. Therefore, the question is whether, in the circumstances of this case, the absence of a preliminary order under S. 145 (1), Criminal P. C. vitiates the entire proceedings which followed. I may state here that the parties filed written statements; they gave evidence; their lawyers argued the case before the learned Magistrate; and no objection was ever raised as to the absence of a preliminary order under sub-s. (1) of S. 145, Criminal P. C. Mr. T. K. Prasad appearing in support of the reference has very strenuously contended before me that the failure to draw up a preliminary order under sub s. (1) of S. 145, Criminal P. C. amounted to an illegality which vitiated the entire proceedings that followed. He relied particularly on two decisions, *Mariasusai Udayan* v. *Muhammad*

Azzeezudden, A. I. R. (23) 1936 Mad. 824 : (37 Cr. L. J. 953) and *Jamuna Prasad* v. *Mohan Koeri*, 2 P. L. T. 724 : (A. I. R. (8) 1921 Pat. 353: 23 Cr. L. J. 64). Undoubtedly these two decisions contain observations which support the contention of Mr. T. K. Prasad. Mr. Bajrang Sahay arguing against the reference has referred to other decisions in which it was held that the failure to make a preliminary order in strict compliance with the provisions of sub-s. (1) of S. 145, Criminal P. C. was a mere irregularity, which could be cured under S. 537 of the Code. He has placed great reliance on the Full Bench decision of the Allahabad High Court in *Kapoor Chand* v. *Suraj Prasad*, A. I. R. (20) 1933 ALL. 261: (34 Cr. L. J. 414 F. B.). That was a case in which a notice was issued which professed to be one under S. 145, though it did not comply with the provisions of sub-s. (1) of S. 145. The argument advanced was that as the Magistrate did not proceed in accordance with the law and as he did not strictly comply with the provisions of S. 145, he had no jurisdiction in the matter. Their Lordships dealt with the argument in the following way :

> "Now we have to consider whether the defects in the Magistrate's order deprived him of jurisdiction to proceed with the case. In other words, we have to see whether because the Magistrate did not strictly comply with the letter of the law in formulating his order under S. 145 (1), he had no jurisdiction to proceed with the case. On this point a large number of cases have been cited and as most of the cases have been decided by learned Judges of this Court, sitting singly, we do not propose to examine each and every one of them. We may also point out that many of these judgments do not consider the effect of S. 537 upon defects in the order passed under S. 145 (1) . . . . .
>
> Now, if we read S. 145, in the light afforded by the sections quoted above, we see that if the Magistrate is satisfied from a police report or other information that a dispute likely to cause a breach of the peace exists, he is seized of jurisdiction to take action and he is empowered by the Code to act in a particular way. If this view be correct, the jurisdiction of the Magistrate arises from the fact that he has received certain information and that he is satisfied as to the truth of that information. The jurisdiction of the Magistrate does not depend on how he proceeds. There are two things; One is the authority conferred on him to act and the other is how he is to act. If he has jurisdiction, he is not deprived of jurisdiction merely because his procedure is erroneous or defective. If this view be right, the omission on the part of the Magistrate to follow certain directions contained in the Code, although some of these directions may be more important than others, cannot be said to deprive him of jurisdiction."

[7] If I may say so with respect, I agree with the observations made above. The other decision on which Mr. Bajrang Sahay relies goes even further. In *Ratan* v. *Tika*, A. I. R. (26) 1939 Lah. 233 : (40 Cr. L. J. 784) it was observed that defects, such as failure to make an initial order as required by sub-s. (1) of S. 145, failure to serve notice on opposite party according to law or to affix copy of order of Magistrate to some conspicuous place at or near the subject of dispute, were defects which S. 537 could cure. They are not defects which necessarily vitiate the proceedings. This question of the distinction between an irregularity and illegality has caused difficulties and given rise to decisions all of which cannot be reconciled. Fortunately, however, the matter has now, I think been clarified by a decision of their Lordships of the Judicial Committee in *Pulukuri Kottaya* v. *Emperor*, A. I. R. (34) 1947 P. C. 67 : (48 Cr. L. J. 533). Their Lordships were dealing with a case in which there was a breach of the proviso to S. 162, Criminal P. C. Their Lordships stated as follows :

> "There are, no doubt, authorities in India which lend some support to Mr. Pritt's contention, and reference may be made to *Tirkha* v. *Nanak*, 49 All. 475 ; (A. I. R. (14) 1927 All. 350 : 28 Cr. L. J. 291) in which the Court expressed the view that S. 537, Criminal P. C., applied only to errors of procedure arising out of mere inadvertence, and not to cases of disregard of, or disobedience to, mandatory provisions of the Code and to *In re Maduramuthu Vannian*, 45 Mad. 820 : (A.I.R (9) 1922 Mad. 512 : 24 Cr. L. J. 124), in which the view was expressed that any failure to examine the accused under S. 342, Criminal P. C., was fatal to the validity of the trial and could not be cured under S. 537. In their Lordships' opinion this argument is based on too narrow a view of the operation of S. 537. When a trial is conducted in a manner different from that prescribed by the Code as in *Subramania Iyer* v. *King-Emperor*, 28 I. A. 257 : (25 Mad. 61 P. C.), the trial is bad, and no question of curing an irregularity arises; but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured under S. 537, and nonetheless so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code. The distinction drawn in many of the cases in India between an illegality and an irregularity is one of degree rather than of kind. This view finds support in the decision of their Lordships' Board in *Abdul Rahman* v. *Emperor*, 5 Rang. 53 : (A. I. R (14) 1927 P. C. 44 : 28 Cr. L J. 259), where failure to comply with S. 360, Criminal P. C., was held to be cured by Ss 535 and 537."

[8] In my opinion, the failure in the present case to draw up a formal preliminary order in accordance with the provisions of S. 145 (1), Criminal P. C., was nothing more than a mere irregulartiy. I realise that in certain cases the irregularity may go to such a degree that it will vitiate the subsequent proceedings; it may also cause great prejudice in some cases; but in the case before me no question of prejudice arises. The parties knew what the dispute was about; they knew what the disputed lands were; they had no difficulty in filing written statements of their respective claims; they gave evidence without any difficulty; their lawyers argued the case without any difficulty; no objection was ever raised by any of the parties to the absence of a

formal order under sub-s. (1) of S. 145. As a matter of fact, in the proceeding under S. 144 full details were given, and the parties had no difficulty in knowing what the dispute was about. In view of these circumstances, I am unable to agree with the learned Sessions Judge that the failure to draw up a formal order under S. 145 (1), Criminal P. C., was such as to vitiate the subsequent proceedings.

[9] As to the failure to serve the order in accordance with sub-s. (3) of S. 145, Criminal P. C., there can be no doubt that even on the decisions on which reliance has been placed by Mr. T. K. Prasad, the failure was a mere irregularity which could be cured under S. 537 of the Code.

[10] Lastly, one of the points referred to by the learned Sessions Judge is that some members of the second party did not appear, and the case was heard in their absence. The learned Magistrate while passing the final order made it clear that the order would have no effect as against the persons who were not parties to the proceeding. Apart, however, from that, it seems that except Barhan Mahton and Genda Mahton, no other persons of the second party had any claim to the raiyati lands of Lalo Mahton. The proceeding under S. 144 related also to other lands, but the learned Magistrate made it quite clear that the proceeding under S. 145, Criminal P. C., related only to the raiyati lands of Lalo Mahton. That being the position, no other members of the second party, except Barhan Mahton and Genda Mahton, were necessary parties to the proceeding under S. 145, Criminal P. C. These two persons filed written statements. They led evidence and their arguments were heard before the learned Magistrate passed the final order. I do not think it is now open to them to say that the learned Magistrate had no jurisdiction to initiate a proceeding under S. 145, Criminal P. C.

[11] For the reasons given above, I do not think there is any merit in the reference. The reference is accordingly discharged.

V.B.B. *Reference discharged.*

A. I. R. (37) 1950 Patna 375 *[C. N. 101]*

SHEARER J.

Bundi Singh — Appellant v. *Jaiprakash Singh and others—Respondents.*

A. F. A. D. No. 972 of 1948, D/- 2-2-1950, from decision of Addl. Sub-Judge, Monghyr, D/- 5-2-1948.

Tenancy Laws—Bihar Tenancy Act (VIII [8] of 1885), S. 153B (2)—Procedure under — Non-compliance with, is merely an irregularity rendering the sale voidable but not void. [Para 2]

K. K. Sinha and Umesh Chandra Sharma — for Appellant.

R. K. Verma and Ugrah Singh—for Respondents.

Judgment. — This second appeal arises out of a suit to set aside an *ex parte* decree passed in a rent suit and to recover possession of the occupancy holding which was sold in execution of that decree. The sale took place in 1938, and the suit was instituted in 1941. The occupancy holding comprised an area of 2.21 acres and was sold for the wholly inadequate price of Rs. 21-13-0. A portion of the holding was in the possession of a mortgagee, and the plaintiff in the suit asserted that this mortgagee, or a relation of his, and the co-sharer landlord who obtained the decree had been parties to a conspiracy. The suit has been decreed by both the Courts below and the defendant has appealed. The principles on which suits of this kind are to be dealt with have been laid down by Kulwant Sahai and Allanson JJ. in *Ramchandra Prasad* v. *Firm Parthu Lal Ramratan*, 6 Pat. 458 : (A. I. R. (14) 1927 Pat. 183). Mr. K. K. Sinha, for the appellants, complains that the Courts below have not kept these principles in mind and have misplaced the burden of proof. So far as the judgment of the trial Court is concerned, this criticism is well-grounded. The learned Munsif began by detailing the various circumstances from which the plaintiff asked him to infer that a fraud had been committed and, having come to the conclusion that such an inference could and ought to be drawn, observed :

> "Now fraud having been established, the onus of proving the service of summons and the processes in the execution proceeding lies heavily on the defendant.'

I am not, however, satisfied that the learned Subordinate Judge fell into a similar error. One of the circumstances relied on as going to establish fraud was that the cosharer landlord, who was the plaintiff in the rent suit, had claimed a larger sum than was actually due to him. The learned Subordinate Judge after expressing the opinion that this cosharer landlord, who was a recent purchaser, might well have been under a *bona fide* belief that the interest of his vendor in the estate was what his vendor had purported to convey to him, and not, as in the event it turned out, a lesser interest, said :

> "It is settled principle of law that falsity or exaggeration of claim is no ground to set aside a decree on ground of fraud. It may at best be a piece of evidence to prove the motive for filing a false case. It may go a great way in establishing fraud if it be proved that the processes were not served on the defendants who were prevented by the plaintiff from appearing by tricks or misrepresentation. So let us see whether the processes in the aforesaid rent suit and the execution proceedings were duly served on the defendants or not."

[2] When this was pointed out to learned advocate for the appellant, Mr. K. K. Sinha said that the learned Subordinate Judge had nevertheless placed the onus of proof on the defendants and had not even considered the evi-

dence adduced by the plaintiff. It has, however, to be remembered that the record in the rent suit had been destroyed. So far, therefore, as the summons in the rent suit was concerned, there was, on the one side, the denial of the plaintiff that summons had been served on him, and, on the other, the evidence of servant of the defendant who said that he had been present and acted as identifier when it was served. In this situation, it was obvious that the lower appellate Court had to examine the rest of the evidence and the various circumstances of the case in order to ascertain whether the evidence of the plaintiff or the evidence of the servant of the defendant was corroborated. It appears that, subsequent to the taking out of a writ for delivery of possession, another rent suit was instituted against the plaintiff rent in it being claimed for a period subsequent to the date on which the writ for delivery of possession purports to have been served. This suit was withdrawn, the plaintiff in it explaining that it had been instituted through a mistake on the part of his *karpardaz*. The learned Subordinate Judge was unable to accept this explanation and was of opinion that the occupancy *raiyat* had continued in possession of the holding and had been unaware of the rent suit and the execution proceedings until they were brought to his notice by one Hashimuddin. It is true that the learned Subordinate Judge discussed at some considerable length the evidence adduced by the defendant to show that the processes in the execution proceeding had been duly served. It was, however, incumbent on the lower appellate Court to do so. Mr. K. K. Sinha, for the appellants, made a good deal of the circumstance that the learned Subordinate Judge would seem to have fallen into an error of record in supposing that notice under S. 158B (2) was not issued and also in supposing that the sale was a sale held without jurisdiction as the procedure laid down in S. 162A, Bihar Tenancy Act was not followed. It is now settled that an omission to comply with that procedure is merely an irregularity which renders the sale voidable but not void. These matters, however, are not very relevant. The lower appellate Court has found it as a fact that summons in the rent suit was not served and that the plaintiff in the present suit was unaware of the decree or the execution proceedings until immediately before this suit was instituted. From this alone it would, I think, have been permissible to infer fraud. There is, however, another circumstance on which reliance can be and was placed in the Courts below. Although the cosharer landlord in the rent suit may, as the learned Subordinate Judge assumed, have believed that he was the owner of a 4 annas interest, and not, as it turned out eventually, of a 2 annas 6 dams interest, in the estate, nevertheless, there is reason to suppose that the rent suit was instituted in order that the plaintiff in it might have some evidence with which to go to the Land Registration Deputy Collector and ask that his name be entered in register D as owing a 4 annas interest. Immediately after the rent suit was decreed an application to that effect was made and allowed and the other cosharer landlords, or some of them, had to institute a regular title suit. I can see no reason to interfere in second appeal. This appeal will accordingly be dismissed with costs.

V.R.B. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 376 [*C. N. 102.*]

SINHA AND RAI JJ.

Damari Rai and others — Defendants — Petitioners v. *Rampirit Ahir and another — —Plaintiffs—Opposite Party.*

Civil Revn. No. 4 of 1949, D/- 14-2-1950, against order of Addl. Sub-Judge, Arrah, D/- 20-9-1948.

Arbitration Act (1940), S. 33—Award filed subsequent to application under S. 33—Effect.

An application under S. 33 to challenge the validity of an award can be thrown out as not maintainable so long as the award is not filed before the Court but once it is produced in Court and the Court determines upon the validity of the award the proceedings cannot be treated as infructuous: A. I. R. (36) 1949 Cal. 350, *Rel. on.* [Para 3]

Annotation : ('46-Man.) Arbitration Act, S. 33 N. 1.

Kailash Ray and B. K. Sharma — for Petitioners.
A. B. N. Sinha — for Opposite Party.

Sinha J. — This is a defendants' application against an order, dated 20th September 1948, passed by the Additional Subordinate Judge of Arrah confirming that of the Additional Munsif of Buxar, dated 13th March 1948, setting aside an award given by an arbitrator appointed by the parties, out of Court.

[2] It appears that on 20th March 1946, the parties agreed to refer their differences to the arbitration of a single person. The arbitrator gave his award on 18th January 1947, apparently in favour of the defendant. On 31st July 1947, the opposite party purported to file a 'suit' to set aside the award on the ground of misconduct of the sole arbitrator. Both the Courts below have agreed in setting aside the award. Hence this application in revision by the defendants.

[3] It is not necessary, in this case, to go into the merits of the case of either party. The only point urged in support of the application is that the so-called 'suit' was not maintainable, or that, at any rate, it was premature. It appears that the award had not been filed in Court. It was filed during the pendency of the so-called

'suit' in the Court of the learned Munsif. At what exact stage it was filed does not appear from the record that is before us; but one thing is clear that the award was before the Court before the proceedings terminated in favour of the opposite party. The Courts have gone into evidence, and come to the conclusion that the award was vitiated by the misconduct of the arbitrator. But Mr. Kailash Ray, for the petitioners, has contended that, under S. 32, Arbitration Act, the suit was not maintainable. That would appear to be so. But the so-called suit was treated as an application under S. 33, Arbitration Act, and the parties appear to have proceeded on that footing. An application is maintainable under S. 33 of the Act to have the validity of an arbitration or an award determined by the Court. In this case, the Courts below have determined that the award was not valid. But Mr. Kailash Ray, relying upon the decision of a single Judge of the Bombay High Court in *Ratanji Virpal and Co.* v. *Bhirajlal Manilal*, I. L. R. (1942) Bom. 452 : (A.I.R. (29) 1942 Bom. 101) and on the decision of the Calcutta High Court in *Bengal Jute Mills Co. Ltd.* v. *Jewraj Heeralal*, I.L.R. (1943) 2 Cal. 392 : (A.I.R. (31) 1944 Cal. 304), has contended that the proceedings were entirely infructuous, inasmuch as there was no award before the Court when the application had been made. But the case more in point is that decided by S. R. Das J. of the Calcutta High Court in *I. G. H. Ariff* v. *Bengal Silk Mills Ltd.*, A.I.R. (36) 1949 Cal. 350 : (I. L. R. (1945) 2 Cal. 70) in which his Lordship has pointed out that once the award is produced in Court, even though it may not have been filed before the application was made, it will be deemed to have been made as an application to set aside the award. Treated as such, there, is no difficulty in holding that, when the award was produced in Court in the present case, the Court could entertain the opposite party's application to get the award set aside. Hence, it must be held that there is no substance in this technical objection that, when the application had been filed in Court, there being no award in Court, the same could be thrown out. The application could have been thrown out so long as there was no award in Court. But, during the pendency of the case in the Court of first instance, the award having been produced, it was there before the Court to be examined with a view to deciding as to whether the award should, or should not, be made a decree of the Court.

[4] As no other question of substance was raised before us, it is manifest that the orders passed by the Courts below are correct. This application must, therefore, be dismissed; but, in view of the fact that the applicants in the Court below themselves made the mistake, which has given a handle to the petitioners, there will be no order as to costs in this Court.

[5] **Rai J.** — I agree.

K.S. *Revision dismissed.*

A. I. R. (37) 1950 Patna 377 [*C. N. 103.*]

REUBEN AND JAMUAR JJ.

Awadh Bihari Singh and others — Appellants v. *Jadu Rai and others — Respondents.*

A. F. A. D. No, 633 of 1947, D/- 8-2-1950, against decision of 4th Addl. Sub-J., Arrah, D/- 16-1-1947.

(a) Tenancy Laws—Bihar Tenancy Act (VIII [8] of 1885), S. 188—Parties to suit for fair rent—Civil P. C. (1908), O. 1, R. 1.

In a suit for assessment of fair and equitable rent, it is not necessary to join other co-sharers as plaintiffs. It is sufficient if they are impleaded as party defendants. [Para 8]

Annotation : ('44 Com.) C. P. C., O. 1, R. 1, N. 7.

(b) Tenancy Laws—Bihar Tenancy Act (VIII [8] of 1885), S. 188—Tenant holding under two sets of landlords—Fair rent.

A tenant, holding under two co-sharer landlords and paying rent to one co-sharer landlord in respect of that landlord's interest, may be assessed to rent in respect of the interest of the other co-sharer landlord. Where a tenant holds under different sets of co-sharer landlords, each set can enter into a separate agreement with him as regards the rent payable to it so for as its share is concerned. [Para 11]

A. N. Sinha — for Appellants.
Gorakhnath Singh — for Respondents.

Jamuar J. — This appeal is by the defendants first party arising out of a suit brought for assessment of fair rent and compensation for use and occupation for a period of three years prior to the institution of the suit. The trial Court passed a decree assessing the rent of the land in suit at the rate of Rs. 5 per bigha and ordered that the plaintiffs shall be entitled to realise cess on this amount at the schedule rate. The plaintiffs were also held entitled to damages for use and occupation for the said period on the basis of that rental. The plaintiffs had impleaded the tenants as the defendants first party and his co-sharers as the defendant second party.

[2] Against the decree given by the trial Court, the defendants first party appealed to the District Judge of Arrah and the appeal was heard by the fourth Additional Subordinate Judge of Arrah, who by his judgment, dated 16th January 1947, dismissed the appeal. Hence this second appeal.

[3] The land in respect of which an assessment of fair rent was sought measures 20·28 acres appertaining to Khata No. 314, Khewat No. 1/28 of village Babhniaon. The share of the plaintiffs is to the extent of one-sixth, while the defendants second party are entitled to the remaining five-sixth. The lands have been recorded in the survey papers as occupancy lands of

Mt. Lakbraje Kuer, the predecessor-in-interest of the defendants first party. No rent is recorded for the land but it is entered that the land is "Kabil Lagan". The plaintiffs alleged that they had asked the defendants first party to get a fair rent assessed, but with no result. They, accordingly, instituted their suit claiming rent at the rate of Rs 10 per bigha as also, as already stated, for compensation for use and occupation at the same rate.

[4] The defendants second party did not contest the suit.

[5] The main defence of the defendants first party was that the lands in suit already bore rental at the rate of Re. 1 per bigha, and that, therefore, no fresh rental was assessable. They alleged that they had been paying rent at this rate all along to the defendants second party to the full knowledge of the plaintiffs and their ancestors. Their further defence was that even if new rental was assessable, a fair and equitable rent would be at the same rate, namely, Re. 1 per bigha.

[6] Both the Courts below have found that no rent has been assessed on the lands in suit so far as the plaintiffs are concerned. But that as the lands are entered in the survey records as "Kabil Lagan", they assessed a rent of Rs. 5 per bigha as being fair and equitable. They have further found that so far as the defendants second party are concerned, it has been shown by means of documents that they have been realising their proportionate share of the rent on the basis that the total rent is Rs. 37 besides cess. But it has been held that these documents are not binding on the plaintiffs.

[7] Mr. Sinha, who appeared for the appellants, argued two points in support of this appeal. It was contended, in the first place, that under S. 188, Bihar Tenancy Act, it was incumbent for the plaintiffs to join their other co-sharers as plaintiffs in the suit and that by their omission to do so the suit was not maintainable; and, in the second place, it was argued that the Courts below were in error in assessing rent at the rate of Rs. 5 per bigha so far as the plaintiffs were concerned for the reason that by so doing there will now henceforth be two rentals in respect of the same holding, namely, a rental payable to the defendants second party at the rate of Rs. 37 for the entire holding, that is to say, the rent payable to them would be five-sixth of Rs. 37, and that there would be another rental payable to the plaintiffs in respect of their one-sixth share at the rate of Rs. 5 per bigha, which would be against law.

[8] I do not think that either of the two contentions can succeed. The case of *Gour Sundar* v. *Krishna Kamini*, 54 C. L. J. 74 : (A. I. R. (19) 1932 Cal. 41) is in point. It was held therein that a suit to have fair and equitable rent assessed, is consistent with and arises out of the general law and is not one which the landlord is required or authorised to do under S. 188, Bengal Tenancy Act, with the result that in such a suit that section has no application. It is, therefore, unnecessary to join the other co-sharers as plaintiffs, but they should be made party defendants. Section 188, Bihar Tenancy Act, provides that where two or more persons are joint landlords, anything which the landlord is under this Act required or authorised to do must be done either by both or all those persons acting together, or by an agent authorised to act on behalf of both or all of them. Where a plaintiff brings a suit for fair and equitable assessment of rent, he is not doing anything which he is, under the Tenancy Act, "required or authorised to do" within the meaning of S. 188 of the Act. The other co-sharers having been impleaded, there is no defect in respect of the maintainability of the suit and there is no bar to the plaintiffs getting a decree.

[9] In the same case *Gour Sundar* v. *Krishna Kamini*, 54 C. L. J 74 : (A. I. R. (19) 1932 Cal. 41) there were two suits brought for assessment of fair and equitable rent and for recovery of damages for use and occupation of lands during a certain period as also for other reliefs. The entries in the record-of-rights showed that the tenant defendant paid certain amounts to the pro forma defendant as rent but no rent was shown as payable to the plaintiff, as is the case in the present suit out of which this appeal has arisen. The record-of-rights also contained a note that the tenancies forming the subject-matter of those suits were liable to be assessed with rent in respect of the shares of the co-sharers landlords, of whom the plaintiff was one. The plaintiff's claim was accordingly based upon the allegation that no rent had been settled as payable by the tenant defendant in those suits in respect of his share. The plaintiff obtained a decree. No authority was cited in support of the argument that the assessment of rent in respect of the plaintiffs' share would be against law. In my opinion, the Courts below have committed no illegality in giving a decree to the plaintiffs. In the circumstances, I see no justification for interference with the judgment and the decree passed by the Courts below.

[10] The appeal is, therefore, dismissed with costs.

[11] **Reuben J.** — I agree. *Gour Sundar* v. *Krishna Kamini*, 54 C. L. J. 74 : (A I R. (19) 1932 Cal. 41) is an authority that a tenant, holding under two co-sharer landlords and paying rent to one co-sharer landlord in respect of that

landlord's interest, may be assessed to rent in respect of the interest of the other co-sharer landlord vide also *Chiranjib Sen* v. *Mohendra Nath*, 32 C. W. N. 1238 : (A. I. R (16) 1929 Cal. 90). It was argued before us that, since one set of co-sharers is realising rent at the rate of one rupee a bigha, this must be taken to be the rate payable in respect of the entire holding. The two cases to which I have just referred are authorities to the contrary, since they contemplate that the co-sharer landlord in respect of whose share no rent has been agreed to between him and the tenant, may sue for an assessment of the rent payable to him. It is also well settled that where a tenant holds under different sets of co sharer landlords, each set can enter into a separate agreement with him as regards the rent payable to it so far as its share is concerned, vide *Jognesh Prokash* v. *Maniraddi*, 35 Cal. 417 Banerjee J. observed in *Hurry Churn* v. *Runjit Singh*, 1 C. W. N. 521 : (25 Cal. 917*n*) that tenancies of this class are not uncommon. Under the authority of *Jatindra Nath* v. *Prasanna Kumar*, 38 Cal 270 : (38 I. A. 1 P. C) the co-sharer landlords would still be joint landlords within the meaning of S. 188, Bihar Tenancy Act, but this is not an obstacle in the way of the plaintiffs, since a suit for assessment of rent is not governed by S. 188: *Partap Mahton* v. *Mt. Wazirunnisa*, 4 Pat. 604 : (A. I. R. (12) 1925 Pat. 559).

D.H. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 379 [*C. N. 104.*]

REUBEN AND JAMUAR JJ.

Gajadhar Marwari and others—Appellants v. *Baidyanath Mandal and others — Respondents.*

A. F. O. D. No. 113 of 1946, D/- 5-4-1950, from decision of Addl. Sub-Judge, Dhanbad, D/- 10 1-1946.

(a) Interpretation of Statutes—Intention of legislature.

A Court of law is not concerned with what was or might have been the intention of the legislature. The Court has to construe the provisions of the Act and give effect to the meaning of the plain words of the section. The intention of the legislature cannot be invoked to override the express provisions of a section. [Para 14]

Annotation: ('44-Com.) Civil P. C. Pre. N. 7.

(b) Debt laws—Bihar Money-lenders (Regulation of Transactions) Act (VII [7] of 1939), S. 7—Applicability—Suits not brought by money-lender.

The terms of section 7 of the Bihar Act are of a mandatory nature and the words admit of no ambiguity. The condition for the application of that section is that the suit must be brought by a money-lender in respect of a loan advanced. It cannot, therefore, apply to a suit for redemption of prior mortgage brought by a purchaser of equity of a redemption in execution of a mortgage decree obtained by a subsequent mortgagee: A. I. R. (27) 1940 F. C. 1, *Disting.*; A. I. R. (30) 1943 Pat. 185, *Ref.* [Para 14]

(c) Contract Act, (1872), S. 16—Applicability.

Section 16 does not apply when there is no material on record or any evidence to show that a transaction of mortgage was entered into by 'undue influence' or that the mortgagees were in a position to dominate the will of the mortgagor. [Para 15]

Annotation: ('46-Man.) Contract Act, S. 16 N. 1, 3.

(d) Debt laws—Usurious Loans Act (1918), S. 3 (1)—Right to re-open—Mere excessive interest not sufficient.

Mere excess of interest, by itself, cannot give right to re-open a transaction. It must be such that a Court may consider the transaction substantially unfair or so monstrous as to show that the transaction was harsh and unconscionable by itself : (1913) 2 Ir. R. 416, *Ref.* [Para 16]

(The rate of interest on a secured debt at 2 P. C. P. M. compoundable with yearly rests held not execessive and did not attract the provisions of S. 3.)

Annotation: ('46-Man.) Usu. Loans Act, S. 3 N. 3.

(e) Debt laws—Usurious Loans Act (1918) S. 3(1)—Suit by non-debtor—Relief to re-open—Granting of.

The re-opening of a transaction is for the purpose of relieving the debtor of all liability in respect of the excessive interest. The relief is to the debtor and it cannot be granted when it is sought by person who is not the debtor. [Para 16]

Annotation: ('48-Man.) Usu. Loans Act, S. 3 N. 10.

(f) Civil P. C. (1908), S. 34—Pendente lite interest—Granting of—Discretion of Court.

The granting of *pendente lite* and future interest lies in the discretion of the Court and it may take the high rate of interest allowed to the party into consideration in exercising its discretion as regards *pendente lite* and future interest : A. I. R. (27) 1940 P. C. 20, *Ref.* [Para 18]

Annotation: ('44-Com.) Civil P. C., S. 34 N. 3.

(g) Transfer of Property Act (1882), S. 76—Profits of property—Failure to realise—Liability of mortgagee.

A mortgagee in possession who is given full right of realising profits from the mortgaged property is accountable for the profits not realised by him due to his own wilful default. [Para 19]

Annotation: ('50-Com.) T. P. Act, S. 76 N. 7 pt. 5.

(h) Transfer of Property Act (1882), S. 76 (g)—Usufructuary mortgage—Failure to keep and produce account—Presumption—Inference adverse to mortgagee must be drawn. [Para 19]

Annotation: ('50-Com.) T. P. Act, S. 76 N. 15 pt. 1.

B. C. De, J. M. Ghosh and S. S. Rakshit —for Appellants.

S. C. Mazumdar and S. K. Mazumdar —for Respondents.

Jamuar J.—This appeal is by defendants 1 to 4 (a), and arises out of a suit for redemption brought by the plaintiffs, who are members of a joint Hindu family and carry on business in coal under the name and style of Baidyanath Mandal and Co. The facts giving arise to the suit are these.

[2] Thakur Girdhari Singh of Nowagarh was the proprietor of the two villages concerned in this case, namely, villages Kenduadih and Natundih. On 14th Chaitra, 1313 B. S., corresponding to 20th March 1907, he gave in lease by means of a registered patta (Ex. 7) a plot of coal land, having an area of 220 bighas in village Kenduadih, as described in Sch. A of the plaints

to one Prasanna Kumar Ray. The lease is still subsisting.

[3] Thereafter, Thakur Girdhari Singh died and the succession to his estate being governed by the law of lineal primogeniture he was succeeded by his eldest son Ran Bahadur Singh, who by a registered patta (Ex. 7 (a)), dated 14th February 1921, gave in lease the coal mining rights in village Natundih, as described in Sch. B of the plaint, to one Damodar Prasad Lala. This lease is also subsisting.

[4] Then on 29th November 1922, Ran Bahadur Singh executed a mortgage, which is called either a usufructuary mortgage or an anomalous mortgage, by a registered deed (Ex. 9) in favour of the defendants 1 and 2 and the father of defendants 4 and 4 (a), named Sheodanmall Marwari, to secure a loan of Rs. 15,000 on the properties described in Schs. A and B of the plaint, and the mortgagees were said to have been put in possession of these properties, that is, of both the villages Kenduadih and Natundih. The mortgagees were entitled to recover rent and royalties from the leasehold properties, the minimum royalty for Sch. A property being Rs. 1,925 and that for Sch. B property Rs. 4,720 per annum. According to the plaintiffs, the dues under this mortgage bond had been fully satisfied from the rents and royalties realised by these mortgage deeds.

[5] Ran Bahadur Singh executed another mortgage deed on 2nd February 1923, mortgaging the entire village Kenduadih along with some other properties to Srimati Probhabati Devi, the widow of the late Rai Bahadur Jyotirmoy Chatterji. On her death, her son T. K. Chatterji instituted a suit, being Mortgage suit No. 17 of of 1927, on the basis of that mortgage and having obtained a decree transferred it to one Suresh Chandra Dutta, who in his turn assigned it to Srimati Saralakshi Debi. She put the decree into execution and the entire village Kenduadih as also the property described in Sch. A of the plaint were sold and they were purchased by the plaintiffs on 15th July 1943. The plaintiffs obtained the usual sale certificate and also the delivery of possession through Court.

[6] In these circumstances, the plaintiffs brought their suit, out of which this appeal has arisen, on 12th January 1944, against defendants 1 to 4 (a) as also against two other defendants, namely, Thakur Manmohan Singh, the son of Ran Bahadur Singh, as defendant 5 and Srimati Hira Kumari Devi, the wife of Thakur Manmohan Singh, as defendant 6. They claimed to be entitled to redeem the two villages Kenduadih and Natundih, which were given in mortgage to the defendants. Their further claim was that the stipulated rate of interest under the mortgage, namely, at the rate of 24 per cent. per annum compoundable with yearly rests, is excessive and penal and should be reduced.

[7] The defendants, who are the appellants, contested the suit. Their main defence was that they as mortgagees were not put in actual possession of village Natundih by Ran Bahadur Singh and that the minimum royalty mentioned in their lease in respect of this village was kept in abeyance for a certain period awaiting the allotment of a railway siding in the vicinity of the village, and on 23rd December 1926, by a document called a Patta Ran Bahadur Singh absolved the lessee of Natundih, namely, Damodar Prasad Lala, from payment of the minimum royalty according to the previous lease as he reduced it from Rs. 4720 to Rs. 1000 only. These defendants pleaded that, in these circumstances, in spite of all attempts, they were unable to realise anything from Damodar Prasad Lala as royalty for village Natundih. They admitted their liability to render accounts to the plaintiffs but stated that they were entitled to the full benefit of the terms under the mortgage bond without any reduction in the stipulated interest. According to these defendants, the entire amount of principal and interest is still due. Their further defence was that the suit was barred by the principle of *res judicata* as the relief claimed in this suit had been directly and substantially in issue in two previous suits, namely, Money Suit No. 568 of 1934 and Money Suit No. 27 of 1941.

[8] The learned Subordinate Judge of Dhanbad passed a preliminary decree for redemption. With regard to the rate of interest, which was mentioned in the mortgage bond, namely, 24 per cent. per annum compoundable with annual rests, the learned Subordinate Judge made a mention of S. 5, Bihar Money-lenders (Regulation of Transactions) Act, 1939, and stated that the maximum rate of interest provided under that section for a secured loan was 9 per cent. per annum simple, and proceeded to apply the provisions of S. 7 of the same Act and reduced the interest by holding that the defendants were entitled to no more than double the amount of principal as interest, as provided by that section.

[9] The learned Subordinate Judge also came to the conclusion that the defendants never realised any profit out of village Natundih and as such they were not liable to account in respect of this village. He accordingly ordered that an account be taken of the profits realised from village Kenduadih from the date of the execution of the mortgage bond up to the date of the decree in order to ascertain whether the amount to which the defendants have been

found entitled has been satisfied therefrom. He held that the amount thus found to have been realised by the defendants from Kenduadih would be set off towards their claim and in case the debt be found not to have been fully satisfied, the plaintiffs should be liable to pay the balance to redeem the Kenduadih property, as described in Sch. A of the plaint.

[10] As against the decree passed by the learned Subordinate Judge, the defendant-appellants have preferred this appeal and the appeal has been confined only to the question of the interest payable on the principal amount of Rs. 15,000. As I have just stated, the learned Subordinate Judge reduced the interest of 24 per cent. per annum compoundable with annual rests, as was mentioned in the mortgage bond, by applying the provisions of S. 7, Bihar Money-lenders Act. The contention of the appellants in this appeal is that neither S. 5 nor S. 7 of that Act can have any application to the present case with the result that the interest, as stated in the bond, should be left untouched, as it is neither excessive nor penal. The appellants have also contended that they are entitled to interest *pendente lite* as also to future interest till realisation of the amount found due to them.

[11] The plaintiff-respondents have also filed a cross-objection against that part of the judgment of the learned Subordinate Judge in which he has found that the defendants never realised any profit out of the Natundih property and that accordingly they were not liable to account in respect of that property. According to the plaintiffs, the defendant mortgagees either did in fact realise the rents and royalties in respect of the Natundih property as well or should be presumed to have done so, as they have deliberately suppressed their account books, and they should be made liable to account for the same as well.

[12] I will first deal with the points raised in the main appeal. I am of the opinion that the defendant-appellants should succeed in their contention that neither S. 5 nor S. 7, Money-lenders Act can be made applicable to the suit out of which this appeal has arisen. That S. 5 cannot be applied is conceded. Section 5 deals with rates of interest in connection with a "suit brought by a money-lender in respect of a loan advanced *after* the commencement of this Act" (namely, the Money-lenders Act). Admittedly the loan in the transaction, with which we are concerned in this case, was advanced long before the commencement of the Money-lenders Act, as it had been advanced in the year 1922. Hence S. 5 of this Act can have no application.

[13] Coming now to S. 7 of the Act, it seems to me that the provisions of this section also can have no application in the present case. This section reads as follows:

> "Notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any agreement, no Court shall, in any suit brought by a money-lender before or after the commencement of this Act in respect of a loan advanced before or after the commencement of this Act or in any appeal or proceedings in revision arising out of such suit, pass a decree for an amount of interest for the period preceding the institution of the suit, which together with any amount already realised as interest through the Court or otherwise, is greater than the amount of loan advanced, or, if the loan is based on a document, the amount of loan mentioned in, or evidenced, by such document."

[14] Emphasis must be laid on the words "no Court shall, in any suit brought by a money-lender . . . . . pass a decree for an amount of interest. . . . ." Clearly the suit on the facts of which this section can be made applicable must have been brought by a money-lender. In the present case before us the suit was not brought by a money-lender but by persons who are purchasers of the equity of redemption in execution of a mortgage decree obtained by certain mortgagees. The money-lenders in the suit are not the plaintiffs but the defendant-appellants. This difficulty seems to have been realised in the Court below, but the learned Subordinate Judge referred to Bengal Money-lenders Act, 1940; Cl. (c) of sub-s. (22) of S. 2 of which Act provides that a suit to which that Act applies includes a suit

> "for the redemption of any security given before or after the commencement of this Act in respect of any loan advanced whether before or after the commencement of this Act."

The Bengal Act, therefore, applies to all suits brought for redemption regardless of who is the plaintiff. In the Bihar Act, on the other hand, there is provided a limitation. The learned Subordinate Judge, however, was of the opinion that the Bihar Act had been enacted to give relief to a borrower and that S. 7, Bihar Act should be made applicable in suits which were not brought by a money-lender. While I think that it is harsh upon the borrower not to get relief when he himself desires to pay the debt, this relief being only available to him if he is sued by the money-lender for the debt, and although the intention of the legislature may have been to give relief to the debtor in all cases, yet a Court of law is not concerned with what was or might have been the intention of the legislature. The Court has to construe the provisions of the Act and give effect to the meaning of the plain words of the section. The intention of the legislature cannot be invoked to override the express provisions of a section and, in the present case before me, of S. 7, Bihar Money-lenders Act the terms of S. 7, Bihar Act, are of a mandatory nature and the words admit of no ambiguity. The condition for the application of that section is that the suit must be brought by a money-lender in respect of a loan advanced. I am supported in my view by certain observations made in the case of *Bishunlal Singh* v. *Jagarnath Singh*, A.I.R. (30) 1943 Pat. 185: (22 Pat. 148.) The learned advocate for the plaintiff-respondents, however, referred to the case of *Ramnandan Prasad Narain Singh* v. *Madhwanand Ramji*, 1940-3 F. L. J. 1: (A. I. R. (27) 1940 F. C. 1) in support of his contention that S. 7, Bihar Money-lenders Act, 1939, can be made applicable even in suits which have not been brought by money-lenders. In my view this decision does not support that contention. In that case their Lordships were considering the applicability of S. 7, Bihar Act of 1939. When the executing Court was proceeding under S. 11, Bihar Money-lenders Act of 1938, S. 11 of the Act of 1938 having been re-enacted as S. 7 of the Act of 1939, their Lordships held that, as S. 11 had been re-enacted as S. 7 in the Act of 1939, the appellants before them, who were the judgment-debtors, were entitled to claim the benefit of that provisions in the new Act. The question of the applicability of S. 7 of the Act of 1939 on the facts of that case was by itself not before their Lordships. I am, therefore, of the view that this case is of no assistance to the plaintiff-respondents. I would accordingly hold that the learned Subordinate Judge was in error in reducing the interest payable to the defendant-appellants by applying the provisions of S. 7, Bihar Money-lenders Act of 1939.

[15] It was then argued that the interest, as mentioned in the mortgage bond, of 24 per cent. compoundable with annual rests was penal and excessive and ought to be reduced. Some cases were placed before us on behalf of the plaintiff-respondents to show that the Courts have in appropriate cases reduced the interest from that which had been mentioned in mortgage bonds on the ground of its being excessive and penal. The learned advocate for plaintiff-respondents submitted that the provisions of S. 16, Contract Act might be applied in this case. Clause (1) of that section explains that a contract can be said to be induced by "undue influence," namely, where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other, and Cl. (3) of that section states that where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other. The argument was that the transaction in this particular case was entered into by undue influence. It may be stated at once that there is no material on the record nor any evidence to come to any such conclusion. It is impossible to say that this particular transaction was entered into by "undue influence" or that the mortgagees were in a position to dominate the will of the mortgagor. I do not think, therefore, that the provisions of S. 16, Contract Act, can be made applicable to the facts of this case.

[16] The argument then turned to S 3, Usurious Loans Act, 1918. Clause (1) of this section provides that where, in any suit to which this Act applies, the Court has reason to believe (a) that the interest is excessive; and (b) that the transaction was, as between the parties thereto substantially unfair, the Court may exercise certain powers as provided by that section, for example, passing an order for the re-opening of the transaction. As will be noticed two conditions are essential for the application of this section, namely, (a) that the interest is excessive and (b) that the transaction was substantially unfair, and the explanation to that section provides that the interest may of itself be sufficient evidence that the transaction was substantially unfair. The interest may be excessive but it must be such that a Court may consider that the transaction was substantially unfair, that is to say, that the rate of interest may be so monstrous as to show that the transaction was harsh and unconscionable by itself. As I have already said, there is no evidence to show that the lender was in a position to exercise such influence as to dominate the will of the borrower. Mere excess of interest, by itself, can give no right to re-open any transaction but it may be such as to render the transaction unconscionable. To borrow a phrase from Irish case *Thomas* v. *Ashbrock*, (1913) 2 Ir. R. 416:

> ". . . . As to excess: the interest or charge may be *ex facie* so exorbitant as to make the conclusion irresistible that an unfair advantage has been taken of desperate necessity or reckless improvidence; the thing not merely speaks for itself, but shouts."

Furthermore, the re-opening of a transaction is for the purposes of relieving the debtor of all liability in respect of the excessive interest. The relief is to the debtor. In the present case, the relief sought is by the plaintiffs, who are not the debtors; they are purchasers of the equity of redemption of the mortgagor and thus not themselves debtors.

[17] We were not referred to any evidence to support the contention about the unfairness of the transaction but reliance was placed on the explanation to sub-s. (2) of S. 3, Usurious Loans

Act and our attention was drawn to the rate of interest itself, i. e. 2 per cent. per month, compoundable with yearly rests. Reference was made to certain decisions which it is urged support that conclusion in the present case. *Rukmina* v. *Mohib Ali Khan*, A. I. R. (21) 1934 ALL. 938 : (153 I. C. 695) is an authority under S. 16, Contract Act and not the Usurious Loans Act. In *Kharag Narayan* v. *Dwarka Prasad*, 3 Pat. 465 : (A. I. R. (11) 1924 Pat. 580) 24 per cent. per annum with yearly rests was reduced to 12 per cent. simple but, apparently, there was evidence before the Court that 12 per cent. simple was the market rate. *Butto Kristo Roy* v. *Gobindram*, A. I. R. (26) 1939 Pat. 540 : (182 I. C. 132) was not a case of loan at all but of interest on arrears of rent. In *Chota Nagpur Banking Association Ltd.* v. *Lal Mohan*, A. I. R. (30) 1943 Pat. 301: (22 Pat. 213) the point was not contested before the High Court and the report does not disclose what the grounds were on which the contract rate of 10 per cent. per annum was reduced to 9 per cent. per annum. In *Chuni Lal* v. *Udai Prakash*, A. I. R. (26) 1939 P. C. 200 : (183 I. C. 177) also the report does not disclose the grounds on which an interest of 24 per cent. per annum compoundable with 6 months rests was held to be within the mischief of S. 3, but the judgment of the Privy Council shows that an amount of Rs. 6000 was the principal of the loan in suit and as much as Rs. 2800 was due on account of interest due to the creditor on previous transactions between the parties. This is a circumstance which materially affects the fairness of the rate of interest (vide *Prayag Lal* v. *Palakdeo Narain Singh*, A. I. R. (29) 1942 Pat. 419: (202 I. C. 634).) On the other hand, in the case of *Mukteswar* v. *Satya Charan*, A. I. R. (26) 1939 Pat. 360 : (180 I. C. 103) an interest of 18 per cent. per annum compoundable every six months was held not to attract the operation of S. 3. In these circumstances, it seems to me to be impossible to reduce the rate of interest.

[18] The question, however, remains whether any relief can be given to the plaintiffs at all in the matter of interest. Although the circumstances point to the conclusion that the interest as claimed is high but as it cannot be held that the transaction was unfair as between the parties to the suit, no relief can be given under the Usurious Loans Act. The Court, however, may take the high rate of interest into consideration in exercising its discretion as regards *pendente lite* and future interest. The granting of *pendente lite* and future interest lies in the discretion of the Court. See *Jaigobind Singh* v. *Lachmi Narain Ram*, 1940 P. W. N. 614 : (A. I. R. (27) 1940 F. C. 20). In the case before us the mortgagees will be getting a high rate of interest for a considerable period of time. While therefore holding the defendant-appellants to be entitled to interest at the bond rate from the date of the mortgage up to the date of the institution of the suit, I would allow them interest, *pendente lite* and future, at 4 per cent. simple per annum ; the period of grace shall be six months from the date on which the Subordinate Judge confirms and countersigns the account taken by the Commissioner. Their appeal is accordingly allowed.

[19] Coming now to the cross-objection of the plaintiff respondents, the point for consideration, as I have already stated, is whether the defendants can be found to have realised the rent and royalty in respect of the Natundih property and thus be liable to account for that property as well. The learned Subordinate Judge has found this part of the case in favour of the defendants, namely, that they never realised any profit out of the Natundih property and that therefore they are not liable to account for the same. The circumstances are these. [After stating the facts and referring to documentary and oral evidence his Lordship proceeded]: By this evidence it is apparent that the realisation could have been made from Damodar Prasad Lala and the mortgagees, the defendant-appellants, failed to take steps to realise the royalty from him for no satisfactory reason. In the mortgage bond (exhibit 9) executed in favour of the defendants by Ran Bahadur Singh Ran Bahadur had stated :

> "You shall possess right and title to the said properties like me and shall be competent to realise the amount due to you under this mortgage bond by selling the same."

and then they were given the right to realise the minimum royalty of the jama. I think that the mortgagees in the circumstances are accountable for the profits of the Natundih property on the footing of wilful default. Under the mortgage, the mortgagee was entitled to realise Rs. 4720 and could enforce his demand by bringing the leasehold to sale. But it is evident from the parwana dated 14th August 1922 and the patta dated 23rd December 1926, that the property was incapable of bearing this amount of minimum royalty. We may take the minimum royalty agreed to be paid from 23rd December 1926, namely, Rs. 1000, as representing the value of the leasehold, and proceed on the assumption that if the mortgagee had proceeded with due diligence to recover the royalty due from this leasehold he would have recovered the equivalent of Rs. 1000 a year. To this extent therefore credit should be given to the mortgagor in the accounting between him and the mortgagees beginning from the expiry of 1927. Under cl. (g), S. 76, T. P. Act, a mortgagee in possession

> "must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee, at any time during the continuance of the mortgagee, give the mortgagor, at his request and cost, true copies of such accounts and of the vouchers by which they are supported."

The mortgagees in the present case have filed no account whatsoever as probably no such account was kept. An inference, therefore, adverse to the case of the mortgagees must be drawn.

[20] In the Court below, a contention appears to have been raised on behalf of the defendants that the question whether they were liable to account for the Natundih property or not had been directly and substantially in issue in Money Suit No. 568 of 1934 and in Money Suit No. 27 of 1941, and as such these decisions operated as *res judicata*. The Court below did not accept this contention and it was not pressed before us.

[21] In these circumstances, I am of the opinion that the cross objections filed by the plaintiff-respondents should succeed and the decree of the Court below be varied to include the profits realised from the Natundih property in the light of the observations made in the body of the judgment together with the profits realised from Kenduadih property.

[22] Since success has been partial both in the appeal and in the cross objection, I would not pass any order as to costs in this Court.

[23] Before I conclude I desire to draw the attention of the Court below to the form in which the decree of that Court has been drawn up. The decree in the suit should have been drawn up in the appropriate form to be found in Appendix D of the Sch. 1, Civil P. C.

[24] **Reuben J.**— I agree.

D.R.R. *Order accordingly.*

A. I. R. (37) 1950 Patna 384 *[C. N. 105.]*

SINHA AND RAI JJ.

Nitya Gopal Goswami and others— Appellant v. Sm. Gangamani Devi and others— Respondents.

A. F. A. D. No. 1313 of 1947, D/- 24-3-1950, from decision of A. Sub. J., Purulia, D/- 10-4-1947.

(a) Tenancy Laws— Chota Nagpur Tenancy Act (VI [6] of 1908), S. 208 – Sale of entire tenure – Non-representation of all co-sharers – Sale is void.

In order that a revenue Court may have jurisdiction to sell a tenure or holding the execution must be levied against the entire tenure or holding and as against the entire body of tenure holders or raiyats as the case may be. [Para 14]

Hence a sale of the entire tenure held by a Revenue Court under S. 208 is void if one of the co-sharers in the tenure has died before the execution without his legal representatives being brought on record of the execution proceedings: **A. I. R. (20) 1933 Pat 537 and A. I. R. (20) 1933 P. C. 122, *Rel. on.*** [Paras 9 and 13]

(b) Tenancy Laws—'Chota Nagpur Tenancy Act (VI [6] of 1908), Ss. 214 and 211 – Applicability – Rent decree sale – Necessary parties not joined – S. 214 is no bar to suit to set aside sale.

Where all the necessary parties are not joined or represented in the proceedings relating to a sale in execution of a decree for rent, S. 211 does not apply, and the revenue Court has no jurisdiction to order a sale, and consequently S. 214 of the Act does not preclude the civil Court from entertaining a suit to set it aside: A. I. R. (26) 1939 Pat. 225, *Foll.* [Para 15]

S. C. Majumdar—for Appellants.

R. S. Chatterji, P. K. Bose and A. Shasisekhar Sinha— for Respondents.

Rai J.—This is an appeal by plaintiff 6, against the judgment and decree passed by the Additional Subordinate Judge at Purulia, dated 10th April 1947, reversing those of the Munsif at Raghunathpur.

[2] The present appellant along with others had filed a suit for a declaration that the auction sale in Rent Execution Case No. 136 of 1936-37 of the Court of the Munsif at Raghunathpur was *ultra vires* and that it did not affect the interest of the plaintiffs. They further prayed for khas or joint possession and mesne profits.

[3] The case of the plaintiffs was that in village Jagannathdih there was a brahmottar tenure in which one Gostho Bihari Goswami had one-third share, Banbihari Goswami had one-third share, Gurudas Goswami had one-sixth share and Ramdas Goswami had one-sixth share. The rent and cess in respect of the tenure were payable to one Shankari Prasad Singh Das, defendant 3. Gurudas Goswami had gifted his share in the tenure to his mother Sourabh Sundari Devi, and, after the death of the latter, the share in the tenure was inherited by Nitya Gopal Goswami, who is the appellant in this Court. In the year 1933, the landlord instituted a rent suit and, without proper service of notice, succeeded in getting a fraudulent and collusive rent decree. The landlord executed that decree in execution case No. 136 of 1936-37, and put the entire tenure to sale which was purchased by defendant 2, Bhudeb Chandra Roy, in the farzi name of his wife, Sm. Gongamani Devi, defendant 1. On 3rd July 1937, the auction purchaser claimed to have taken symbolical delivery of possession over the tenure. The case of the plaintiffs further was that the landlord had not joined Sourabh Sundari Devi as a party defendant in the rent suit, and, though Gostho Bihari Goswami had died before the execution was started, the landlord chose to proceed in execution against him as if he was alive and his heirs and legal representatives were not brought on the record. On account of this, the plaintiffs

claimed the rent decree and the rent sale to be void and without jurisdiction.

[4] The suit was contested by defendants 1 and 3 who filed written statements contending that the suit was barred by limitation, and that it was also barred under the provisions of Ss. 214 and 258, Chota Nagpur Tenancy Act, according to those defendants, Gostho Bihari Goswami did not die before or during the execution proceedings. According to them, by a family arrangement, Ban Bihari Goswami had acquired the share of Gostho Bihari Goswami in the village long before the institution of the suit, and hence Gostho Bihari or his heirs were not necessary parties to the execution proceedings. They further claimed that every process in the suit and in the execution proceedings had been properly served, and that the sale was not without jurisdiction and was binding upon the plaintiffs.

[5] The trial Court decreed the suit holding that the sale in question was not binding upon the plaintiffs who were entitled to recover possession over their share of the tenure. The plaintiffs were also held entitled to mesne profits, the amount of which was to be determined later on.

[6] On appeal by defendant 1, the appellate Court has modified the judgment and decree passed by the trial Court. The appellate Court has held that Sourabha Sundari Devi was not in actual possession of the share of Gurudas Goswami, that the legality of the rent decree or the execution sale was not in any way affected by her non-joinder in those proceedings, and hence, Nitya Gopal Goswami was not entitled to avoid the sale in respect of one-sixth share which belonged to Gurudas Goswami in the tenure.

[7] As regards the non-joinder of the heirs of Gostho Bihari Goswami in the execution proceedings, the lower appellate Court also affirmed the finding of the trial Court that Gostho Bihari had died on 3rd November 1934, long before the execution started. The Court of appeal below, therefore, held that the sale in respect of Gostho Bihari's share in the tenure was altogether void, and it cannot be binding on his heirs, the plaintiffs 1 to 5. The lower appellate Court was further of opinion that the suit was maintainable, and was not barred by limitation. Hence, the appeal by Nitya Gopal Goswami, plaintiff 6 and the cross-objection on behalf of defendant 1 concerning the share of Gostho Bihari Goswami.

[8] Mr. S. C. Mazumdar, the learned counsel for the appellant contended that as the tenure was not fully represented during the execution proceedings, even on the findings of the Court of appeal below, the revenue Court had no jurisdiction to sell the holding under S. 208, Chotanagpur Tenancy Act. There is no doubt that the sale of the tenure was purported to have been held under S. 208, Chotanagpur Tenancy Act, and has been so found by the Courts below. Section 208, Chotanagpur Tenancy Act, before the recent amendment runs as follows :

> "(1) When a decree passed by the Deputy Commissioner under this Act is for an arrear of rent due in respect of a tenure or holding the decree-holder may apply for the sale of such tenure or holding, and the tenure or holding may thereupon be brought to sale, in execution of the decree, according to the provisions for the sale of under-tenures, contained in the Bengal Rent Recovery (Under Tenures) Act 1865; and all the provisions of that Act, except Ss. 12, 13, 14 and 15 thereof, shall as far as may be applied to such sale :
>
> Provided that the purchaser of a tenure at any such sale shall not be entitled to annul any lease, right or tenancy referred to in cls. (a) to (e) of S. 14 of this Act :
>
> Provided also that the Commissioner may by order in any case in which he may consider it desirable so to do, (a) prohibit the sale of any tenure or portion thereof, or (b) stay any such sale for any period specified in the order :
>
> Provided also that any sale of a resumable tenure under this section shall not affect the right of the grantor or his successor-in-title to resume such tenure, but shall be made subject to such right.
>
> (2) When a warrant of execution has been issued under this chapter against the person or movable property of the judgment-debtor no application shall be received under sub-s. (1) while such warrant remains in force."

[9] According to Mr. Mazumdar, the revenue Court could sell a tenure only when all persons interested in the tenure were before it. In support of his contention, he has cited the case of *Jyoti Prasad* v. *Tara Sankar*, 12 Pat. 799 : (A. I. R. (20) 1933 Pat. 537). He has also relied upon the case of *Jagdishwar Dayal Singh* v. *Dwarka Singh*, 12 Pat. 626 : (A. I. R. (20) 1933 P.C. 122). He also placed before us an unreported judgment of this Court in the case of *Midnapur Zamindari Co., Ltd.* v. *Chintamani Mandal*, (S.A. No. 40 of 1944, decided by Fazl Ali C. J. and Ray J. on 20th March 1946). The Patna decisions and the decision of the Privy Council have clearly laid down that unless the tenure is fully represented in the suit or in the execution proceeding, a sale of the entire tenure held by a revenue Court under S. 208, Chotanagpur Tenancy Act is void. Their Lordships of the Privy Council in the case of *Jagdishwar Dayal Singh* v. *Dwarka Singh*, 12 Pat. 626 : (A. I. R. (20) 1933 P. C. 122) clearly laid down that

> "under Chap. 16 of the Act a statutory jurisdiction is conferred on the Revenue Courts, but that jurisdiction must be exercised within the statutory powers conferred. If then as already stated, it is not competent to order a sale of the tenure under S. 208 unles the whole interests in the tenure are represented before the Court, it is clear that the order for sale of the tenure in the present case was *ultra vires* of the Revenue Court, and

it follows that the sale was not made under this chapter and was outside the jurisdiction of that Court."

[10] Mr. Radheshyam Chatterji, the learned counsel for the respondents, sought to distinguish the Privy Council case as well as the Patna case on the ground that in those cases one of the persons interested in the tenure or holding had not been made party to the rent suit also. But, in the present case, as found by the lower appellate Court, all persons interested in the tenure had not been joined as party to the execution proceeding. In my judgment, the distinction suggested by Mr. Chatterji does not make any difference to the applicability to the present case of the principles laid down by the Judicial Committee in the case of *Jagdishwar Dayal Singh*, 12 Pat. 626: (A.I.R. (20) 1933 P. C. 122) aforesaid. The unreported decision of this Court in S. A. No. 40 of 1944 deals with this aspect of the case also. In that judgment it has been clearly held that in order that an entire tenure or holding may pass by sale under S. 208, Chotanagpur Tenancy Act, it was not only necessary that the rent decree should have been a proper rent decree in the strict sense of the term, but that it should also have been executed as a rent decree, that is to say, all the persons interested in the holding or tenure must have been brought on the record of the execution proceeding.

[11] Mr. Radheshyam Chatterji, the learned counsel for the respondents, referred to the Full Bench case of *Pratap Udai Nath* v. *Baraikmohan*, 25 Pat. 470: (A.I.R. (33) 1946 Pat. 358 F.B.). But in that case the facts were different. There, the auction sale was not that of the entire tenure. The decree in that case had been executed as a money decree and only the right, title and interest of the judgment-debtors, who were before the Court had passed by the sale. Agarwala C. J. who delivered the leading judgment while distinguishing the case before the Full Bench from the case of *Jagdishwar Dayal Singh*, 12 Pat. 626 : (A.I.R. (20) 1933 P.C. 122) said as follows :

> "In the latter case a decree for rent had been obtained without impleading all the persons interested in the tenure, and in execution of that decree the tenure had been put up for sale. A person holding a mortgage then instituted a suit for a declaration that his interest was not affected by the sale, as the sale held in execution of a decree made in such a suit did not pass the tenure so as to have the effect of annulling a pre-existing encumbrance on it. At the end of the judgment of the Privy Council there is an observation that the sale was void. But a perusal of the passage preceding this observation shows that on an examination of the claim in the suit, he Privy Council was satisfied that what the decree-holder intended to proceed against was the interest of the defendants in the tenure. What the decision really means is that, if the decree-holder intends to proceed only against the interest of the defendant in the tenure, the sale of the tenure itself is void."

According to this Full Bench decision also, when admittedly, in the present case the entire tenure was purported to have been sold under S. 208, Chotanagpur Tenancy Act, the defendants respondents cannot contend now that only the interest of those impleaded in the execution proceedings itself might be deemed to have passed by the auction sale.

[12] Mr. Radheshyam Chatterji further referred us to the case of *Jang Bahadur* v. *Bank of Upper India, Ltd.*, 55 I. A. 227: (A. I. R. (15) 1928 P. C. 162) in support of his contention that non-substitution of the heirs of Gostho Bihari Goswami would not affect the jurisdiction of the revenue Court to sell the property. But the facts of that case were different. In that case what had happened was that the respondent there had obtained a final decree for sale on a mortgage in the Court of the Subordinate Judge at Lucknow. As the property which the decree-holder sought to sell under the decree was situated in the District of Hardoi the decree was sent to the Court in the latter district for execution, and it was numbered as execution case No. 175 af 1916 there. The judgment-debtor thereafter died on 23rd April 1920. On 25th May 1920, the decree-holder filed a petition in the Hardoi Court for substitution of the legal representative of the judgment-debtor, and the executing Court at Hardoi ordered substitution, and issued notice to the substituted judgment-debtors as required under the Code of Civil Procedure. The heirs and legal representatives of the original judgment-debtor appeared during the execution proceedings at Hardoi has raised various objections. After the proceedings had been pending for about three and a half years, those legal representatives, then put in a petition before the sale officer on 10th April 1924, that the sale proceedings were illegal and without jurisdiction, inasmuch as the decree-holder did not get the name of the legal representative entered in the decree of the Court executing the same, in accordance with the provisions of S. 50, Civil P. C. The Courts below had rejected the objections of the judgment-debtors who had gone up in appeal to the Privy Council. Their Lordships of the Judicial Committee, while dealing with the objections, held as follows :

> "If the judgment-debtor dies before any such certificate is issued, the Court of transfer does not lose its jurisdiction over the execution proceeding, which does not abate by reason of the death. But before execution can proceed against the legal representative of the deceased judgment-debtor, the decree-holder must get an order for substitution from the Court which passed the decree. This is a matter of procedure, and not of jurisdiction. The jurisdiction over the subject-matter continues as before, but a certain procedure is prescribed for the exercise of such jurisdiction. If there is non-compliance with such procedure, the defect might be

waived and the party who has acquiesced in the Court exercising it in a wrong way cannot afterwards turn round and challenge the legality of the proceedings."

[13] In the present case Gostho Bihari Goswami had died before the execution started, and his heirs and legal representatives had not been brought on the record of the execution proceedings at all, and there was no case of an irregularity as contemplated by the judgment of the Privy Council in the aforesaid case. Here the tenure was not fully represented during the execution proceedings, and, as held in the case of *Jagdishwar Dayal Singh*, 12 Pat. 626: (A. I. R. (20) 1933 P. C. 122), and the decisions of this Court referred to above, the entire sale was void.

[13a] Mr. Chatterji further drew our attention to the case of *Ramlal Sahu* v. *Mt. Ramia*, 26 Pat. 340: (A. I. R. (34) 1947 Pat. 454 F. B.). But there the question in controversy was different. Their Lordships in that case held that if there was any irregularity in the service of the notice issued by the executing Court it would not render the sale void. But in the present case all the persons interested in the tenure had not been joined at all in the execution proceedings. Mr. Chatterji also referred us to the Full Bench case of *Ajablal* v. *Haricharan* 23 Pat. 528: (A. I. R. (32) 1945 Pat. 1 F. B.) and contended that in the Full Bench case their Lordships had held that the sale would not affect the interest of the heirs of the deceased judgment-debtor, because the notices had not been served on them, and in absence of service of notice under O. 21, R. 22, Civil P. C., the executing Court would have no jurisdiction to sell. According to his contention, as there is no specific rule for service of notice on the heirs of a deceased judgment-debtor in the Chota Nagpur Tenancy Act or the Bengal Rent Recovery Act, the sale in the present case cannot be held to be without jurisdiction.

[14] But the execution proceedings in the cases of *Ramlal Sahu* v. *Mt. Ramia*, 26 Pat. 340: (A.I.R. (34) 1947 Pat. 454 F. B.) and *Ajablal* v. *Haricharan*, 23 Pat. 528: (A.I R. (32) 1945 Pat. 1 F. B.) had been taken out not before a revenue Court which had been vested with a limited jurisdiction, and as such, the decisions in those cases would not govern the facts and circumstances in the present case. Mr. Chatterji further stressed that no specific provision had been made in the Chota Nagpur Tenancy Act or in the Bengal Rent Recovery Act for service of notice on judgment-debtor personally and as such the sale held in the present case without service of notice on the heirs of Gostho Bihari Goswami was not without jurisdiction. The consensus of opinion in the decided cases of this Court as well as of the Privy Council, on the other hand, is that in order that a revenue Court may have jurisdiction to sell a tenure of holding the execution must be levied against the entire tenure or holding and as against the entire body of tenure-holders or raiyats as the case may be.

[15] Mr. Chatterji further contended that S. 214, Chota Nagpur Tenancy Act bars the present suit. Section 214 runs as follows:

> "No suit or application shall be entertained by any Court to set aside or to modify the effect of (a) any sale made under this Chapter, save under S. 211, S. 212 or S. 213 or on the ground of fraud or want of jurisdiction, or (b) an order under S. 212, sub s. (2) or S. 213 sub-s. (2), setting aside a sale."

This contention of Mr. Chatterji is answered by the decision of this Court in *Manki Kanak Ratan* v. *Sundar Munda*, 20 P. L. T. 346: (A. I. R. (26) 1939 Pat. 225) wherein a Division Bench of this Court held that where all the necessary parties are not joined or represented in the proceedings relating to a sale in execution of a decree for rent, S. 211, Chota Nagpur Tenancy Act, does not apply, and the revenue Court has no jurisdiction to order a sale, and consequently S. 214 of the Act does not preclude the civil Court from entertaining a suit to set it aside.

[16] The contentions of Mr. Majumdar, the learned counsel for the appellant, are, in my judgment well founded, and the sale held by the revenue Court was void and without jurisdiction as against all including the share of the appellant before this Court.

[17] In this view of the matter, the cross-objection filed on behalf of defendant 1 has no merit.

[18] The appeal, therefore, succeeds. The judgment and the decree of the Court of appeal below are modified and the suit of the plaintiffs decreed with costs throughout. The cross-objection filed by defendant 1 fails, and is dismissed, but without costs.

[19] **Sinha J.**—I agree.

K.S. *Appeal allowed.*

A. I. R. (37) 1950 Patna 387 *[C. N. 106.]*

FULL BENCH

MEREDITH C. J., SHEARER AND DAS JJ.

Bagaram Tuloule—Petitioner v. *The State of Bihar.*

Criminal Misc. No. 155 of 1950, D/- 5-4-1950.

Constitution of India, Art. 226 (1) — "For any other purpose"—Meaning of—Issue of mandamus in matters of discretion — Mandamus upon State Government directing it to refer dispute under S. 10 (1), proviso, Industrial Disputes Act — Industrial Disputes Act (1947), S. 10 (1), proviso.

Article 226 contemplates the issue of writs and directions for purposes other than the enforcement of the fundamental rights. At the same time the words "for any other purpose" in the article can hardly mean that the High Court can issue writs for any purpose it

pleases. The correct interpretation is that the words mean 'for the enforcement of any legal right and the performance of any legal duty.' To that extent the words must be read *ejusdem generis*, which is the ordinary principle of construction. Moreover, it could never have been intended that resort could be had to this extraordinary procedure where an adequate remedy is available by ordinary legal process, for example, by suit, otherwise the ordinary legal procedure, including the payment of court-fees, would be abrogated. An application under Art. 226 is and must remain an extraordinary remedy to be used where ordinary legal process cannot give adequate and prompt relief.
[Paras 5 & 6]

It is well settled that *mandamus* will not issue in a matter of discretion. Under sub-s. (1) to S. 10, Industrial Disputes Act, 1947 and the proviso thereto, it is a power or discretion that is given rather than a duty or obligation. The word "inexpedient" in the proviso is very wide and despite the use of the word "shall" it gives complete discretion to Government. Where, therefore, the State Government refuses to refer the industrial dispute under the proviso, writ of *mandamus* under Art. 226 cannot be issued directing the Government to refer the dispute under the proviso.
[Paras 8, 9, 10, 11 & 15]

Awadhesh Nandan Sahay and S. L. Nandkeolyar — for Petitioner.

The Advocate-General and Messrs. Balabhadra Singh, Baldeva Sahay, N. N. Roy and Bajrang Sahay — for the State.

Meredith C. J.—This is an application under Art. 226 of Indian Constitution for the issue of a writ in the nature of *mandamus* upon the State Government of Bihar directing it to refer an industrial dispute to a Tribunal for adjudication under the proviso to S. 10 (1), Industrial Disputes Act, 1947 (Act XIV [14] of 1947).

[2] The petitioner is the Vice-President of the Wire Products Labour Union, Jamshedpur, which, it is stated, is a registered trade union and has a membership of over 2000 workers who are employed in the Indian Steel and Wire Products Limited, which is a public utility service.

[3] The facts stated in the petition may be summarised as follows: In the year 1947, an award was given by the Chairman, Industrial Tribunal, who decided *inter alia* that the management and the Union should evolve through mutual consultation a suitable wage structure for the workmen. One Mr. John was then the President of the Union, and he agreed to a wage structure which was later enforced by the management some time in February 1949. This wage structure was detrimental to the interests of the workers and had not been sanctioned either by the executive committee of the Union or its general body. Accordingly, the workers, through their executive committee, passed a vote of non-confidence against Mr. John and the other office bearers of the Union in April 1949, and elected one Munshi Ahmad Din as their President and other trade union workers allied to the socialist party of India as office bearers, including the petitioner as Vice-President. On 26th July 1949, the Union addressed a letter to the management asking that the question of wage structure might be re-opened. But this proposal was rejected. It is further stated that a number of items of the award of 1947 had not been given effect to by the management, and the Union forwarded a list of the outstanding grievances of the workers to the management and requested immediate attention to be paid to them, failing which the Union would take such steps as it thought fit. As this was not accepted by the management on 19th September 1949, notice was served on the managing director under sub-s. (1) of S. 22, Industrial Disputes Act, stating that a strike would be organised on and from Friday the 14th October 1949. A Conciliation Officer attempted to arrive at a settlement but failed, and the Conciliation Officer intimated this failure to the Government. But on 13th October 1949, the Government informed the Union by telegram that it had decided not to refer the dispute to a Board or Tribunal as it considered it inexpedient to do so. The strike of the workers commenced on 14th October 1949, and continued for 75 days, on which date the Deputy Commissioner of Jamshedpur declared the strike illegal, whereupon the Union called off the strike.

[4] It is stated that the Government acted *mala fide* in refusing to refer the dispute to a Tribunal for adjudication, and therefore, did not carry out its legal duty under S. 10.

[5] The first question is whether the Court has any power to issue writs or directions in a matter of this kind which cannot be said to involve the enforcement of the fundamental rights laid down in Part III of the Constitution. Article 226 (1) is in these terms:

> "226 (1). Notwithstanding anything in Art. 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority including in appropriate cases any Government, within those territories directions, orders, or writs including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari* or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose."

Reliance is placed on the words "and for any other purpose." It is quite clear that these words have been added advisedly and must mean something in addition to the enforcement of the rights conferred by Part III, and this is so whether they be read *ejusdem generis* or otherwise. It is clear because Art. 32, which is the corresponding provision for the Supreme Court, does not contain these words, but speaks merely of the enforcement of "any of the rights conferred by this part," and that is obviously because the original jurisdiction of the Supreme

Court extends only to the enforcement of the fundamental rights. And this view receives confirmation from the terms of Art. 139 which says:

> "The Parliament may by law confer on the Supreme Court power to issue directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus* prohibition, *quo warranto* and *certiorari*, or any of them for any purposes other than those mentioned in cl. (2) of Art. 32."

Undoubtedly, therefore, Art. 226 contemplates the issue of writs and directions for purposes other than the enforcement of the fundamental rights. At the same time, the words can hardly mean that the High Court can issue writs for any purpose it pleases. I think the correct interpretation is that the words mean for the enforcement of any legal right and the performance of any legal duty. To that extent the words must be read *ejusdem generis*, which is the ordinary principle of construction.

[6] Moreover, it could never have been intended that resort could be had to this extraordinary procedure where an adequate remedy is available by ordinary legal process, for example, by suit. Otherwise, the ordinary legal procedure, including the payment of court-fees, would be abrogated. An application under Art. 226, in my judgment, is and must remain an extraordinary remedy to be used where ordinary legal process cannot give adequate and prompt relief.

[7] Now, turning to the present case, let us see if there is any clear legal duty of the Government which it has failed to perform. To this the answer must clearly be in the negative. Section 10 (1), Industrial Disputes Act, says:

> "10 (1). If any industrial dispute exists or is apprehended, the appropriate Government may, by order in writing—
>
> (a) refer the dispute to a Board for promoting a settlement thereof, or
>
> (b) refer any matter appearing to be connected with or relevant to the dispute to a Court for inquiry, or
>
> (c) refer the dispute to a Tribunal for adjudication."

All this is clearly purely discretionary. Next comes the proviso in these terms:

> "Provided that where the dispute relates to a public utility service and a notice under S. 22 has been given, the appropriate Government shall, unless it considers that the notice has been frivolously or vexatiously given or that it would be inexpedient so to do, make a reference under this sub-section notwithstanding that any other proceedings under this Act in respect of the dispute may have commenced."

[8] It is conceded that we are concerned with a public utility service and that a notice under S. 22 has been given. But, on the other side, it is conceded that Government has refused to make the reference on the express ground that it considers it would be inexpedient so to do. The word 'inexpedient' is very wide, and in my judgment despite the use of the word 'shall' it gives a complete discretion to Government. Government might consider a reference inexpedient for all sorts of reasons, including reasons of policy, which are no business of the Courts and it might well be that Government would not wish to disclose its reasons. That being so, in my opinion, the question of *bona fides* or *mala fides* cannot at all arise, since the matter is left entirely to the discretion of Government.

[9] It is well settled, both in England and in America, that *mandamus* will not issue in a matter of discretions, see for example *The King* v. *Marshland Smeeth and Fen District Commissioners*, (1920) 1 K. B. 155 at p. 165 : (89 L. J. K. B. 116); *Ex parte Bassett*, (1857) 119 E. R. 1251 : (7 E. & B. 280) and in America *In the matter of Robert L. Cutting*, 94 U. S. Sup. C. R. 14 : 24 Law. Ed. 49; *United States ex. rel. International Contracting Co.* v. *Danial S. Lamont*, 155 U. S. Sup. C. R. 303 : 39 Law. Ed. 160 and *Intestate Commerce Commission* v. *United States of America ex. rel. Members of the Waste Merchants Association of New York*, 260 U. S. Sup. C. R. 32 : 67 Law. Ed. 112 (114).

[10] The reason why this limitation is imposed is quite plain. Suppose we order the Government to make the reference by the issue of a writ. We are depriving Government of the discretion which the law allows it. While if the writ is issued to compel exercise of this discretion, then it will be infructuous because the reply would be "We have exercised our discretion."

[11] In my opinion, the present application was misconceived and must, therefore, be rejected The State Government is entitled to its costs, which I would assess at five gold mohars.

[12] **Shearer J.**—I agree with my Lord the Chief Justice and have nothing to add.

[13] **Das J.**— I have had the advantage of seeing the judgment proposed to be delivered by my Lord the Chief Justice. I so entirely agree with him that it is not necessary for me to add anything except a few words about two decisions on which Mr. Awadhesh Nandan Sahay placed reliance.

[14] Mr. Sahay has contended that the proviso to S 10 (1), Industrial Disputes Act, 1947, imposes a duty on the appropriate Government to refer an industrial dispute, relating to a public utility service, in which a notice under S. 22 has been given, to a Board or a Court of Inquiry or a Tribunal for adjudication. His contention is that the use of the word 'may' in the sub-section, and 'shall' in the proviso, makes no difference and despite the use of the word 'may' in the sub section, a duty is imposed, though the duty is to be performed subject to the fulfilment of certain conditions. Mr. Sahay

argues that even when a duty is to be performed subject to certain conditions the non-performance of the duty on arbitrary grounds is no exercise of discretion, and will give the party aggrieved a right to move this Court for an order directing performance of that duty. The two decisions on which Mr. Sahay has relied are *Alderman Backwell's case*, 1 Vern. 152: 23 E. R. 381 and *The King* v. *Marshland Smeeth and Fen District Commissioners*, (1920) 1 K. B. 155: (89 L. J. K. B. 116). In *Alderman Beckwell's case*, 1 Vern. 152 : 23 E. R. 381, several creditors of the Alderman petitioned for a commission of bankruptcy against him. On behalf of the Alderman, the plea taken was that a majority of the creditors had compounded with him, and the Alderman having already made very fair proposals, the granting of the Commission might for some time be suspended. The matter came before the Lord Keeper who declared that though the words in the Act of Parliament were that the Chancellor may grant a commission of bankruptcy yet that 'may' was in effect 'must', and the granting of a commission was not a matter discretionary in him. A reference was made to *Julius* v. *Bishop of Oxford*, (1880) 5 A. C. 214 at p. 223 : (49 L. J. Q. B. 577) where it was observed that where a statute directs the doing of a thing for the sake of justice or the public good, the word 'may' is the same as 'shall'. It was, however, pointed out that the construction of the words 'may' and 'shall' depended on circumstances. In the other case *King* v. *Marshland Smeeth and Fen District Commissioners*, (1920-1 K. B. 155: 89 L. J. K.B. 116) also, the word 'shall' was used in the statute. By S. 1, Marshland Smeeth and Fen District Act, 1796 (36 Geo. III, C. 100), it was provided as follows :

> "Be it enacted that the said tracts of common and waste lands called Marshland Smeeth and Marshland Fen, shall be effectually drained and that the same shall be stinted and regulated, set out inclosed, divided and allotted, by such Commissioners, in such manner and under such powers and authorities, and subject to such rules, orders and directions, as are hereinafter appointed, mentioned and declared."

One of the owners of land in the district alleged that the Commissioners had failed to drain the district effectually. The Divisional Court issued a writ of mandamus which, after reciting that the Commissioners had neglected to drain the district effectually, commanded them to do so. The Commissioners by their return to the writ alleged that they had carried out the order of the Court to the best of their ability. The plaintiff by his reply to the return joined issue thereon, and claimed damages for injury sustained by his land through the Commissioners' neglect to drain the district. One of the questions raised was whether the Commissioners were entitled to argue that the writ of mandamus should not have been issued by the Divisional Court. McCardie J. held that the Commissioners were so entitled. He then observed as follows :

> "Concisely put, the defendants contend that the Acts which govern them are permissive rather than directory, and that the Commissioners have a discretion as to the carrying out of those Acts of Parliament which, if exercised bona fide, cannot be supervised, governed or directed. The validity of this contention must, I think, depend in every case upon the true construction of the enactment in question. If, for example, a jurisdiction be given to an inferior Court all that that Court can be called upon by the High Court to do, save in special circumstances, is to hear and determine the matters brought before it in a regular and proper manner. Hence, a mandamus is granted, if jurisdiction has been declined by the inferior Court, to hear and determine only. If the inferior Court has a discretion as to the decision it may give, then if that discretion be exercised bona fide and not arbitrarily or illegally and without reference to extraneous considerations the Court will not control the exercise of that discretion. See the cases cited in Short and Mellor on Crown Office Practice, Edn. 2, pp. 200 and 201. But I conceive that Acts of Parliament which confer a judicial discretion upon a subordinate Tribunal are fundamentally different from Acts of Parliament which place duties upon such bodies as canal companies, dock companies, land drainage corporations and the like. The object of the former enactments is to secure a hearing and determination. They could scarcely provide that a decision should be given contrary to the view of the tribunal. But the object of the latter class of enactments is wholly distinct. They aim at securing a benefit to the public or a particular section of the community by creating a body for the performance of certain public works and the discharge of the duties appropriate thereto. But even in the latter class it may be that the Act of Parliament has granted a power rather than imposed a duty, has conferred a discretion rather than an obligation. If a power or discretion only, as distinct from a duty, exists then the prerogative writ of mandamus will not be issued by the Court."

[15] Therefore, the test laid down by McCardie J. is whether the statute has granted a power rather than imposed a duty, has conferred a discretion rather than an obligation. It was pointed out that the use of the word 'may' as distinguished from the word 'shall' was, in no way, conclusive. It is a mere point for consideration. Taking sub-s. (1) of S. 10, Industrial Disputes Act, 1947, and the proviso thereto, it seems clear to me that what is intended by the statute is to give the appropriate Government a power to refer for settlement or adjudication an industrial dispute in a public utility service, when a strike notice has been given, notwithstanding that any other proceedings under the Act in respect of the dispute may have commenced. It is a power or a discretion which is given rather than a duty or an obligation. The use of such expressions as "unless it considers that the notice has been frivolously or vexatiously given." "Or that it would be inexpedient

so to do" makes it quite clear, in my opinion, that a very wide and unfettered discretion is given to the appropriate Government. If that be the correct construction of the proviso, and I do not think any other construction is possible, then on the very decisions relied on by Mr. Sahay, this Court should not issue any writ or order of the nature wanted by Mr. Sahay against the State Government.

G.M.J. *Application rejected.*

A. I. R. (37) 1950 Patna 391 *[C. N. 107.]*

RAMASWAMI AND NARAYAN JJ.

Surendra Nath Karandeo — Appellant v. *Digambar Pathak — Respondent.*

A. F. A. D. No. 2042 of 1946, D/- 16-3-1950, from decision of Addl. Sub-Judge, Hazaribagh, D/- 21-6-1946.

(a) Tenancy laws —Bihar Tenancy Act (VIII [8] of 1885), S. 158AA—Rent suit — All parties interested not impleaded—Decree passed, if rent decree.

A decree in order to operate as a rent decree should be made against all parties interested in the tenure. [Para 3]

Where a rent suit was instituted against the defendant who had gifted a portion of the land in question to his wife long before the suit was instituted and it was not suggested that the land gifted was joint family property of which the defendant was the karta and the wife and two other persons who also were interested in the tenure were not impleaded in the suit:

Held that the decree passed in the suit was a money decree and had not the character of a rent decree. [Para 3]

(b) Civil P. C. (1908), S. 100 — Question of fact — Question whether person is interested in tenure is question of fact — Finding thereon cannot be impeached in second appeal. [Para 3]

Annotation : ('44-Com.) Civil P. C., S. 100, N. 35.

(c) Civil P. C. (1908), O. 34, R. 11 — Payment of interest at contractual rate up to date of redemption, if obligatory.

It is no longer absolutely obligatory on the Courts to decree interest at the contractual rate up to the date of redemption in all circumstances, if there be no question of the rate being penal, excessive or substantially unfair within the meaning of the Usurious Loans Act, 1918. [Para 7]

Annotation : ('44-Com.) Civil P. C., O. 34, R. 11, N. 2, Pt. 25.

J. M. Ghosh — for Appellant.
T. K. Prasad and K. D. De — for Respondent.

Ramaswami J.—The only question argued in this appeal is whether the decree obtained by defendant 8 in Rent Suit No. 809 of 1940-41 operated as a rent decree or as a money decree.

[2] On behalf of the appellant, Mr. J. M. Ghosh properly conceded that if it be held that the decree had the force of a money decree this appeal must fail. If not, it is manifest that this appeal should succeed.

[3] The appeal had been remanded by the High Court to the learned Subordinate Judge for rehearing the parties and

> "after excluding Ex. 8, a judgment, from evidence send up a clear finding to this Court by making clear references to and discussing the relevant evidence which justifies him in holding that the decree in question was a rent decree or a money decree."

The learned Subordinate Judge has now examined the evidence afresh and submitted a finding that the decree in question operated as a money decree and not as a rent decree. Learned counsel for the appellant impeached this finding on the ground that there was no evidence in support thereof. In my opinion, this argument is not tenable. It it true that the judgment or the decree of the rent suit was not exhibited on behalf of the parties. But as the learned Subordinate Judge remarks the plaintiff definitely alleged in para. 8 of the plaint that

> "defendant 8 had instituted a rent suit against defendant 1 only without impleading defendant 7 and other persons who were interested in the tenure."

There is no specific denial of this fact by the defendant in his written statement. On the contrary, in para. 11 thereof the defendant admitted that he had instituted in good faith the rent suit against defendant 1 by rightly impleading him as defendant. It was then contended for the appellant that though defendant 1 had made a gift of a portion of the land in favour of his wife he should nevertheless be deemed to have represented her in the rent suit. But there is no evidence to suggest that the property which was granted to defendant 7 was a joint family property of which defendant 1 should have been the *karta*. It should be noted that the deed of gift was executed on 6th February 1937 long before the rent suit was instituted. Since the appellant failed to implead defendant 7 in the rent suit, it is manifest that the decree in question had not the character of a rent decree. The learned Subordinate Judge has found that Babuni and Churo were also interested in the tenure and ought to have been impleaded in the rent suit. Learned counsel for the appellant contended that the documents by which they acquired the interest were not produced in proof of the transactions. The learned Subordinate Judge, however, accepted the oral evidence on this point and found that Churo and Babuni had also interest on an utter absence of evidence and since it is essentially a question of fact the finding cannot be impeached in second appeal. The principle cannot be disputed that a decree in order to operate as a rent decree should be made against all parties interested in the tenure. In *Jagdishwar Dayal Singh* v. *Dwarka Singh*, 12 Pat. 626 : (A. I. R. (20) 1933 P. C. 122) the Judicial Committee held that in order to justify a sale of a tenure under S. 208, Chota Nagpur Tenancy Act, all parties interested in the tenure must be joined as defendants in the rent suit, or be sufficiently represented. Where all the parties are not joined or represented S. 211 does not apply, and the revenue Court has no jurisdiction to order a sale; consequently S. 214 does not preclude the civil Court from entertaining a suit to set it aside. The Judicial Committee stated that the circumstance that a recorded tenure-holder has not got her name entered in the landlord's *sherista,* nor paid rent, nor been recognised by him as a tenure holder, was not such as to justify the landlord in selling if she has not been joined or represented in the rent suit.

[4] For these reasons, therefore, I hold that this appeal fails and should be dismissed with costs.

[5] The respondent has filed a cross objection that the lower appellate Court had committed an error of law in passing a decree for *pendente lite* interest at the rate of 6 per cent. per annum on the amount of claim. Mr. T. K. Prasad on behalf of the respondent maintained that the Courts below ought to have awarded interest at the rate of 2 per cent. per annum from the date of the institution of the suit till the date of the payment of the amount claimed.

[6] It should be stated that the learned Munsif omitted to award any interest *pendente lite* to the respondent. In appeal the learned Subordinate Judge granted interest *pendente lite* at the rate of 6 per cent. per annum on the amount of the claim. On behalf of the respondent learned counsel contended that under O. 34, R. 11 it was obligatory upon the Court to decree interest at the contractual rate up to the date of redemption. In my opinion, it is not possible to accept this argument. Prior to 1929, the position was that under S 34, Civil P. C., the Court had full discretion to order interest at such rate as it deemed reasonable to be paid on the principal sum adjudged from the date of the suit. Order 34, Rules 2 and 4 stipulated that the Court had to order an account to be taken of what was due to the plaintiff at the date of such decree for principal "and interest on the mortgage." In *Jagannath Prosad* v. *Surajmal,* A.I.R. (14) 1927 P.C. 1: (54 Cal. 161) the Judicial Committee held that in the case of mortgages the question as to rate of interest is to be determined under O. 34, and not S. 34, that upon the true construction of O. 34 it was obligatory upon the Court to decree interest at the contractual rate till the period fixed for redemption of the mortgage. At page 2 Lord Phillimore states :

> "Up to this point, till the period for redemption has expired, the matter remains in contract and the interest has to be paid at the rate and with rests specified in the contract of mortgage. That is the judgment which the High Court has delivered and of which complaint is, in their Lordships' opinion, ineffectually made. But after the period of redemption has expired the matter passes from the domain of contract to that of judgment, and the right of the mortgagee should thenceforth depend not on the contents of his bond, but on the directions in the decree."

[7] By Act XXI [21] of 1929, O. 34 was amended, and a new R. 11 was inserted, which deals specially with interest, and provides that the Court "may" order payment of interest to the mortgagee up to the date fixed for payment at the rate payable on the principal. It follows that this special provision, which removes any conflict that there might have been between S. 34 and O. 34, Rr. 2 and 4, gives a certain amount of discretion to the Court, so far as interest *pendente lite* and subsequent interest are concerned, as observed by Sulaiman J. in *Jaigobind Singh* v. *Lachmi Narain Ram,* A. I. R. (27) 1940 F. C. 20 : (I. L. R. (1940) Kar. F. C. 33) :

> "It is no longer absolutely obligatory on the Courts to decree interest at the contractual rate up to the date of redemption in all circumstances, if there be no question of the rate being penal, excessive or substantially unfair within the meaning of the Usurious Loans Act, 1918 : see *Sripat Singh* v. *Naresh Chandra,* A. I. R. (19) 1932 Pat. 332 at p. 334 : (140 I. C. 104) although in this case when considering O. 34, R. 2 the Privy Council case in A.I.R. (14) 1927 P.C. 1 was overlooked. In *Jagdish Jha* v. *Aman Khan,* 1939 F.L.J. 7 at p. 9 : (A. I. R. (27) 1940 F. C. 3) interest after the institution of the suit was ordered by this Court to be paid at the rate of 6 per cent. per annum on the principal amount till the date fixed for payment. In my opinion, the view then taken as to the power of a Court to reduce interest *pendente lite* was not contrary to law."

[8] In view of the newly added provision of O. 34, R. 11, Civil P. C., as construed by the Federal Court in the case to which reference has just been made it is manifest that the lower appellate Court has not committed any error of law in granting interest *pendente lite* at the rate of 6 per cent. per annum on the amount of claim.

[9] For these reasons this cross-objection should in my opinion be dismissed.

[10] **Narayan J.** — I agree.

V.R.B. *Appeal and Cross-objection dismissed.*

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* A. I. R. (37) 1950 Patna 392 *[C. N. 108.]*

SPECIAL BENCH

SHEARER, SINHA AND DAS JJ.

Sir Kameshwar Singh — Plaintiff v. *The Province of Bihar—Defendant.*

Title Suit No. 3 of 1950 and Misc. Judicial Cases Nos. 61, 73, 74, 75 and 60 of 1950, D/- 5-6-1950.

✠ (a) Bihar State Management of Estates and Tenures Act (XXI [21] of 1949) — Validity — Government of India Act (1935), S. 299 (1)—Constitution of India, Art. 31 (1).

(Per *Shearer J.*)— The Bihar State Management of Estates and Tenures Act is not an Act under which a

proprietor or tenure-holder as an individual has been deprived of his right in property. The Act purports, on the face of it, to affect all persons belonging to a particular class, namely, proprietors of estates and tenure-holders. As the Act purports to affect an entire class of persons it is a municipal or civil law and the Courts are not entitled to disregard it as something done by the Legislature wholly in excess of its jurisdiction. [Para 3]

Annotation: ('46-Man.) Govt. of India Act, S. 299 N. 1.

✠ (b) Constitution of India, Art. 31 (6)—Exercise of powers under—Restriction.

(Per *Shearer J.*)—The restriction, on the exercise of the power under Art. 31 (6), that the President should refrain from certifying any law unless that law provided for compensation is not a legal but rather a moral or political restriction. [Para 5]

✠ (c) Constitution of India, Art. 31 (6)—"It shall not be called in question"—Meaning of—Institution of suit prior to Constitution.

The intention of the Constituent Assembly was that certain rights in land should be or be liable to be extinguished with effect from the date of enactment purporting to extinguish them and it cannot be said that words "it shall not be called in question" being words of futurity the certificate of the President is of no avail to the defendant where a suit for a declaration that the Bihar State Management of Estates and Tenures Act (XXI [21] of 1949) is an unconstitutional law is instituted prior to the enactment of the Constitution. [Paras 5, 37, 83]

✠ (d) Government of India Act (1935), S. 299 (2), Sch VII, List II, item 9—Acquisition—Meaning of —Constitution of India, Art. 31 (2).

(Per *Shearer and Sinha JJ.*) —The Bihar State Management of Estates and Tenures Act only deprives the proprietor of his right to manage his property or rather the greater part of his property. The proprietor still remains the owner of the property. This does not amount to acquisition of property. [Paras 6, 24]

Annotation: ('46-Man.) Govt. of India Act, S. 299 N. 1.

✠ (e) Bihar State Management of Estates and Tenures Act (XXI [21] of 1949), S. 1—Act, validity of Government of India Act (1935), S. 299 — Constitution of India, Art. 248.

The subject-matter of the Act is not to be found in any of the items of the legislative lists in Government of India Act and in consequence, neither the Central nor the Provincial Legislature had jurisdiction over that subject-matter unless and until a notification had been issued by the Governor-General under S. 104, Government of India Act. Nor has the Legislature of the State of Bihar jurisdiction to enact such a law now, as, under Art. 248 of the Constitution, residuary powers of legislation are vested in Parliament. [Paras 6, 27]

✠ (f) Constitution of India, Art. 19 (5)—Bihar State Management of Estates and Tenures Act (XXI [21] of 1949)—Reasonableness.

The Bihar State Management of Estates and Tenures Act imposes restrictions of the most far-reaching and drastic kind on the power of proprietors and tenure-holders to deal with their property, and it cannot fairly be said that these restrictions are either "reasonable" or "imposed in the interests of the general public." [Paras 7, 40, 80]

✠ (g) Constitution of India, Art. 31 (6)—Certificate of President—Effect.

(Per *Shearer J.*)—**The Constitution of India merely debarred the Courts from entering into the question of compensation or the propriety of the acquisition. The intention was not to compel the Courts to obey implicitly any enactment passed by the Legislature where a certificate was granted by the President.** [Para 8]

(h) Government of India Act (1935), Sch. VII, List II, item 21 — Power to take management of property—Bihar State Management of Estates and Tenures Act (XXI [21] of 1949).

(Per *Sinha J.*)—The provisions of item 21 do not include the power to take over management of property of such persons as do not come within any of the disabilities imposed by the Court of Wards Act or the Chota Nagpur Encumbered Estates Act. The pith and substance of Bihar Act, XXI [21] of 1949 is to deprive proprietors and tenure-holders of their valuable rights to manage their property, irrespective of whether they are "disqualified" persons, rendering them incapable of managing their own property. The Bihar Act is therefore beyond the powers of the Provincial Legislature as contained in Govt. of India Act, 1935, as amended by Indian Independence Act. [Paras 24, 27]

✠ (i) Government of India Act (1935), S. 299 (2)—Public purpose—Power of Court to decide — Constitution of India, Art. 31 (2).

(Per *Sinha J.*)—Public policy in relation to an enactment is a matter entirely for the Government and the legislature to decide, with which the Courts have no concern. But whether a particular piece of legislation is for a public purpose is a matter which is not beyond scrutiny by the Courts, though the Government may be good judges of whether a particular legislation was for a public purpose. [Para 32]

Annotation: ('46-Man.) Government of India Act, S. 299 N. 1.

✠ (j) Government of India Act (1935), S. 299 (2), Sch. VII, List II, item 9 — Bihar State Management of Estates and Tenures Act (XXI [21] of 1949) — Validity of.

(Per *Sinha and Das JJ.*)—The Bihar State Management of Estates and Tenures Act does not give any indication that it was meant to be for a public purpose and cannot be presumed to be so. Hence, even if it is assumed that the Act was an acquisition within the meaning of Sch. VII, List II, item 9 it would be void on the ground of not being for a public purpose. [Paras 32, 76]

Annotation: ('46-Man.) Govt. of India Act, S. 299, N. 1.

✠ (k) Government of India Act (1935), S. 299 (2) —Payment of compensation—Bihar State Management of Estates and Tenures Act (XXI [21] of 1949)—Constitution of India, Art. 31 (2).

(Per *Sinha and Das JJ.*) —Assuming that Bihar State Management of Estates and Tenures Act has the effect of acquisition of property for public purposes, there is no provision in the Act for making compensation to the owner of the property acquired. Hence the Act is *ultra vires* the Provincial Legislature. [Paras 33, 69]

Annotation: ('46-Man.) Govt. of India Act, S. 299, N. 1.

✠ (l) Constitution of India, Art. 31 (2), Sch. VII, List I, item 33 and List II, item 36 — Taking possession — Meaning of — Bihar State Management of Estates and Tenures Act (XXI [21] of 1949), S. 1.

(Per *Sinha J.*)—Taking possession under Art. 31 has reference to the power of requisition under item 33 of List I and item 36 of List II of Sch. 7 to the Constitution. The Bihar State Management of Estates and Tenures Act does not contemplate requisitioning of property and hence is *ultra vires* on this ground. [Para 34]

(m) Bihar State Management of Estates and Tenures Act (XXI [21] of 1949) — Severance of provisions—Interpretation of Statutes.

(Per *Sinha and Das JJ.*)—The provisions of the Act are so inextricably interwoven that one set of provisions cannot be separated or severed from the rest. If the Act is invalid in certain parts, the whole Act is invalid. [Paras 41, 86]

✠ (n) Constitution of India, Art. 31 (6)—Effect of —Civil P. C. (1908), S. 9.

(Per *Sinha J.*) — A Court must have jurisdiction throughout the proceedings until termination of those proceedings by the judgment of the Court. If the Court had jurisdiction to go into the question at the date of the institution of the suit, the jurisdiction will continue until something has happened to take away that jurisdiction. Article 31 (6) has not the effect of taking away the pre-existing jurisdiction of the Court to go into a matter. [Para 37]

Annotation : ('44 Com.) C. P. C., S. 9, N. 3, 4.

✠ (o) Constitution of India, Art. 31 (6)—Any law of the State—Meaning of—Bihar State Management of Estates and Tenures Act (XXI [21] of 1949), S. 1.

(Per *Sinha J.*)—In order to attract the operation of Art 31 (6) there must be a valid law of the State. The certification by the President may cure an irregularity or an illegality in some details of the law in a valid piece of legislation but cannot cure a law which is void *ab initio*. The Bihar State Management of Estates and Tenures Act (XXI [21] of 1949) being void *ab initio* cannot be cured by the certificate under Art. 31 (6). [Para 38]

(p) Interpretation of Statutes — General and special provisions.

Where the same statute makes general provisions in respect of a particular subject-matter, and makes specific provisions with respect to a special category, the latter must prevail over the general. [Para 39]

Annotation : ('44 Com.) C. P. C. Pre. N. 7.

(q) Interpretation of Statutes—Inconsistent provisions.

Different provisions of the same statute, which are apparently inconsistent with each other, should be so construed as to give effect to all the provisions, so as to avoid a repugnancy. [Para 39]

Annotation : ('44-Com.) C. P. C. Pre. N. 7.

✠ (r) Constitution of India, Arts. 19 (1) (f) and 31 (2) and (6)—Construction—Certification—Limitation.

(Per *Sinha and Das JJ.*) —Article 31 cannot be read as an exception to the fundamental rights as declared in Art. 19 (1) (f). But certainly the two Articles have got to be read together in order to give full effect to the intention of the Constituent Assembly. Terms of Art. 31 (6) are not wide enough to cover each and every contravention of the Constitution but only of cl. (2) of Art. 31. Hence, as the Act XXI [21] of 1949 is inconsistent with Art 19 (1) (f), it must be held to be invalid notwithstanding the certification by the President. [Paras 39, 81, 84]

(s) Interpretation of Statutes — Constitution statutes.

(*Per* Das J.) —The Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. [Para 57]

✠ (t) Government of India Act (1935), S. 299 (1)— 'Law'—Meaning of.

(Per *Sinha and Das JJ.*)—The word "law" in sub-s. (1) must mean "valid law". Sub-section (1) of S. 299 has taken the shape of general declaratory statement, in the negative form, which must surely mean that no person shall be deprived of his property by a mere executive, administrative or prerogative act. If the executive takes the property of any person, it must be prepared to justify that act under the authority of a valid law. [Paras 39, 67]

(u) Government of India Act (1935), S. 299 (2) — Acquisition — What amounts to — Bihar State Management of Estates and Tenures Act (XXI [21] of 1949), S. 3—Constitution of India, Art. 31 (2).

(Per *Das J.*)—Bihar State Management of Estates and Tenures Act (XXI [21] of 1949) does not merely provide for taking of possession of land. The Act is a piece of confiscatory legislation which deprives a proprietor or tenure-holder of several of his important rights in land without providing for compensation to him. Important rights in land are transferred by the Act to the State Government or the Manager named in the vesting order. Therefore, the Act is hit by S. 299, and was made in contravention of the provisions of that section. [Para 72]

Annotation: ('46-Man.) Govt. of India Act, S. 299, N. 1.

(v) Interpretation of Statutes — Intention of legislation.

(Per *Das J.*)—A Court of law is not called upon to determine the expediency or otherwise of State policy; nor is it concerned with motives of legislation. [Para 74]

Annotation : ('44-Com.) C. P. C. Pre. N. 7.

✠ (w) Government of India Act (1935), S. 299 (2) —Public purpose — Meaning of — Constitution of India, Art. 31 (2).

(Per *Das J.*) —Mere State policy or policy of the party in power is not the same thing as public purpose; further, though *prima facie* the legislature or the Government are good judges of whether a particular purpose is a purpose in which the general interest of the community is concerned, they are not absolute judges particularly where the constitutional charter or instrument creating the legislative power imposes a restriction by saying that a law relating to compulsory acquisition must be for a public purpose. [Para 76]

Annotation: ('46-Man.) Govt. of India Act, S. 299, N. 1.

In No. 3 of 1950—

P. R. Das, Khaleel Ahmad, S. P. Srivastava and Raghu Nath Jha—for Plaintiff.

Advocate General, Government Pleader and Bajrang Sahai—for Defendant.

In No. 61 of 1950—

Mahabir Prasad, Khaleel Ahmad and Balbhadra Prasad Singh—for Petitioner.

The Advocate General—for Opposite Party.

Shearer J. — This Special Bench has been constituted to try a suit instituted by the Maharajadhiraja of Darbhanga in the Court of the Subordinate Judge at Laheriasarai which has been removed to this Court to be tried by it in the exercise of its extraordinary original civil jurisdiction. In this suit the plaintiff has asked for a declaration that the Bihar State Management of Estates and Tenures Act, 1949, is an unconstitutional law and for an injunction restraining the defendant from taking possession, through its officers, of his estate. The defendant in the suit, which was instituted prior to the enactment of the Constitution, is the Province of Bihar. Along with this suit, there have been set down for hearing a number of applications under Art. 226 of the Constitution. These applications are by zemindars who have instituted suits similar to the suit instituted by the Maharajadhiraja of Darbhanga. They too asked for injunctions restraining the State of Bihar or any of its officers from taking possession of their estates, and, on one ground or another, their applications for an ad-interim injunction, pending the disposal of the suits, were refused. At a very early stage, we pointed out that, if the suit instituted by the Maharajadhiraja of Darbhanga was decreed, the State of Bihar would, presumably, refrain from taking possession of the estates of the petitioners, unless and until the decree had been reversed on appeal, and that, if, on the other hand, the suit was dismissed, the applications under Art. 226 of the Constitution would, necessarily, have to be dismissed also. The learned Government Pleader subsequently assured us that the State would take the course which, we had suggested, was proper. In these circumstances we thought it unnecessary to consider what other protection could or ought to be afforded to the various petitioners, and intimated that their applications would be dismissed, but, in the circumstances, without costs.

[2] It is unnecessary to set out in more than their broad outlines the provisions contained in the impugned Act. The draftsman apparently took as his model, the Chota Nagpur Encumbered Estates Act, and one somewhat curious result of this is that, while the Act professes "to provide for the State management of estates and tenures in the Province of Bihar," the management is, in fact, to be vested in a Manager who is to be an officer not below the rank of Deputy Collector. Although the Manager, being a public servant, may be amenable to the control of the Provincial Government, it is the Manager alone, and not the Provincial Government, who

> "stands responsible in law for fidelity in the discharge of the entire duties of management, disposal, realisation and restoration, with regard to the estate under his care/vide *Hukum Chand* v. *Ran Bahadur Singh*, 51 I. A. 208 at p. 214 : (A. I. R. (11) 1924 P. C. 156)."

As from the commencement of the period of management, which is to be 20 years, the proprietor is disabled from recovering rent, including arrears of rent, which have already accrued due, and from making a valid lease or a valid mortgage, although not from selling the estate outright or making a gift of it. The Manager is required to pay him a quarterly allowance not exceeding 20 per cent. of the gross annual income in the case of estates yielding an income of not more than Rs. 10,000 and not exceeding 5 per cent. in the case of estates yielding an income exceeding Rs. 5 lakhs. Although the quarterly allowance to be made to the proprietor is comparatively small, the Manager is, nevertheless, required, at the end of the year, to make over the surplus income to him. The proprietor may, however, have some difficulty in ascertaining what that surplus is or ought to be, as he is not entitled to inspect the accounts until they have been audited, and is then entitled only to inspect them once in the course of every twelve months. He is not free to institute a suit for accounts or, indeed any other suit, and can only bring any grievance which he may have regarding the management or the payments made to him to the notice of an Advisory Committee, and, through the Advisory Committee, to the notice of the Provincial Government. The Manager is empowered to remove mortgagees and lessees in the possession of any part of the estate, and, as a necessary corollary, to ascertain, or rather determine the amounts due to them, and to frame a scheme for the liquidation of the proprietor's debts. The main purpose of the Legislature, in enacting the Chota Nagpur Encumbered Estates Act, was to discharge the liabilities of the disqualified proprietor, and so prevent his estate passing into the hands of other persons whose acquisition of the property was likely to be resented and so cause trouble. From Mr. Reid's Settlement Report on the District of Ranchi (pp. 37-38), it appears that, in the earlier part of the 19th century, the raiyats in Chota Nagpur were much attached to their zamindars and that in several instances serious disorders had occurred when the estate of a zemindar was sold for arrears of revenue and a purchaser, who was not known and esteemed in the locality, sought to take possession of it. If, under the Chota Nagpur Encumbered Estates Act, possession was taken of estates, this was not done in exercise of what, to American jurists, is known as the right of eminent domain, but rather in exercise of the police power of the State. It was necessary to deprive the owners of these estates of their right to manage them in order to prevent the disorders that might arise if they were sold up by their creditors. Mr. Lal Narayan Sinha, for the defendant, suggested that the impuged Act could be supported on somewhat similar grounds. The learned Government Pleader drew on our attention to certain recent enactments and, more particularly, to the Bakasht Disputes Settlement Act. It may well be that the impugned Act is part of a scheme for agrarian reform, and that is certainly suggested by cl. (6) in sub-s. (1) of S. 25, under which the Manager is required to expend a certain proportion of the income on the maintenance of irrigation works for the benefit of the tenantry. The enactment, however, with which the impugned Act is most closely connected is one which was not mentioned by Mr. Lalnarayn Sinha, namely the Bihar Abolition of Zamindaris Act, 1948. That is made clear by a comparison of the provisions contained in sub-ss. (2) and (3) of S. 5 of the impugned Act and the provisions contained in Ss. 5 and 6, Bihar Abolition of Zamindaris Act. Under the former, the Manager is restrained from taking charge of land in the *khas* possession of the proprietor or of buildings or structures in the possession of the proprietor and used "as golas, factories or mills for the purpose of trade, manufacture or commerce or used for storing grains or keeping cattle or implements for the purposes of agriculture". Under the latter, the proprietor is, when his estate is acquired, to be entitled to retain buildings so used on payment of a fair and equitable ground rent and is to be deemed to be a *raiyat* with a right of occupancy in land in his *khas* possession. These provisions, regarding which little or nothing was said in the course of argument, are, in my opinion, of considerable significance. The intention of the Legislature appears to be that, in so far as proprietors and tenure-holders derive an income from land which, in the language of economists, is an unearned income, they are to be expropriated, while, in so far as they themselves utilise the land as a means of production and derive an earned income from it, they are to be left in undisturbed possession.

[3] The greater part of the lengthy and very able argument which has been addressed to us on behalf of both parties has proceeded on the assumption that, not merely is the impugned Act part and parcel of a scheme which aims at the extinguishment or abolition of one form of property, but is itself an expropriatory measure. Mr. P. R. Das, for the plaintiff, has strongly contended that the word "law" as used in sub-s. (1) of S. 299, Government India Act and in cl. (1) of Art. 31 of the Constitution must be understood as meaning a general law, or, as he put it, *lex terrae* or the law of the land and as excluding any law passed for the express purpose of depriving an individual or individuals of their rights to property. The learned counsel referred to a passage in Blackstone's Commentaries, Vol. I, p. 38, in which it was said that

> "a particular act of the legislature to confiscate the goods of Titius, ... does not enter into the idea of a municipal law"

and to the decision of the Supreme Court of the United States in the *Trustees of Dartmouth College* v. *Woodword*, 4 U. S S. C. L. Ed. 629. In that case the plaintiff, in an action to recover some documents from persons who, under an Act of a State Legislature, had been constituted the trustees of certain property complained that he and certain other persons had been granted a charter by the Crown and that the effect of the Act had been to transfer property, which was vested in himself and these other persons as trustees, to another and different body of persons who had also been constituted trustees under it. The plaintiff succeeded in the action on the ground that, in passing the Act which deprived him and his co-trustees of a vested right, the State Legislature had exceeded its legislative jurisdiction and that, in consequence, the Courts were entitled to treat the Act as a nullity. The impugned Act is not, however, an Act under which the plaintiff, as an individual, has been deprived of his rights, in property. The Act purports, on the face of it, to affect not merely the plaintiff, but all persons belonging to a particular class, namely, proprietors of estates and tenureholders. As will appear presently, the British Parliament, in enacting sub-s. (3) of S. 299, Government of India Act, contemplated the possibility of legislation affecting the rights of this class of individuals in land. It is true that the impugned Act confers very wide powers on the executive and leaves a great deal to their discretion. That discretion does not, however, extend to the making of an order depriving a particular individual of his estate or tenure. The Act may be open to criticism on the ground of the wide delegation of power made to the executive but, as it purports to affect an entire class of persons, it is, in the ordinary sense in which the term is used, a municipal or civil law, and the Courts are not entitled to disregard it as something done by the Legislature wholly in excess of its jurisdiction.

[4] Turning to sub-s. (2) of S. 299, Government of India Act, Mr. Das contended that it was proposed to acquire the property of his client and that, as the property was not to be acquired for public purposes and as no compensation was to be paid, the proposed acquisition was unlawful. The learned Government Pleader denied that the property of the plaintiff was to be acquired, although he conceded that possession was to be taken of it, and contended that compensation was, in fact, to be paid and that possession was to be taken for public purposes. Sub-section (2) of S. 299, Government of India Act must be read in close conjunction with sub-s. (3) which immediately follows it. It seems clear that, in enacting the former subsection, the British Parliament had in view a case in which the property of a particular individual or particular individuals was to be acquired by the State. In such a case, it was made a condition prerequisite to the acquisition that compensation, meaning thereby the value of the property in money to the owner, should be paid and that, when acquired, the property should be used for public purposes; that is, that the use to be actually made of it by the

State or by the local body or company for which it was acquired should subserve the interests of the community and not those of an individual or a number of individuals. In enacting the latter, the British Parliament would appear to have had in mind a case in which the property of every individual in a particular class or classes was to be acquired or rather a case in which a certain species of property in land was to be extinguished or modified by legislative enactment. It is significant that neither the word "compensation" nor the words "for public purposes" appear in sub-s. (3), and it may, I think, well be that the British Parliament was not unmindful of the Irish Land Act of 1923 under which the interest of certain land-holders in Ireland was compulsorily acquired, but payment was not made in money, but in bonds which, incidentally, were subsequently guaranteed by the British Government. That this is the proper construction to be put on sub-ss. (2) and (3) of S. 299, Government of India Act is strongly suggested, to my mind, by what is contained in para. 369 of the Report of the Joint Committee on Indian Constitutional Reform. This is as follows:

> "369. We think that some general provision should be inserted in the Constitution Act safeguarding private property against expropriation, in order to quiet doubts which have been aroused in recent years by certain Indian utterances. It is obviously difficult to frame any general provision with this object without unduly restricting the powers of the Legislature in relation particularly to taxation; in fact, much the same difficulties would be presented as those which we have discussed above in relation to fundamental rights. We do not attempt to define with precision the scope of the provision we have in mind, the drafting of which will require careful consideration for the reasons we have indicated; but we think that it should secure that legislation expropriating, or authorising the expropriation of, the property of particular individuals should be lawful only if confined to expropriation for public purposes and if compensation is determined, either in the first instance or on appeal by some independant authority. General legislation, on the other hand, the effect of which would be to transfer to public ownership some particular class of property, or to extinguish or modify the rights of individuals in it, ought, we think, to require the previous sanction of the Governor General or Governor (as the case may be) to its introduction; and in that event he should be directed by his Instrument of Instructions to take into account as a relevant factor the nature of the provisions proposed for compensating those whose interests will be adversely affected by the legislation."

Reference may also be made to paragraph 372 of the Report in which the Joint Committee referred to the possibility of

> "an Indian Ministry responsible to an Indian Legislature wishing to alter the enactments embodying the permanent settlement."

I find myself unable to accept the contention of Mr. P. R. Das that sub-s. (3) of S. 299, Government of India Act dealt with nothing more than a matter of procedure. In the Instrument of Instructions to the Governor, the Governor was directed not to withhold his sanction to the introduction of such a bill as is referred to in the sub-section, but in every case to reserve it, if and when it was passed by the Legislature for the consideration of the Governor General. The Governor General was similarly required by his Instrument of Instructions to reserve for the assent of His Majesty any law altering the permanent settlement. Mr. Das contended that, by reason of what was contained in sub-s. (2), it was implicit that any bill referred to in sub-s. (3), should contain provisions for the payment of compensation. I have no doubt myself that a British Secretary of State would have advised His Majesty to refuse his assent to an Act expropriating proprietors of estates or tenure-holders unless the Act provided for adequate compensation, that compensation not necessarily, however, taking the form of ~~immediate~~ cash payments. It is obvious that, if compensation in the form of hard cash had had to be paid to the vast number of proprietors and tenure holders, the repercussions on the economy of the state would have been very serious, whereas, if, instead of money being paid, bonds were issued, the repercussions would, almost certainly, have been much less serious, and, if there was no great danger of the bonds depreciating to any marked extent in the market, the compensation given might have been not inadequate. To sum up, the position under the Constitution embodied in the Government of India Act was that a particular individial or individuals, whose property was sought to be acquired, had their remedy in the Courts. Individuals belonging to a class, whose rights in land were extinguished or modified by the Legislature, would, no doubt, to a certain extent have been entitled to have recourse to the Courts, but the extent to which they would have been so entitled would have depended solely on the provisions contained in the statute extinguishing or modifying their rights, and not on anything contained in the Constitution Act itself. Nevertheless, the Constitution Act provided them with a very real and valuable safeguard in that any legislation of this kind had to be reserved for the consideration and assent of His Majesty. In the interregnum which occurred between 15th August 1947, and 26th January 1950, this safeguard, of course, did not exist.

[5] The Constitution, which the Indian people gave to themselves on 26th January 1950, recognises the sanctity or inviolability of property. Article 19 (1) (f) states:

> "All citizens shall have the right to acquire, hold and dispose of property."

Under the growing complexities of modern life, the right of an individual to acquire, hold and dispose of property must necessarily be subject to numerous restrictions, ranging, at one end of the scale, from an absolute incapacity in certain individuals to hold certain property, for example, land in certain area in Chota Nagpur, and, at the other, to a provision requiring a resident in a municipal area to obtain the previous sanction of the Municipality before making some quite trifling alteration in his premises. Again the right of an individual to retain his property is always subject to the overriding condition that the State may deprive him of it, permanently or temporarily, in the interest of the community as a whole. The Constituent Assembly recognised the existence of each of these two limitations and embodied the former in Art. 19 (5), and the latter in Art. 31. These two articles, it is clear, deal with matters which are quite separate and distinct. Clause (1) of Art. 31, in terms reproduces sub-s. (1) of S. 299, Government of India Act. Clause (2) of does not, in terms, reproduce the provisions contained in sub-s. (2) of S. 299, but such modifications, as have been made, are purely verbal and cl. (2) has precisely the same effect as had sub-s. (2) of S. 299. The words "for public purposes" and the word "compensasation" which occur in cl. (2), as they occurred in sub-s. (2) of S. 299, must be construed in the manner in which they have always hitherto been construed by the Courts in India and the Courts in Great Britain and in Dominions of the British Commonwealth. In the course of the argument, reference was frequently made to Cooley's Constitutional Limitations. At page 1131, volume II of the 8th edition of this work, there occurs the following passage:

> "It is certain that there are very many cases in which the property of some individual owners would be likely to be better employed or occupied to the advancement of the public interest in other hands than in their own; but it does not follow from this circumstance alone that they may rightfully be dispossessed."

But for the existence of other clauses in Article 31, it is, I think, perfectly clear that a law extinguishing such rights as proprietors and tenure-holders have in land would be a law which offended against clause (2) of Article 31. The clauses in question are clauses (4) and (6) of the Article. These clauses, in fact, proceed on the assumption that an enactment which extinguishes the rights of an entire class of individials in land is an unconstitutional law. What they do or attempt to do is to prevent the Courts from taking notice of this and pronouncing the law to be an unconstitutional law. On the production of a certificate by the President, the Courts are to refrain from considering and deciding whether or not, on certain grounds, the law is a law, in enacting which the legislature has exceeded its jurisdiction. What exactly is the extent of the restriction or disability imposed on the Courts is a matter with which I will deal more fully later. For the present, I propose to deal with two subsidiary points raised by Mr. P. R. Das. Mr. Das contended that it was an implied condition of the exercise by the President of the power conferred on him by cl. (6) of Art. 31 that the President should refrain from certifying any law unless that law provided for compensation. The compensation might, Mr. Das conceded, not be compensation in the sense in which the word is used in cl. (2), that is, the equivalent in money of the property taken, but might be compensation in the form of bonds. It is not really necessary to decide this point, and I must not be taken as deciding it. In my opinion, the President of the Republic, when invited to certify an Act, is in very much the same position as a British Secretary of State would have been, if called upon to advise His Majesty to assent or withhold his assent to an Act extinguishing or modifying the rights of proprietors of estates in their land. It may be that such considerations as the engagements, which were entered into in 1793, would have weighed with a Brithish Secretary of State and might not at all weigh with the President of the Indian Republic and that a British Secretary of State might have regarded as not wholly adequate, provisions for compensation which the President of the Indian Republic might regard as sufficient. In each case, however, such a restriction as exists on the exercise of the power is not a legal, but rather a moral and political restriction. The other subsidiary point taken by Mr. P. R. Das is that the words "it shall not be called in question" are words of futurity and that, as the suit of the plaintiff was instituted prior to the enactment of the Constitution, the certificate is of no avail to the defendant. The decisions on which Mr. Das mainly relied in this part of his argument were *Smithies* v. *National Association of Operative Plasterers*, 1909-1 K B. 310 at p. 319 : (78 L.J.K.B. 259) and *Moon* v. *Durden*, (1848) 154 E. R. 389 : (12 Jur 138). In the former, the Court of Appeal had to construe the words "an action against a trade union . . . . shall not be entertained", and they declined to construe them as if they meant "shall cease to be entertained". In the latter, an action was brought to recover money won on a wagering contract prior to 8th August 1845, on which date a statute was enacted that :

> "All contracts and agreements by way of gaming or wagering shall be null and void and that no suit shall

be brought or maintained in any Court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager."

It was held that the action was maintainable, the writ having issued on 12th June 1845. The decision in each case proceeded mainly on the ground that an intention to confiscate vested rights retrospectively could not or ought not to be imputed to Parliament. In my opinion, neither of these decisions is directly applicable. In the one case, the plaintiff was seeking to recover damages in respect of a tort which was not, as it were, legalised by the subsequent enactment, and, in the other, the plaintiff was seeking to recover property which, in the opinion of the Court, the legislature had no intention of confiscating or extinguishing as from a date prior to the date on which the action was instituted. The intention of the Constituent Assembly was, however, it appears to me, that certain rights in land should be or be liable to be extinguished with effect from the date of the enactment purporting to extinguish them. The Constituent Assembly cannot possibly have intended that individual proprietors or tenure-holders, who had had the foresight or the means to institute a suit, should be permitted to retain their rights, whereas the rights of others, who had not been so fortunately situated, should be extinguished or expropriated.

[6] There has been much controversy at the Bar as to whether or not, what is proposed to be done under the impugned Act, amounts to the acquisition of the plaintiff's property. Mr. Das strongly relied on a decision of the High Court of Australia. *The Minister of State for the Army* v. *Dalziel*, 68 Com. L. R. 261, and, adopting the words of Rich J., contended that, once the management of his client's estate had been taken over, nothing would be left to him but "the empty husk of ownership". I find myself quite unable to accept this view. The plaintiff is to remain the owner of his estate and is alone to be competent to sell or make a gift of it, and he is to continue to derive a considerable, although, perhaps, a much reduced, income from it. The learned Government Pleader was, at first sight, on somewhat stronger ground when he contended that possession was to be taken of the plaintiff's property. The words "shall be taken possession of" which occur in cl. (2) of Art. 31 and which do not occur in sub-s. (2) of S 299 appear, however, to have been inserted as the word "requisition" had been inserted in certain items in the legislative lists and also, perhaps in consequence of the decision of Bhagwati J. of the Bombay High Court in *Tan Bug Taim* v. *Collector of Bombay*, A I. R. (33) 1946 Bom. 216 : (47 Cr. L. J. 594). The taking of possession contemplated in cl. (2) of Art. 31 is a taking of possession which entirely excludes the rightful owner. But, under the impugned Act, the manager is no more entitled to exclude the plaintiff than is a manager of an estate, to which the Chota Nagpur Encumbered Estates Act has been applied, entitled to exclude the disqualified proprietor. On the contrary, under the impugned Act it is the proprietor of the estate or the tenure-holder who is entitled to exclude the Manager from part of the property. The impugned Act does, in my opinion, exactly what it purports to do; that is, it deprives the plaintiff of the right to manage his property or rather the greater part of his property. There are numerous instances in which the State or an official or a Court of the State is by law empowered to take possession of and either manage or arrange for the management of property. The earliest enactments on the subject, which I have been able to discover, are Regulation v [5] of 1799, Regulation VII [7] of 1822 and Regulation V [5] of 1827. More recent enactments are the Chota Nagpur Encumbered Estates Act, the Court of Wards Act, the Indian Lunacy Act 1912, and the provisions contained in Ss. 93 to 100, Bihar Tenancy Act. In a society in which the right of property in land is regarded as inviolable or sacrosanct, property so taken possession of is managed in the interests of the owner and as if it were, for all practical purposes, property held in trust. Under the impugned Act, however, the property of the plaintiff is to be managed to some extent, and, perhaps, largely, in the interests of the tenantry. For instance, 12½ per cent. of the gross annual income is to be spent on irrigation works. The plaintiff is also to be given very little say, indeed, in the management of his estate. A comparison of the relevant provisions in the impugned Act with the provisions contained in Ss. 93 to 100, Bihar Tenancy Act, is instructive. When, under the Bihar Tenancy Act, a common manager is to be appointed, the co-sharer landlords are to be consulted, and, indeed, if they can agree, their choice of a common manager is to be respected, while they are to be at liberty to inspect the accounts of the common manager and take copies of them whenever they think it necessary or desirable to do so. There are, I believe, more or less 30,000 revenue-paying estates on the tauzi roll of the Collector of Muzaffarpur. We were informed that, so far, notifications have issued bringing no more than a dozen or so of these 30,000 estates under State management. Under S. 33 of the impugned Act, the Provincial Government may, at any time, relinquish the management of an estate or tenure. The conclusion is, to my mind, irresistible.

and is that the impugned Act is to be used as a device for making the estate of the plaintiff and the estates of the other substantial *zamindars* the *vile corpus* of a vast and hazardous experiment. If it is found that the estates can be successfully managed and made a source of revenue to the Provincial Government, other estates will gradually be taken charge of. If, on the other hand, the experiment proves a dismal failure, the estates will be restored to their owners, and the latter will be left to do what they can to rehabilitate themselves. Was the Provincial Legislature competent to enact such a law? When this point was put to the learned Government Pleader, Mr. Lalnarayan Sinha relied on the word 'land' in Item 21 in List II to the Government of India Act and on the decision of their Lordships of the Judicial Committee in *Megh Raj* v. *Allah Rakhia*, 74 I. A. 12: (A.I.R. (34) 1947 P C. 72). It is true that, in that case, their Lordships pointed out that the words "that is to say," which follow the word 'land' in Item 21, were not words of restriction, but rather words of explanation or illustration giving instances which may furnish a clue for particular matters. It is, I think, not without significance that, among the matters referred to in the item after the words "that is to say," are "the relation of landlord and tenant," "Court of Wards" and "encumbered and attached estates." The instances in which, hitherto, the State or one of its officers or Courts has taken possession of private property and either managed it directly or arranged for its management will, I think, on examination, be found to come, quite naturally, under one or other of these or other items in the legislative lists. When, hitherto, private property has been taken charge of by the State, the State has taken charge of it either in order to protect it for the owner or to prevent public disorder. In other words, it has acted in exercise of the police power, and not in exercise of the right of eminent domain. I have already referred to the events which led up to the enactment of the Chota Nagpur Encumbered Estates Act, and I may now refer to S. 93, Bihar Tenancy Act which provides for the appointment of a common manager

> "when any dispute exists between co-owners of an estate or tenure as to the management thereof, and in consequence there has ensued, or is likely to ensue, (a) inconvenience to the public, or (b) injury to private rights."

The estate of the plaintiff is not, however, to be taken charge of either in order to protect it or to prevent public disorder. It is to be taken charge of in pursuance of a far-reaching state policy, and it cannot even be said that *raiyats*, as a class, are to be benefited, although, of course, the *raiyats* of the plaintiff may be. It seems to me impossible to say that the subject-matter of the enactment is "the relation of landlord and tenant," still less, that it is "rights in or over land." When the attention of the learned Government Pleader was drawn to the latter words in Item 21, Mr. Lalnarayan Sinha said that the right of the plaintiff to manage his property, to collect rent from his *raiyats* and to make a valid mortgage or lease were taken away by the impugned Act. These, however, are not, strictly speaking, rights in property, but are powers incident to ownership. One may speak loosely of a man's right to make a will, but, in the language of jurisprudence, this is not a right, but a power. The words "rights in or over land" occur in sub-s. (5) and the words "rights in land" occur in sub-s. (3) of S. 299, Government of India Act. There can, I think, be no doubt whatever that the draftsman used the words "rights in land" as connoting an interest or estate in land, and not a mere power incident to the right of ownership, and used the words "right over land" as connoting an easement, such as a right of way or some other incorporeal right. The learned Government Pleader did not himself rely either on the words "the relation of landlord and tenant" or on the words "rights in or over land," but on the word 'land" which is, of course, a word of wide import and on the decision of their Lordships of the Judicial Committee in *Megh Raj* v. *Allah Rakhia*, 74 I. A. 12: (A. I. R. (34) 1947 P. C. 72). What, however, was really decided there was that mortgages of agricultural land, which were not specifically mentioned in any of the items in the legislative lists, might fairly be regarded as coming within the expression "land" in Item 21. Such transactions were so numerous and of such importance to the community that their Lordships took the view that it could not possibly have been the intention of the British Parliament that neither the Provincial Legislature nor the Central Legislature should be competent to enact such a law as was challenged by the plaintiff in that case, unless and until a notification under S. 104, Government of India Act had been issued by the Governor-General. When, however, the same process of reasoning is applied to the present case, the conclusion to be arrived at is, in my opinion, diametrically the opposite. It has to be remembered that the Constitution embodied in the Government of India Act, 1935, recognised the inviolability of private property including private property of all kinds in land. It is true that sub-s. (3) of S. 299 of the Act provided for the enactment of legislation extinguishing or abolishing vested rights in land, but use was made of a device which, over a period of more than a century, had been employed with success to control legislative bodies in the British Colonies, to prevent expropriation except on terms which, to put it at the lowest, were just and equitable. Is it to be supposed that, when the British Parliament took steps to guard against expropriation without or with inadequate compensation, it impliedly assented to proprietors and tenure-holders being deprived of the enjoyment of their property and of a considerable part of the income derived from it over a period of two decades? The idea of taking over and managing the property of the plaintiff in the way in which it is to be managed under the impugned Act would, I feel quite sure, if it had ever occurred to the draftsman of the Government of India Act, have seemed to him as bizarre as the idea of the State taking over a score or so of the best managed coal mines in Great Britain and managing them at the owner's risk for a lengthy period in order to discover whether the nationalisation of the coal mining industry was likely to be a feasible and profitable undertaking. I have no doubt that on 15th August 1947, when India became temporarily a Dominion of the British Commonwelth of Nations, the impugned Act could have been put on the statute book. But I have also no doubt that the subject-matter of the impugned Act is not to be found in any of the items of the legislative lists and that in consequence, neither the Central nor the Provincial Legislature had jurisdiction over that subject-matter unless and until a notification had been issued by the Governor-General under S. 104, Government of India Act. Nor, in my opinion, has the Legislature of the State of Bihar jurisdiction to enact such a law now, as, under Art. 248 of the Constitution, residuary powers of legislation are vested in Parliament.

[7] If I had been of opinion that the impugned Act was, at the time it was enacted, a valid law, I should, nevertheless, have been compelled to hold that, on the coming into force of the Constitution, it became void. The Act, it is quite clear, imposes restrictions of the most far-reaching and drastic kind on the power of proprietors and tenure-holders to deal with their property, and it cannot, I think, fairly be said that these restrictions are either "reasonable" or "imposed in the interests of the general public." These latter words are of course, words of very wide import and, unlike the words "for public purposes," as they occur in cl (2) of Art. 31, have not yet received a well-settled judicial interpretation. If the object of the impugned Act had merely been to confer power on the executive to take over the management of estates and tenures in order to prevent waste or the disappearance of village papers or the like during some comparatively short interval, which was expected to elapse before the estates or tenures could be acquired permanently by the State, the Act might, possibly, have been supported. But it is impossible to support the Act, as it stands, even if one were prepared to construe the words "in the interests of the general public" as equivalent to "in pursuance of State policy," and such an interpretation is not, in my opinion, justifiable.

[8] The learned Government Pleader is much too accomplished a lawyer and much too fair an advocate to have contended that, whatever view we might take as to the real nature of the impugned Act, the certificate granted by the President was an insuperable barrier in the way of the plaintiff. But among laymen, at least, it is commonly believed that any Act aiming, directly or indirectly and immediately or eventually, at the expropriation of proprietors and tenure-holders is non-justiciable, meaning thereby, that the Courts are not entitled to consider, and, still less, to decide and say whether it is or not an unconstitutional law. Before the adoption of the Constitution, the legislatures in this and several other States had embarked on legislation which aimed at the extinguishment of the rights or most of the rights in land of proprietors and tenure-holders. In the absence of anything in the Constitution corresponding to sub-s. (3) of S. 299, Government of India Act, cl. (2) of Art. 31 made such legislation void, and, therefore, in order to prevent its being declared void on this ground by the Courts, the Constituent Assembly provided that, on the production of a certificate by the President, the Courts should be bound to decline to enertain any such plea. There are written constitutions, such as those of France and Belgium, in which the Judges are not, or do not feel themselves, at liberty to disregard the Acts of the Legislature. The policy on which, in 1947, the State of Bihar and other States in the Union had embarked was a policy similar to that which had been carried through in several European countries during the third decade of the present century or later, namely, a policy which, in the name of agrarian reform, aimed at confining rights in land as the principal means of production to those who make a productive use of the land and expropriated with compensation, the adequacy of which was the subject of fierce controversy, all who derived from land an unearned income. If the intention of the Constituent Assembly had been to compel the Courts to obey any enactments passed by the Legislature in pursuance of that policy, it could and might, be expected to, have said so. Instead, it merely debarred the Courts from entering into the question of compensation or the propriety of the ac-

quisition. I am not unmindful that the impugned Act was passed before the adoption of the Constitution, and may have been seen by the members of the Constituent Assembly, or of the circumstance that it has been certified by the President. But I cannot infer from circumstances such as these that the intention of the Constituent Assembly was that the Courts should implicitly obey an Act of this kind. This, in my considered judgment, is not a measure of expropriation in which any question of compensation really arises, but a measure under which the plaintiff's rights in his property are to be subjected to unreasonable restrictions, and moreover, it is a law which the Provincial Legislature never had jurisdiction to pass. In that view of the matter, this Court is at liberty, and, indeed, is bound, to pronounce it to be an unconstitutional law. For these reasons, I would decree the suit with costs, and would give the plaintiff the declaration and also the injunction for which he asks. As I have already said, the connected applications under Art. 226 of the Constitution will be dismissed, but, in the circumstances, without costs.

[9] **Sinha J.**—This suit and the miscellaneous judicial cases have been heard together, as they raise some common questions of law bearing on the interpretation of the Government of India Act of 1935, as amended by the India (Provisional Constitution) Order, 1947, and the Indian Constitution. The suit as well as the applications for issue of writs of mandamus or other writs are based upon the allegation that the impugned Act, namely, the Bihar State Management of Estates and Tenures Act (Bihar Act XXI [21] of 1949), is *ultra vires* of the Bihar Legislature, and, therefore, invalid and inoperative. The Act received the assent of the Governor-General on 29th September 1949, and was published in the Bihar Gazette on 17th October 1949. The plaintiff served a notice on the Government of Bihar under S. 80, Civil P. C, challenging the validity of the Act. On 22nd December 1949, the suit was instituted in the Court of the Subordinate Judge of Darbhanga, and was numbered as Title Suit No. 229 of 1949, against the Province of Bihar as it was called before the Constitution came into force. By an order of this Court, dated 11th April 1950, the suit was removed to this Court for trial, and was renumbered as Title Suit No. 3 of 1950. By an order of the Chief Justice, this Special Bench was constituted to hear this suit along with the other cases.

[10] The plaintiff, the Maharajadhiraj of Darbhanga, made the following allegations in his plaint. The plaintiff is the owner of extensive landed properties, commonly and popularly known as "Raj Reyasat Darbhanga" which comprises a large number of estates and tenures situate in the districts of Darbhanga, Muzaffarpur, Monghyr, Purnea, Palamau and Bhagalpur in the Province of Bihar and also in some other province. He is also the mortgagee and lessee in possession of certain estates in the districts of Gaya, Bhagalpur and Champaran. The total amount of annual average gross income from the estates and tenures in his possession in the Province of Bihar, besides his income from lands in his *khas* cultivation, is said to be about 49 lacs of rupees. The Legislature of Bihar passed the Act aforesaid which received the assent of the Governor-General. In Paras. 3 to 9 of the plaint, the salient provisions of the Act are summarized. In Para. 10 of the plaint, the plaintiff makes the submissions that, under the provisions of the Act, the Government of Bihar are free to take over the estates and tenures of the plaintiff under the management of the State, and to deprive him of his essential rights of ownership without payment of any compensation to him; that the plaintiff has little prospect of getting any income from his property; that the plaintiff shall also be deprived, under the provisions of the Act, of his ordinary civil rights of getting redress in the civil Courts against any serious acts of mismanagement of the manager; that the Executive Government have been vested with powers to abandon, compound and compromise claims, pending in civil Courts; that the Act is expropriatory in its nature without making any provision for compensation; that, under the Act, the proprietor or the tenure-holder, though not disqualified by any reason, or under any specific provisions of the Act, has been deprived of his legal rights incidental to ownership; that the manager appointed under the Act is vested with many wide powers, and, in many respects, the jurisdiction of the civil Courts has been ousted; that the Executive Government have been vested by the Act with arbitrary and unlimited powers to deduct cost of management and other expenses from the income of the owner of the property; that the Act does not mention any public purposes for which the management of the estates or tenures is proposed to be taken over; and that the Provincial Government have no right to take over management of the property of a proprietor or a tenure-holder. It is also stated that the proprietor or the tenure-holder has been wrongfully deprived, under the provisions of the Act, of his power to mortgage or lease his property. It is also stated that, after the Act received the assent of the Governor-General, a cloud has been cast upon the title of the plaintiff in respect of his landed properties comprising estates and tenures; and that there is an imminent danger of the plaintiff's

valuable rights of ownership being infringed and encroached upon by the Government of Bihar. In fact, the Provincial Government have issued a notification under S. 3 of the Act in respect of a number of estates in the Province including estates and tenures of the plaintiff, which notification has been published in the extraordinary issue of the Bihar Gazette dated 26th November 1949. The plaintiff further submitted that the Act in question "virtually provides for acquisition of property and is thus a fraud upon the Constitution Act." The Act is, therefore, *ultra vires* and the Provincial Government are incompetent to take charge of the plaintiff's properties, and the plaintiff is entitled to continue in possession and control of the properties without any interference by, or on behalf of, the Government. The plaintiff's cause of action is said to have arisen on 29th September 1949, when the Act received the assent of the Governor General, and on 17th October 1949, when it was published in the Bihar Gazette, within the jurisdiction of the Darbhanga Court. It is also alleged that the notice under S. 80, Civil P. C., was served on the Collector, Darbhanga, on 21st October 1949. The plaintiff sought the following reliefs; (1) a declaratian that the Act in question is *ultra vires* of the Provincial Legislature, and is wholly void and inoperative, and that the Government of Bihar are not entitled to take over charge and control of any of the landed properties of the plaintiff; (2) that the plaintiff is entitled to be protected from apprehended action of the Government of Bihar; and (3) an order of injunction restraining the defendant and its officers or agents from taking any action under the provisions of the Act interfering with the possession and control of the plaintiff in respect of any of his landed properties.

[11] A written statement was filed on behalf of the Province of Bihar, contending that the plaintiff had no cause of action or right to sue the defendant; that the suit as framed was not maintainable; that the suit is barred by Ss. 42 and 56 (d), Specific Relief Act; that the notice under S. 80, Civil P. C., was not a notice as required by the section; that the Province of Bihar not being a legal entity or a body corporate, the suit for a permanent injunction did not lie; that the statements contained in para. 1 of the plaint were not admitted; and that the properties had neither been specified nor described in the plaint, and hence the suit could not proceed. In para. 7 of the written statement, it was contended that the provisions of the Act summarized in paras. 2 to 9 of the plaint were within the legislative competence of the Provincial Legislature, and that the defendant was entitled to act in accordance with those provisions. With regard to the allegations in para. 10 of the plaint, the defendant submitted that the plaintiff continued to be the owner; that he had not been deprived of his essential rights of ownership, and, consequently, the question of payment of compensation did not arise; that, under the Act, the plaintiff's right of management had been "temporarily suspended"; that the jurisdiction of the Courts has been taken away by the legislature in exercise of the powers conferred under List II Item 22 of Sch. 7, Constitution Act of 1935; that the Act was not expropriatory, as no part of the income of the plaintiff can be appropriated by the defendant under the provisions of the Act; that the entire net income will be paid to the plaintiff; that, under the Act, the proprietor's right of dealing with the property had only been suspended during the period of management, and thus the question of deprivation of rights of dealing with the property of the proprietor did not arise; that the Executive Government have not been vested with arbitrary and unlimited powers in respect of costs of management and other incidental expenses; and that, finally in law, it is not necessary to mention public purpose in the Act itself. It is claimed on behalf of the defendant that it has every right to execute the law as enacted by the legislature. With regard to the allegations in para 11 of the plaint, it is stated that the Act has been enacted by the Provincial Legislature in proper exercise of its legislative powers, and that the defendant has every right to take possession of the property without compensation,

> "inasmuch as the act of management does not and cannot amount to acquisition within the meaning of S. 299 (2), Constitution Act."

It is denied, with reference to the statements in para 12 of the plaint, that any cloud had been cast on the plaintiff's title as a result of the enactment in question, and that there is any danger of the plaintiff's valuable rights of ownership being infringed, or encroached upon by the defendant. In para 11 of the written statement, it is repeated that the Act does not provide for acquisition of property. In para 12, it is denied that the Act is *ultra vires* and inoperative to confer a right on the Government to take over the management of the plaintiff's estate; and that the plaintiff is entitled to remain in possession and control of his properties notwithstanding the provisions of the Act. It is emphasized that the impugned Act is *intra vires* of the Provincial Legislature, and that the provisions of S. 299 have not been contravered. And, finally, it is contended on behalf of the defendant that the prayer for permanent injunction is misconceived, as the Court had no power to issue an injunction against the Government "which is sovereign in its governmental acts."

[12] On 6th February 1950, the learned Subordinate Judge framed the following issues:

"1. Has the plaintiff any cause of action or right to sue the defendant?

2. Is the suit as framed maintainable?

3. Is the suit barred by Ss. 42 and 56 (d) Specific Relief Act?

4. Is the Bihar State Management of Estates and Tenures Act unconstitutional and *ultra vires*? If any provisions of the Act be unconstitutional, whether the same is severable?

5. Whether the provisions of the Act amount to acquisition or infringement of the right of ownership of the plaintiff?

6. Is the plaintiff entitled to the relief sought for?

7. To what relief, if any, is the plaintiff entitled?

[13] During the pendency of the case before us an application for amendment of the plaint was made on the ground that during the pendency of the suit, the Constitution was adopted by the Constitutent Assembly, and came into force on 26th January 1950. Article 19 (1) (f) read with Art. 13 (1) of the Constitution—it was contended on behalf of the plaintiff—showed that the impugned Act was void. The defendant also made an application for filing an additional written statement as a consequence of the Constitution coming into force. The following paragraph was sought to be added to the written statement:

> " Having regard to the fact that the the President of India by public notification dated the 11th March 1950, has certified that impugned Act shall not be called in question in any Court on the ground that it contravenes the provisions of cl. (2) of Art. 31 or has contravened the provisions of sub-s. (2) of S. 299, Government of India Act,1935, the suit is fit to be dismissed."

[14] These amendments in the pleadings of the parties, being of a formal nature, were, by their consent, allowed.

[15] The other applications were made by a number of proprietors or tenure-holders in the Province for "a writ in the nature of mandamus" or "a writ in the nature of quo warranto" and "for information in the nature of quo warranto" or "a writ in the nature of error" and a rule calling upon the opposite party to show cause why they should not be restrained permanenly from intermeddling with the petitioners' property. These applications were founded on the allegations that the petitioners were either proprietors of estates or were tenure-holders within the meaning of the impugned Act, which was in contravention of the provisions of the Government of India Act, 1935; that the provisions of the Act, which were summarized, were unconstitutional; and that the Provincial Government had published a notification in the official Gazette, taking over their property for a period of twenty years. They also submitted that the certification of the said Act by the President of the Indian Republic was void, and had not the effect of curing the illegality of the enactment.

[16] During the hearing of the case, we informed the parties that we need not go elaborately into the question of the powers of this Court to grant any of the writs prayed for in petitions before us, or the limitations on those powers, because, in our opinion, these cases also depended upon the result of the decision of the main question in controversy, namely, whether or not the impugned Act was *intra vires* of the Provincial Legislature. If the Court took the view that the Act was *intra vires* of the Provincial Legislature, certainly the petitioners would not be entitled to any relief. If, on the other hand, we took the view that the Act was *ultra vires* of the Provincial Legislature, the Provincial Government, in accordance with the established practice, would not try to enforce the provisions of the statute which had been declared void by this Court, and that they would stay their hands until the matter was determined by the Supreme Court, in the event of an appeal from our decision. The learned Government Pleader, who argued the case on behalf of the State of Bihar and the learned Advocate General, who represented the State in some of the other miscellaneous judicial cases, also intimated to us that the State Government would. in the usual course, abide by the decision of this Court until and unless reviewed by the appellate Court. Hence, we did not hear arguments on the powers of this Court to issue any of the writs prayed for in the several applications which have been heard along with the suit. In either view, those applications would be dismissed, and costs would have to be adjusted according to the decision on the main issue before us.

[17] Before embarking upon a discussion of the point bearing upon the validity of the Act, it is convenient at this stage to indicate, in brief outline, the nature, scope and purpose of the impugned Act which, as its title indicates, is "to provide for the State management of estates and tenures in the Province of Bihar." The preamble to the Act simply states that "it is expedient to provide for the State management . . . ." Section 3 empowers the Provincial Government, by a notification, to declare that the estates or tenures of a proprietor or a tenure-holder, specified in the notification, shall be placed under the management of the Provincial Government. On such a notification being issued, the estate or tenure is to be deemed to have been placed under the management of the Provincial Government with effect

from the date of the commencement of management" which has been defined in the defining S. 2 as

"the date immediately following the date of the expirations of the period of one month from the date of the publication of such notification in the official Gazettee."

By way of illustration, the following notification issued in respect of the plaintiff's estate may be quoted:

"THE BIHAR GAZETTE (Extraordinary) 25th November 1949.

NOTIFICATION.

The 18th November, 1949.

No. 2299.—L. R / Act-60-49-L. R. In exercise of the powers conferred by sub-section (1) of S. 3 of the Bihar State Management of Estates and Tenures Act 1949 (Bihar Act XXI [21] of 1949), the Governor of Bihar is pleased to declare that the estates described in First Schedule and the tenures described in the Second Schedule hereto annexed belonging to proprietor tenure holder named in the respective schedule shall be placed under the management of the Provincial Government for a period of 20 years and the management of such estates and tenures shall vest in Mr. A. J. Khan, Additional Collector, Darbhanga.

FIRST SCHEDULE.

Name of the proprietor.	Name of the Districts.	Name of the estate, if any.	Tauzi No. of the estate.	Share of the Proprietor in the tauzi.
Maharajadhiraj Sir Kameshwar Singh Bahadur	Darbhanga.	Darbhanga Raj.	6424	A. G. C. K. D. R. P. K. 16 0 0 0 0 0 0 0

By Order of the Governor of Bihar.
S. P. Sinha,
Secretary of Governor.

The other definitions of S. 2 are more or less, on the same lines as the definition of those terms in the Tenancy Acts. The consequences of placing an estate or a tenure under the management of the Provincial Government are laid down in S. 4. It is better to quote the necessary portions of the section as follows:

"(a) the proprietor or tenure-holder shall cease to have any power of management of his estates or tenure;

(b) subject to the provisions Ss 7, 8, 9, 10, 11 and 12 the Manager shall take charge of such estates or tenures together with such buildings, papers and other properties appertaining to the estates or tenures, as in the opinion of the Manager are essential for the proper management of the estates or tenures . . . . ;

(c) the proprietor or tenure-holder shall be incompetent to mortgage or lease the estates or tenures or any portion thereof or to grant valid receipts for the rents and profits arising or accruing therefrom including arrears of rents and profits . . . . ;

(d) all rents and profits arising or accruing from the estates or tenures including arrears of rents and profits which were payable to the proprietor or tenure-holder in respect of such estates or tenures on the date of the commencement of management shall be payable to the Manager . . . . ;

Explanation: —For the purposes of clauses (c) and (d), the expression 'arrears of rents' shall include arrears in respect of which suits were pending on the date of the commencement of management or in respect of which decrees whether having the effect of a rent decree or money decree were obtained before the date of the commencement of management and have not been satisfied and are not barred by limitation, and shall also include the costs allowed by such decrees and costs, if any, incurred in the execution of such decrees.

(e) all suits and proceedings which may be pending at the date of the commencement of management in any Court in respect of any debts or liabilities of the proprietor or tenure holder the payment of which is secured by the mortgage of, or is a charge on, the estates or tenures or any portion thereof shall be barred; and all processes and executions for attachment and sale of such estates or tenures . . . . shall become null and void;

(f) the estates or tenures shall not be liable for attachment or sale under processes of any Court except for or in respect of debts due, or liabilities incurred to the Crown."

Sections 8 to 11 deal with subsisting leases of mines or minerals and the appointment of a Mines Tribunal Section 12 provides for compensation for premature termination of any lease of mines or minerals, and provides for the machinery for determining it. Section 13 empowers the Manager to remove mortgagee, lessees or other persons in possession of any estate or tenure, management of which is vested in him, from possession of the property, and enjoins any such person in possession to give up possession of the estate or tenure to the Manager together with all documents, papers and registers that may be in his possession. Under S. 14, any such person as is dispossessed under the provisions of S. 13 and every creditor holding a mortgage or charge on any estate or tenure placed under the management of the Provincial Government is required to notify his claim in writing to the Manager. In default of notification by the creditor or mortgagee of his claim to the Manager within the prescribed time, the claim shall be barred. Under S. 16, the Manager is constituted the authority to determine the principal amount of such claims and interest, if any, due, and the Manager has been vested with wide powers to scale down the principal or the interest or both. An appeal is provided by S. 27 from an order passed by the Manager, and the order of the Manager or of the appellate Court, in the event of an appeal, has been declared to be final, and such orders are not to be questioned in any Court. Section 18 provides for the preparation of a scheme for liquidation of debts and liabilities of a proprietor or a tenure-holder after they have been determined by the Manager or by the appellate authority, as aforesaid. The claim has to be sanctioned, and such claim may be revised and, subsequently, modified, if so thought necessary, by the Provincial Government. Section 24 renders all arrears of rent payable to the Manager recoverable as a public demand. Section 25 lays down the priorities in the manner of disbursement of moneys collected by the Manager, in the following order: (1) payment of Government revenue and cesses and other public demands or rents payable to the superior landlord and all dues of the Crown; (2) payment of all chaukidari taxes, municipal taxes and any other public demand; (3) payment of costs of management and supervision; (4) payment of allowance to the proprietor or tenure-holder at the end of each quarter of the year at rates not exceeding 20 per cent. of the moneys received by the manager; (5) maintenance of buildings in proper state of repairs; (6) payment of costs of irrigation works for the benefit of the tenantry; (7) liquidation of debts and liabilities of the proprietor or tenure-holder; (8) payment of any incidental and unforseen charges connected with the management including the cost of litigation and the amount of compensation referred to in S. 12; and (9) the liquidation of any debts or liabilities of the proprietor or tenure-holder other than those mentioned in item (7). After meeting all these liabilities, if any surplus remains, it shall be paid to the proprietor or tenure-holder at the end of each financial year, subject, of course, to such deductions as may be prescribed. Section 26 empowers the manager to raise loans on the security of the estate under his management in the interest of the proprietor or the tenure-holder and subject to his previous concurrence. Section 29 entitles a proprietor or a tenure-holder to inspect the audited accounts at the end of every year, that is to say, if the accounts have not been audited within the year, he has no rights of inspection of accounts during that year. Sections 30 and 31 bar the jurisdiction of the civil Courts to entertain any suits or proceedings in certain cases. The other provisions of the impugned Act are merely incidental to the general scheme of the Act already indicated.

[18] It will thus be seen that there is no provision in the impugned Act for transference of title, either permanently or for a short period, from a proprietor or a tenure-holder, whose property is dealt with by the Act, to the Province or State of Bihar. What is done under the provisions of S. 3 of the Act, is to place the property under the management of the Provincial Government, so long as the notification remains in force. The Provincial Government does not take any benefit out of the property thus placed in its management; nor does it have the use and occupation of the property for any declared public purpose. It was admitted on behalf of of the Government that the provisions of the impugned Act were not meant, either directly or indirectly, to augment revenues of the Government. After the notification under S. 3 of the Act, the proprietor or tenure-holder ceases to have any power of management in respect of his property which vests in the manager. The proprietor or the tenure-holder, as the case may be, even after the vesting of the management in the Provincial Government through the manager, continues to have the power to sell or to make a gift or to exchange or to enter into any other kind of transaction involving an out and out transfer of the property. He is only debarred for the time being during the period of management from mortgaging or leasing his property or any portion thereof. As a result of the vesting of the management in the manager, a proprietor's or tenure-holder's right of management in all lands in his *khas* possession, whether homestead or containing buildings, or culturable areas or mines, is not affected. The manager has also been vested with the right to remove mortgagees and lessees from possession of the property, management of which has been vested in the manager as a result of the notification under the Act. All suits and proceedings against property thus vested in the manager by way of enforcing a mortgage or a charge on the property shall be barred, but not proceedings against the person of the holder of the estate or tenure. Hence, the personal liability of a proprietor or tenure-holder continues. He may thus be sent to civil prison for non-payment of his debt, though, as a result of the operation of the Act, he may have been deprived of the means to pay his debts. The impugned Act, in terms, speaks of compensation only in S. 12 when any lease of mines or minerals is terminated by the manager. The Act does not make any reference to compensation in cases other than those covered by S. 12, which makes provision for compensation and for determining the amount of compensation. Owners of property like proprietors or tenure-holders or mortgagees and lessees removed from possession under the provisions of the Act, in terms, are not to get any compensation but have to wait for their turn in accordance with the priority of payment laid down in S. 25, as aforesaid. If, due to mismanagement or other reasons, the manager is able to make collections which are just sufficient to meet the charges enumerated in the first three clauses of sub-s. (1) of S. 25, neither the owner of the property

nor the encumbrancers will get anything so long as collections do not improve. Suits and proceedings on behalf of or against the person whose property has been taken charge of by the manager may be instituted or continued in the name of the manager as representing the proprietor or the tenure-holder concerned, and not as representing the State. Under S. 33, the Government has been empowered to relinquish management of property taken under its management at any time, even before the lapse of the period notified in the notification under S. 3, referred to above. Hence, the idea behind the provisions of the Act appears to be, as contended on behalf of the plaintiff by Mr. P. R. Das, to make an experiment with some of the best-managed estates in the Province, and to collect experience and data with a view to the ultimate acquisition of the property by the Government as contemplated in the Act which was popularly known as the abolition of Zamindari Act.

[19] It will also appear that the Act is based upon, and is analogous to, the provisions of the Chota Nagpur Encumbered Estates Act (Governor-General's Act, VI [6] of 1876). This Act was passed with a view to safeguarding the interest of a holder of immovable property in Chota Nagpur who may be suffering under a disability, being a minor, or of unsound mind, or an idiot, or of a person who is on the verge of bankruptcy, whose property is under attachment or a proclamation of sale. This Act, apparently, was intended to apply to a special class of people who were, or had proved themselves to be, incapable of properly managing their affairs, and on whose behalf the Government intervened to manage the property through a Manager. But the impugned Act goes much further than the Chota Nagpur Encumbered Estates Act in so far as it does not make any such distinction. For ought we know, the plaintiff's estate in the present case may be one of the best managed estates, and certainly is not in any danger of being sold in execution of any decree, or of being mismanaged as a result of "wasteful extravagance likely to dissipate his property". It was suggested at the Bar on behalf of the plaintiff that his estate is much better managed than it can possibly be by a Deputy Magistrate or any other functionary discharging the duties of manager under the Act. The impugned Act does not make any pretence to a better management of the property than it is under the care and management of the proprietor or tenure-holder directly. It contemplates a maximum allowance of twenty per cent. of gross collections to the proprietor or tenure-holder, in the first instance. The Act does not, in terms, contemplate that the estate or tenure taken over by the Government would be managed more efficiently by the manager under the Act. Certainly, it is very difficult to believe that a stranger to the property will be able to manage it better than a normal person who is the owner of the same. Hence, the suggestion made on behalf of the plaintiff in the suit that the impugned Act is not for the benefit of the State, or of the general public, or of the owner of the property, is not wholly unfounded. The Encumbered Estates Act grants complete immunity not only of the property but also of the person of the holder of the property from all processes, executions and attachments for, or in respect of, his debts and liabilities. As already pointed out, the impugned Act does not grant that immunity, apparently because, unlike the Encumbered Estates Act, it does not debar the owner of the property from making an out and out transfer of the property. Unlike the impugned Act, the Encumbered Estates Act completely disables a holder of the property for the time being from alienating or encumbering his property in any way, or from entering into any contract, which may involve him in pecuniary liability. It would thus appear that the provisions of the impugned Act, unlike those of the Chota Nagpur Encumbered Estates Act, are not intended for the benefit of the individual owners or holders of property.

[20] Having thus reviewed the scheme, purpose and provisions of the impugned Act, the most important question arising for decision in this case is whether the Act is within the legislative competence of the Provincial Legislature. The Act was enacted, and came into force when the Government of India Act, 1935, as amended by the India (Provisional Constitution) Order, 1947, was still in force. The power must, therefore, be found in S. 100 read with Lists II and III in Sch. VII of that Act. Pointed reference was made to Item 21 in List II, (Provincial Legislative List) of Sch. VII. Item 21 is in these terms:

> "Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents; transfer, alienation and devolution of agricultural land; land improvement and agricultural loans; colonization; Courts of Wards; encumbered and attached estates; treasure trove."

It was also argued that this Item 21 may have to be read along with Item 9 of the same List which relates to "compulsory acquisition of land". In the pleadings of the parties the position taken by the plaintiff was that the impugned Act had the effect of acquisition of land without making any provision for compensation and without the acquisition being intended for a public purpose. On the other hand, the case on behalf of the Government as disclosed in the written statement is that it was not an acquisition, and that, therefore, the question of compensation was wholly irrelevant. According to the written statement, the impugned Act had only the effect of 'temporarily suspending" the plaintiff's right of management and his right of dealing with the property.

[21] In this connection, the question naturally was mooted at great length whether the impugned Act could come within the purview of item 9 relating to "compulsory acquisition of land". This item must be read in the light of the provisions of the Land Acquisition Act (Governor General's Act I [1] of 1894) which was in force at the time the Government of India Act, 1935, was enacted by the British Parliament. This Act deals with permanent acquisition of land as also with temporary occupation of waste and arable land. The Land Acquisition Act laid down

> "the law for the acquisition of land needed for public purposes and for Companies and for determining the amount of compensation to be made on account of such acquisition."

Throughout the Act, the insistence on acquisition, either permanent or temporary, for a "public purpose" is emphasised. Section 4, Land Acquisition Act, lays down the rule as regards notification in the Official Gazette of the fact that the Provincial Government was satisfied that a particular piece of land was needed, or was likely to be needed, for any public purpose. Section 6 lays down the necessity for a declaration to the effect that the Provincial Government was satisfied that any particular land was needed for a public purpose, or for a Company, subject to the proviso that the declaration shall not be made unless compensation out of the funds of the Company, or out of the public revenues, has been ensured. But such a declaration that the land is needed for a public purpose, or for a Company, as the case may be, shall be treated as conclusive evidence of such a purpose (S 6 (3)). Section 35, Land Acquisition Act, lays down that, after the Provincial Government has been satisfied "that the temporary occupation and use of any waste or arable land are needed for any public purpose, or for a Company" the Government may

> "direct the Collector to procure the occupation and use of the same for such term as it shall think fit, not exceeding three years from the commencement of such occupation."

Section 40 (1) (b) of the Act again insists on the Provincial Government being satisfied that the acquisition for the Company is "likely to prove useful to the public." The rest of the Act lays down the machinery and the procedure for determining the compensation to be made on account of the acquisition, whether permanent or temporary. Hence, it is permissible to infer that Parliament, when it laid down Item 9 of List II dealing with compulsory acquisition of land, meant it in the same sense in which the Land Acquisition Act aforesaid had used the expression "acquisition". That it is permissible to do so is clear from the following observations of Lord Dunedin in the case of *Attorney-General* v. *De Keyser's Royal Hotel*, 1920 A. C. 508 at p. 528 : (89 L. J. Ch. 417):

> "Now, just as the statutes must be interpreted in view of what the rights and practices antecedent to them had been, so we must look at the Defence of Realm Act in view of the law as it stood previous to its passing."

It is absolutely necessary, with reference to the provisions of the Land Acquisition Act, that acquisition of property, either temporary or permanent, must be for a public purpose, and must provide for compensation to the person deprived of his property, either temporarily or permanently. The plaintiff would characterize the impugned Act as an instance of an attempt by Government to acquire the plaintiff's property, or a certain right in property, without its being meant for a public purpose, and without making any provision for compensation to the party whose property has been so dealt with by the statute. Mr. Das, on behalf of the plaintiff, made repeated references to the provisions of S. 299, Government of India Act, which is in these terms:

> "(1) No person shall be deprived of his property in British India save by authority of law.
>
> "(2) Neither the Federal nor a Provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in, or in any company owning, any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, it is to be determined
>
> "(3) No Bill or amendment making provision for the transference to public ownership of any land or for the extinguishment or modification of rights therein, including rights or privileges in respect of land revenue, shall be introduced or moved in either Chamber of the Federal Legislature without previous sanction of the Governor General in his discretion, or in a Chamber of a Provincial Legislature without the previous sanction of the Governor in his discretion.
>
> "(4) Nothing in this section shall affect the provisions of any law in force at the date of the passing of this Act.
>
> "(5) In this section 'land' includes immovable property of every kind and any rights in or over such property, and 'undertaking' includes part of an undertaking."

[22] Mr. P. R. Das's contention is that the plaintiff has been deprived of a very valuable right in property, namely, the right of managing the property as well as he can, and of dealing with his property, without the authority of law

which, according to his contention, to be presently dealt with, means "the laws of the land". In this connection, he made reference to the following passage in Blackstone's Commentaries on the Laws of England by Dr. Herbert Broom, vol. 1, pp. 163-64:

> "The third absolute right, inherent in every Englishman, is that of property, which consists in the free use, enjoyment and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. . . . . The Laws of England are, therefore, in point of honour and justice, extremely watchful in ascertaining and protecting this right. Upon this principle the great charter has declared that no freeman shall be disseized, or divested, of his freehold or of his liberties, or free customs, but by the judgment of his peers, or by the law of the land. And by a variety of ancient statutes it is enacted, that no man's lands or goods shall be seized into the king's hands, against the great charter, and the law of the land. . . . ."

His argument further was that the Land Acquisition Act of 1894 and the other statutes relating to the subject of acquisition, which it replaced, were all in consonance with the laws of England, and specifically provided that such acquisition must be for a public purpose, or a purpose analogous to that, and only upon compensation being made to the party deprived of his property, either temporarily or permanently. Mr. Das's contention further is that "law" within the meaning of sub-s. (1) of S. 299, quoted above, can never mean law of a confiscatory nature like the impugned Act applicable to a limited class of persons, but law applicable generally to all citizens of the State, so that the impugned Act, which discriminated against a particular class of persons, and intended to deprive them of their valuable rights in property, is not what is intended by sub-s. (1). In this connection, Mr. P. R. Das drew our pointed attention to the following observations in Cooley's Constitutional Limitations, Eighth Edition Vol. II, p. 737:

> "The words 'by the law of the land', as used in the Constitution, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense."

In this connection, Mr. Das also referred to the classical words in the submission of Mr. Webster in the *Dartmouth College case*, 4 U. S. S. C. R. L. Ed. 629:

> "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land."

[23] Sub-section (1) of S. 299, Government of India Act, 1935, though expressed in a negative form, is a positive guarantee of a citizen's right to property, and, to that extent, is a restraint on the power of the State or Government. The positive aspect of the matter is: how far S. 100 of the Act read with the Lists in Sch. VII confers a right on the legislature to enact a legislation like the impugned Act. If the impugned Act comes within the purview of Item 9 of List II of Sch VII, it is certainly within the legislative competence of the Provincial Legislature. Though Mr. P. R. Das, for the plaintiff, would bring it within the terms of Item 9 of List II, he would, at the same time, argue that, as it was not justified by the terms of either sub-s. (1) or sub-s. (2) of S. 299, the Provincial Legislature had acted beyond their competence. On the other hand, the learned Government Pleader, appearing on behalf of the Government, would bring it within the purview of Item 21, quoted above, standing by itself, or, if necessary, read along with Item 9 of the same List as also Items 4, 8, 9 and 10 of List III, Part I. The Government Pleader further contended that the opening word "land" in Item 21 must be taken in its widest significance. He relied particularly on the following observations of Lord Wright in the case of *Megh Raj* v. *Allah Rakhia*, 74 I. A. 12 at p. 20 : (A. I. R. (34) 1947 P. C. 72) :

> ". . . . .Item 21 is part of a constitution and would on ordinary principles, receive the widest construction, unless for some reason it is cut down either by the terms of Item 21 itself or by other parts of the constitution, which has to be read as a whole. As to Item 21, 'land,' the governing word, is followed by the rest of the item, which goes on to say, 'that is to say.' These words introduce the most general concept 'rights in or over land.' 'Rights of land' must include general rights like full ownership or leasehold or all such rights. 'Rights over land' would include easements or other collateral rights, whatever form they might take. Then follow words which are not words of limitation but of explanation or illustration, giving instances which may furnish a clue for particular matters......"

The learned Government Pleader also relied upon the decision of their Lordships of the Judicial Committee in the case of *Jagannath Buksh Singh* v. *United Provinces*, 73 I. A. 123: (A.I.R. (33) 1946 P. C. 127), in which the United Provinces Tenancy Act of 1939 was sought to be declared null and void on the ground that the Provincial Legislature had exceeded its legislative competence. In that case, their Lordships accepted the preamble as clearly stating the general scope of the Act, namely,

> "to consolidate and amend the law relating to agricultural tenancies and other matters connected therewith."

Their Lordships held that the Provincial Legislature had the necessary power to enact the impugned Act by virtue of Item 21, set out above. The following observations of their Lordships in the course of their judgment indicate the real position *vis a vis* the impugned statute in that case:

> "The appellant relies on certain express provisions of the Government of India Act. Thus he relies on

> S. 299 of the Act, which provides that no person shall be deprived of his property in British India save by authority of law, and that neither the Federal nor a Provincial Legislature shall have power to make any law authorizing the compulsory acquisition of land for public purposes save on the basis of providing for the payment of compensation. But in the present case there is no question of confiscatory legislation. To regulate the relations of landlord and tenant and thereby diminish rights, hitherto exercised by the landlord in connexion with his land, is different from compulsory acquisition of the land."

[24] As already pointed out, the impugned Act is a mixture of restraints on the power of alienation of land by a proprietor or a tenure-holder, a suspension of his rights of management, without acquisition of any rights by the Government to be exercised for the benefit of the public or for the benefit of any particular section of the public. I will presently show that the pith and substance of the Act in question is not acquisition of any rights in property by the Government. Hence, it is difficult to bring this legislation within the purview of the power conferred on the Provincial Legislature by Item 9 of List II, whether it is covered by the power contained in Item 21 is another question. As pointed out by their Lordships in the case of *Megh Raj* v. *Allah Rakhia*, 74 I. A. 12 at p. 20: (A. I. R. (34) 1947 P. C. 72), the words "that is to say" following the opening word "land" in Item 21 are not words of limitation but of explanation or illustration of the wide meaning which the legislature intended to give to that key-word "land." The explanatory words following the key-word in Item 21 may cover most of the provisions of the impugned Act in so far as it deals with collection of rents, transfer or alienation of land, or makes provisions analogous to those of the Encumbered Estates Act, as discussed above. The pith and substance of the impugned Act is to deprive proprietors and tenure-holders of their valuable right to manage their property, irrespective of whether they are "disqualified" persons by reason of minority, or unsoundness of mind, or sex, or other physical defects, or infirmities, rendering them incapable of managing their own property. In other words, even though the provisions of the Court of Wards Act (Bengal Act IX [9] of 1879), or of the Chota Nagpur Encumbered Estates Act, referred to above, do not justify the taking over of management of property by Government, or an official appointed by Government, owners of property are to be deprived of their right to manage their property, or to dispose of their property to their best advantage. Such wide powers are not, in my opinion, within the contemplation of Item 21 of List II of Sch. 7, Government of India Act, 1935, as amended.

[25] Mr. P. R. Das, on behalf of the plaintiff, laid great stress on the decision of the Australian Court in the case of the *Minister of State for the Army* v. *Dalziel*, 68 Comm. L. R. 261. In that case, the question arose whether the taking of possession by the Commonwealth for an indefinite period, of the exclusive possession of a certain leasehold interest belonging to the respondent amounted to an acquisition of property within the meaning of S. 51 of the Constitution. During the last Great war, in 1942, the Commonwealth took possession of the respondent's land for the purpose of occupation by the Army authorities. The relevant words of the statute in question were:

> "the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws".

In that case, it was not a point at issue whether the occupation of the property by the Army authorities was for a public purpose. On the face of it, it would be so. What was in dispute in the case was the question whether temporary occupation of the property, that is to say, for the duration of the War and six months later, could come within the purview of the words "acquisition of property", so as to make it obligatory on the State to make compensation on "just terms". The learned Chief Justice was of the opinion that it was not. The other four learned Judges were of the contrary opinion. The reasons of the learned Chief Justice for his opinion may be stated thus in his own words:

> "In the present case the Commonwealth has not acquired any interest of any kind in the land. It has not acquired any interest either from the owner of the fee simple or from the tenant. The possession of the Commonwealth may, I think, properly be described as that of a licensee whose rights are defined by the Regulations." (page 282).

The decision of the majority may be summed up in the words of Rich J. as follows:

> "The meaning of property in such a connection must be determined upon general principles of jurisprudence, not by the artificial refinements of any particular legal system or by reference to *Sheppar's Touchstone*. The language used is perfectly general. It says the acquisition of property. It is not restricted to acquisition by particular methods or of particular types of interests, or to particular types of property. It extends to any acquisition of any interest in any property. It authorizes such acquisition, but it expressly imposes two conditions on every such acquisition. It must be upon just terms, and it must be for a purpose in respect of which the Parliament has power to make laws . . . . Property, in relation to land, is a bundle of rights exercisable with respect to the land. The tenant of an unencumbered estate in fee simple in possession has the largest possible bundle. But there is nothing in the placitum to suggest that the legislature was intended to be at liberty to free itself from the restrictive provisions of the placitum by taking care to seize something short of the whole bundle owned by the person whom it was expropriating. . . . . . :
>
> "It would, in my opinion, be wholly inconsistent with the language of the placitum to hold that, whilst preventing the legislature from authorizing the acquisi-

tion of a citizen's full title except upon just terms, it leaves it open to the legislature to seize possession and enjoy the full fruits of possession, indefinitely, on any terms it chooses, or upon no terms at all. In the case now before us, the Minister has seized and taken away from Dalziel everything that made his weekly tenancy worth having and has left him with the empty husk of tenancy." (pages 285-86).

It will be noticed that the occupation of property in that case was unquestionably for a public purpose, and the order taking possession was coupled with the direction for giving compensation on certain terms. The only controversy before the Court in that case was whether the taking of property was "acquisition" and whether the terms offered were "just terms", as required by the Constitution. No claim was made in that case on behalf of the Government that they could take possession of the property without any compensation. The real controversy was whether the taking of possession was acquisition within the meaning of the Constitution, so as to make it obligatory on the State to make compensation on "just terms". Hence, in my opinion, the facts of the case in the Australian Court were materially different from the facts before us. In the case before us, it was not claimed on behalf of the Government, in the first instance, that it was a case of acquisition of property for a public purpose. The learned Government Pleader rested his case on the submission that the impugned Act only authorized Government to take possession of a citizen's property within the meaning of Art. 31 (2) of the Constitution.

[26] The decision of the House of Lords in the case of *Attorney-General* v. *De Deyser's Royal Hotel*, 1920 A. C. 508 : (89 L. J. Ch. 417), already referred to, is very instructive on the question of Government's right to take possession of a citizen's property, or to acquire property belonging to an individual, during the exigencies of war. In that case, their Lordships ruled that the Crown is not entitled, either by virtue of its prerogative or under any statute, to take possession of the property of a subject for purposes related to the defence of the realm without paying compensation for its use and occupation. In that case, their Lordships had before them precedents from original records of acquisition of a citizen's property, either permanently or for a temporary purpose, during the exigencies of war, or disturbance of public tranquillity, during the course of centuries. Their Lordships found that not a single instance could be pointed out on behalf of the Government, showing that property had been acquired permanently, or occupied temporarily, without compensation being made either by private negotiation or by assessment through the machinery provided by the statute. After reviewing the precedents, Lord Dunedin summarised them in these words :

> "The first period contained instances of the acquiral of private property for the purposes of defence by private negotiation, in all of which, it being a matter of negotiation, there is reference to the payment to be offered for the land taken. With the second period we begin the series of statutes which authorize the taking of lands, and make provision for the assessment of compensation, the statutes being, however, of a local and not of a general character, dealing each with the particular lands proposed to be acquired. The third period begins with the introduction of general statutes not directed to the acquisition of particular lands, and again making provision for the assessment and payment of compensation." (Page 524).

Lord Atkinson, in the course of his speech, after referring in great detail to the provisions of the statute under which the property in question had been taken possession of, made the following observations, which are quite pertinent to the point now in controversy before us :

> "There is nothing in the statute to suggest that the liability to pay is to be affected or taken away by the Regulations which may be issued, and if the Regulations purported to do that I doubt if they would not, having regard to the wording of sub-s. (2), be ultra vires. Neither the public safety nor the defence of the realm requires that the Crown should be relieved of a legal liability to pay for the property it takes from one of its subjects. The recognized rule for the construction of statutes is that, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation." (page 542).

Lord Parmoor, in the course of his speech, has pointed out the difficulty of drawing a distinction between a permanent acquisition and temporary occupation on the question of compensation and has observed as follows:

> "It is further noticeable that the prerogative right claimed is limited to an entry upon, or to taking temporary possession of, or to the temporary occupation and use of the land, of any subject without payment of compensation. It is not claimed that it can be extended to a case of disseisin. Since Magna Carta the estate of a subject in lands or buildings has been protected against the prerogative of the Crown. It is not easy to see what the distinction is between disseisin and an indefinite use and occupation which may extend beyond the estate of any particular owner. The later statute law gives the same claim to compensation to the subject in either case" (p. 569).

The noble Lord has further explained, in the following words, the reasons why the statute law made provision for compensation:

> 'Statutes which provide rent or compensation as a condition to the right of the Executive to take over the temporary possession of lands or buildings on the occasion of public exigency come, in my opinion, within the category of statutes made for the advancement of justice and to prevent injury and wrong. This is in accord with the well-established principle that, unless no other interpretation is possible, justice requires that statutes should not be construed to enable the land of a particular individual to be confiscated without payment. I am further of opinion that where a matter has

been directly regulated by statute there is necessary implication that the statutory regulation must be obeyed, and that as far as such regulation is inconsistent with the claim of a Royal Prerogative right, such right can no longer be enforced (p. 576)."

[27] I have made these extensive quotations from the decision of the House of Lords to show the course the law has taken in England since early until the enactment of the law similar to the Land Acquisition Act in India, referred to above. The Statute law in England has followed the well-established rule of the common law that a citizen shall not be deprived, either temporarily or permanently, of his property without due compensation being made, and only for the purpose of serving the interest of the community as a whole, and not merely for enabling the Government to follow a particular policy. Hence, under the British common law as crystallised later in statute law, for example, the Act of 1842 (5 and 6 Victoria, Chap. 94), the notion of acquisition or occupation of private property by Government is inextricably interwoven with the two prerequisites of public purpose and making of compensation to the party deprived. In English law, as I know it, one cannot think of acquisition or occupation of a citizen's property by, or on behalf of, the Government for purpose other than a public purpose and without making due compensation in the shape of money as the equivalent of the property taken. The Regulations of the Bengal Code and the Land Acquisition Act, which displaced them, all were based on the British notion of acquisition, as indicated above, and insisted that property of a citizen could be taken possession of or acquired by the Government only for a public purpose and after making due compensation in accordance with well-established principles, besides the statutory solatium as an additional compensation for compulsory acquisition. Hence, when Item 9 of List II of Sch. 7 speaks of "compulsory acquisition of land," it covers the whole field of land acquisition as dealt with by the Land Acquisition Act, referred to above. Sub-section 4 of S. 299, in my opinion, has particular reference to the Land Acquisition Act when it provides that "nothing in this section shall affect the provisions of any law in force at the date of the passing of this Act." For these reasons, in my opinion, when Mr. P. R. Das, for the plaintiff, contended that the impugned Act aimed at acquisition of property without making any compensation and without paying any regard to the question of public purpose, he meant really to say that the impugned Act did not come within the purview of Item 9, referred to above. The learned Government Pleader perhaps realising his difficulties did not primarily rely upon the power of the Provincial Legislature as contained in Item 9 aforesaid but relied upon Item 21. But I have already pointed out that the effect of the impugned legislation goes beyond the legislative competence of the Provincial Legislature, in so far as the Government purported to take over management of property of persons who could not come within the purview of disqualified proprietors within the meaning of S. 6, Court of Wards Act, or of the provisions of the Chota Nagpur Encumbered Estates Act, because the reference to the several constituent parts of Item 21 must be in the context of the existing statute law. The provisions of Item 21 of List II do not include the powers to take over management of property of such persons as do not come within any of the disabilities imposed by the Court of Wards Act or the Chhota Nagpur Encumbered Estates Act, as indicated above. My considered opinion, therefore, is that the impugned Act is beyond the powers of the Provincial Legislature as contained in the Government of India Act of 1935, as amended in 1947 as a result of the Indian Independence Act.

[28] I will now examine the position on the assumption that I am wrong in my opinion that the impugned Act is beyond the competence of the Bihar Legislature with reference to Item 21 read by itself or read in conjunction with Item 9 of List II of Sch. VII. If the Bihar Legislature has been empowered by those provisions to make law of the kind under discussion, the next question naturally arises whether the power aforesaid is not subject to the restraint on power contained in S. 299 of the Government of India Act of 1935. As already indicated, sub-s. (1) of S. 299 is a general guarantee of the right of property vested in a citizen of British India. In this connection, reference may be made to the Report of the Joint Parliamentary Committee, Para. 369:

> "We think that some general provision should be inserted in the Constitution Act, safeguarding private property against expropriation, in order to quiet doubts which have been aroused in recent years by certain Indian utterances. It is obviously difficult to frame any general provision with this object without unduly restricting the powers of the Legislature in relation particularly to taxation; in fact, much the same difficulties would be presented as those which we have discussed above in relation to fundamental rights, we do not attempt to define with precision the scope of the provision we have in mind, the drafting of which will require careful consideration for the reasons we have indicated; but we think that it should secure that legislation expropriating, or authorising the expropriation of, the property of particular individuals should be lawful only if confined to expropriation for public purposes and if compensation is determined, either in the first instance or on appeal, by some independent authority. General legislation, on the other hand, the effect of which would be to transfer to public ownership some particular class of property, or to extinguish

> or modify the rights of individuals in it, ought we think, to require the previous sanction of the Governor-General or Governor (as the case may be) to its introduction; and in that event he should be directed by his Instrument of Instructions to take into account as a relevant factor the nature of the provisions proposed for compensating those whose interests will be adversely affected by the legislation."

[29] It is permissible to refer to the Joint Select Committee Report in this connection:*vide* the observations of Sir Maurice Gwyer C. J. in *In re Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act No. XIV [14] of 1938*, 1939 F.C.R. 18 at p. 46: (A.I.R. (26) 1939 F. C. 1) and of Jayakar J. in the same case at p. 107. It would thus appear that S. 299, Government of India Act, was enacted for the first time in Indian constitutional law for safeguarding private property against expropriation. Sub-section (2) of S. 299 elaborates and indicates the limitations to the general provisions in sub-s. (1). It lays down that the legislature may make any law authorising the compulsory acquisition for public purposes of any land, etc., subject to the condition that the law makes provision for payment of compensation for the property acquired either by fixing the amount of compensation or by laying down the principles on which the compensation shall be determined and the machinery for doing so. Sub-section (3) does not come into the present controversy, because, in my opinion, it does not enlarge the powers of the legislature but only provides an additional barrier against introduction of expropriatory legislation. Hence, that sub-section need not detain us. I have already indicated that sub-s. (4) in meant to have exiting law like the Land Acquisition Act intact. Sub-section (5) only defines "land" for the purposes of this section, and gives a wide legal significance to it.

[30] It is noteworthy that sub-s. (2) of S. 299 assumes that the compulsory acquisition is for public purposes. The only condition precedent prescribed for such acquisition is provision for payment of compensation. Hence, it is not accurate to say that there are two conditions attaching to a compulsory acquisition of land, namely, (1) that it should be for public purposes, and (2) that there should be provision for compensation. The words of sub-s. (2), in my opinion do not justify the construction that public purpose is a condition of the acquisition, rather it is inherent in the very notion of acquisition.

[31] Is the impugned Act an instance of the exercise by the Provincial Legislature of its "power to make any law authorising the compulsory acquisition for public purposes of any land" within the meaning of sub-s. (2)? The term "public purpose" has not been defined, and is not capable of an exact definition, and the relevant authority and the Court have got to determine in each particular case whether a particular taking of property is for such a purpose. In this connection, reference was made at the Bar to the decision of their Lordships of the Privy Council in the case of *Hamabai Framjee v. Secretary of State*, 42 I. A. 44 : (A. I. R. (1) 1914 P. C. 20). In this case, the Government had, in terms of a lease and a *sanad*, the right to resume possession of the land granted, if they desired to use it for a public purpose, of course, subject to giving notice and paying compensation. In pursuance of that provision in the document, Government gave notice of their intention to resume possession with the object of using the land for providing residences to officials. It was argued on behalf of the grantees that public purpose in taking the land should be construed as making the land available to the public at large. Their Lordships of the Judicial Committee repelled that contention, and adopted the language of Batchelor J. that :

> "The phrase, whatever else it may mean, must include a purpose, that is, an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned."

Their Lordships further pointed out that, in order to determine whether a particular purpose was a public purpose, the Government are good judges; but they are not absolute judges. Mr. P. R. Das, for the plaintiff, made repeated references to certain observations in Cooley's Constitutional Limitations, Vol. II, Chap. XV, relating to the law of "eminent domain" in order to emphasise that land can be acquired only for public purposes. The author has quoted the following observations at P. 1110 from a decision of an American Court :

> " 'Eminent domain' is a right inherent in all sovereignties, and is defined as the right of the nation or the State, or those to whom the power has been lawfully delegated, to condemn private property for public use, and to appropriate the ownership or possession of such property for such use upon paying the owner due compensation to be ascertained according to law."

He also relied upon the following observations of the author at P. 1124 :

> "The definition given of the right of eminent domain implies that the purpose for which it may be exercised must not be a mere private purpose; and it is conceded on all hands that the legislature has no power, in any case, to take the property of one individual and pass it over to another without reference to some use to which it is to be applied for the public benefit. 'The right of eminent domain', it has been said, "does not imply a right in the sovereign power to take the property of one citizen and transfer it to another, even for a full compensation, where the public interest will be in no way promoted by such transfer."

[32] Mr. P. R. Das for the plaintiff, contended that the impugned Act does not, in terms

say that the legislation was for a particular public purpose, and that, even construing the provisions of the Act as a whole, there is no indication that it was for a public purpose. On the other hand, the learned Government Pleader contended that it was for a public purpose. He further contended that, though the Act was not in exercise of the State's right of eminent domain as understood in America, or of police powers, it was in pursuance of a policy of the Government to substitute management of estates and tenures by private persons by management of public officers with a view to eliminating conflict between landlords and tenants. He drew our attention to a number of recent legislations to show that the policy of the Government was to grant larger rights to tenants, who cultivate the soil, to reduce the opportunity of landlords to harass their tenants, and to provide for greater security to tenants in the enjoyment of their lands. He made specific reference to the Bihar Tenancy (Amendment) Act (XIII [13] of 1946), the Bihar Tenancy (Second Amendment) Act (XIV [14] of 1946), the Bihar Bakasht Disputes Settlement Act (XIII [13] of 1947), the Bihar Tenancy (Amendment) Act (XXIII [23] of 1947), the Bihar Privileged Persons Homestead Tenancy Act (IX [9] of 1948) and the Bihar Private Forests Act (IV [4] of 1948). He contended that the policy lying behind all these Acts would be worked out more effectively if the big estates, to which the impugned Act has been applied in the first instance, came directly under the control and management of the Government through their officers. In my opinion, this argument proceeds upon a confusion between a public purpose and public policy. Public policy in relation to an enactment is a matter entirely for the Government and the legislature to decide, with which the Courts have no concern. But whether a particular piece of legislation is for a public purpose is a matter which is not beyond scrutiny by the Courts, though the Government may be good judges of whether a particular legislation was for a public purpose. The Government Pleader went to the length of contending that there is a strong presumption in favour of the Act being for a public purpose. He did not cite any direct authority in support of this far-reaching contention. He read certain passages from Cooley's Constitutional Limitation, Vol. II, pages 1026-33 and 1141-45 as also from Willoughby's Constitution of the United States, Vol. III, pages 1875-80 in support of his contention that there is a very strong presumption in favour of the constitutionality of an Act of a legislature which has got plenary powers of legislation in respect of certain specified matters. He also contended that that strong presumption is not rebutted simply by showing that the exact purpose of the impugned Act does not clearly appear from the provisions of the Act. But, in my opinion, all those observations have no application to the present controversy, inasmuch as they were made with reference to taxing statutes. Taxation is the special power of Government which raises taxes through the legislature, apparently for the purposes of the State. Naturally, in such a legislation, the public purposes being apparent, the party challenging the law must clearly make out the invalidity alleged. Mr. P. R. Das, on the other hand, pointed out the difference between a legislation in exercise of the State's power of eminent domain and that in exercise of its power to levy taxes. He referred to the following observations in Cooley's Constitutional Limitations, Vol. II, pages 1119-20:

> "The right to appropriate private property to public uses lies dormant in the State, until legislative action is had, pointing out the occasions, the modes, conditions and agencies for its appropriations. Private property can only be taken pursuant to law: but a legislative Act declaring the necessity, being the customary mode in which that fact is determined, must be held to be for this purpose 'the law of the land', and no further finding or adjudication can be essential, unless the constitution of the State has expressly required it. When, however, action is had for this purpose, there must be kept in view that general as well as reasonable just rule, that whenever in pursuance of law the property of an individual is to be divested by proceedings against his will, a strict compliance must be had with all the provisions of law which are made for his protection and benefit, or the proceeding will be ineffectual. Those provisions must be regarded as in the nature of conditions precedent, which are not only to be observed and complied with before the right of the property owner is disturbed, but the party claiming authority under the adverse proceeding must show affirmatively such compliance."

If the legislature had said that the impugned Act was for a particular public purpose, or clearly indicated by its provisions that it was meant to be so, *prima facie*, it would have been taken to be for a public purpose. But the Act read as a whole does not give any such indication. The provision in S. 25 (1) (f), which gives the sixth priority out of the gross collections of the estate to the payment of costs of irrigation works for the benefit of the tenantry, in my opinion, only emphasizes the pre-existing obligation of the landlord to keep the irrigation works in an efficient state. It is not the key to the legislation, nor could it be said to be the underlying idea behind the Act. I am, therefore, of opinion that the impugned Act, even it was an acquisition of land within the meaning of Item 9 of List II of Sch. VII, Government of India Act of 1935, was not for a public purpose within the meaning of sub-s (2) of S. 299 of the Act. The impugned Act is, therefore, void on this ground also.

[33] Assuming that the impugned Act has the effect of acquisition of property for public purposes, does it satisfy the condition precedent, that is to say, does it "provide for the payment of compensation for the property acquired?" It was argued on behalf of the plaintiff that no compensation is provided for by the statute. The Government Pleader, on the other hand, contended that compensation had been provided for, and he referred to the provisions of S. 25 of the Act, particularly the fourth item providing for the payment of allowance to the owner of the property, and to sub-s. (2) of S. 25 which speaks of the payment of the surplus, if any, to the owner of the property at the end of each financial year, subject, though it is, to certain deductions by the Manager. The learned Government Pleader argued, though rather half-heartedly, that, though the payment of the allowance, or of the surplus, is not made compulsory under the Act, and is made dependent upon so many contingencies, still those payments may be justly characterized as compensation. In my opinion, this argument on behalf of the Government is not well-founded. In the first instance, in their written statement, the Government had not claimed that it is acquisition of property that has been effected by the impugned Act, and, therefore, no question of compensation could arise on that pleading secondly, the owner's income from the property, in a very attenuated form, may be paid to the owner of the property, if the other items of expenditure, which have a higher priority, as indicated in S. 25, have been fully met. Here, I may point out that the whole scheme of the Act has been conceived in such a way as completely to shut out the idea of acquisition of property by Government. It was not a part of the Government's case that the impugned legislation aimed at acquisition of property on payment of compensation. Hence, this argument on behalf of the Government by the learned Government Pleader is against the pleadings. There is no provision in the impugned Act even professing to compensate the owner of property dealt with by the Act. The State undertakes no liability to the owner, even as it takes no benefit for itself, as a result of taking over property. If the provisions of the Land Acquisition Act, which is the existing law on the subject, and which must be looked to for guidance with reference to the law of acquisition of property by the State, were appealed to, the irresistible conclusion would be that no compensation was contemplated by the impugned Act. It must, therefore, be held that, properly speaking, there is no provision in the Act for making compensation to the owner of the property acquired. As a result of all these considerations, it must be held that the restraint on power laid down in S. 299, Government of India Act of 1935, stands in the way of the impugned Act being valid. The position, therefore, is that, before the coming into effect of the Constitution on 26th January 1950, the impugned Act was not a valid law; it was *ultra vires* of the Provincial Legislature.

[34] Now, let us turn to a discussion of the position as it has emerged after the Constitution came into force. Mr. P. R. Das for the plaintiff, contended that Art. 13 (1) read with Art. 19 (1) (f) renders the impugned Act completely void, even assuming that it was valid before the Constitution came into force. Article 13 (1) is in these terms:

> "All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this part, shall, to the extent of such inconsistency, be void."

Article 19 (1) (f) provides that

> "all citizens shall have the right ... (f) to acquire, hold and dispose of property..."

Both these Articles are contained in Part III dealing with "Fundamental Rights." Mr. Das further contended that Art. 31 is an elaboration of Art. 19 (1) (f) subject to the words of limitation contained in the other clause of Art. 31. Article 31 is in these terms:

> "(1) No person shall be deprived of his property save by authority of law.
>
> (2) No property, moveable or immovable, including any interest, in or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of compensation, or specifies the principles on which, and the manner in which the compensation is to be determined and given.
>
> (3) No such law as is referred to in cl. (2) made by the Legislature of a State shall have effect unless such law, having been reserved for the consideration of the President, has received his assent.
>
> (4) If any Bill pending at the commencement of this Constitution in the Legislature of a State has, after it has been passed by such Legislature, been reserved for the consideration of the President and has received his assent, then, notwithstanding anything in this Constitution, the law so assented to shall not be called in question in any Court on the ground that it contravenes the provisions of cl. (2).
>
> (5) Nothing in cl. (2) shall affect —
>
> (a) the provisions of any existing law other than a law to which the provisions of cl. (6) apply, or
>
> (b) the provisions of any law which the State may hereafter make —
>
> (i) for the purpose of imposing or levying any tax or penalty, or
>
> (ii) for the promotion of public health or the prevention of danger to life or property, or
>
> (iii) in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other

> country, or otherwise with respect to property declared by law to be evacuee property.
>
> "(6) Any law of the state enacted not more than eighteen months before the commencement of this constitution may within three months from such commencement be submitted to the President for his certification; and thereupon, if the President by public notification so certifies, it shall not be called in question in any Court on the ground that it contravenes the provisions of Cl (2) of this article or has contravened the provisions of sub-s. (2) of S. 299, Government of India Act, 1935."

It will be noticed that Cl. (1) of Art. 31 is practically in the same terms as Cl. (1) of S. 299, Government of India Act, 1935. Similar is the case with Cl. (2) of Art. 31, except for the addition of taking "possession" before "acquisition", and of "movable" before "immovable", so that, whereas sub-s. (2) of S. 299 referred to acquisition of only immovable property, Cl. (2) of Art. 31 speaks not only of that but also of taking possession of movable and immovable property. This amendment, by way of addition of certain words, as aforesaid, in my opinion, has been rendered necessary because of the addition of "requisitioning" to "acquisition" both in Item 33 of List I and Item 36 of List II of Sch. VII to the Constitution. It was suggested at the Bar that this addition of requisitioning to the Items of Sch. VII and of taking possession in Cl. (2) of Art. 31 was made as a result of the decision of a single Judge of the Bombay High Court in the case of *Tan Bug Taim* v. *Collector of Bombay*, A.I.R. (33) 1946 Bom. 216 : (47 Cr. L. J. 594) in which he held that the power of requisition was not included within the specific power of acquisition in the Government of India Act of 1935. However that may be, it is, to my mind, clear that the addition of taking "possession" to the power of acquisition vested in Government by Art. 31 is consequential upon the addition of "requisition" to the Items aforesaid of Sch. VII of the Constitution. The learned Government Pleader, as already indicated, relied most emphatically on the power of the state to take "possession of property". But taking "possession", under Art. 31 of the Constitution, has reference obviously to the power of "requisition" added to the Items of the two Lists in Sch. 7 of the Constitution. But can it be said that the impugned Act has in contemplation requisitioning of property ? All the arguments against holding that the Act empowered acquisition of property apply with greater force to this argument of the Government Pleader. No state of emergency is declared to have existed to justify such a scheme of general requisitioning of property.

[35] It is manifest that, if I am right in coming to the conclusion that the impugned Act was *ultra vires* of the Provincial Legislature under the Constitution Act of 1935, the same consideration must apply to the new Constitution which came into force on 26th January 1950, subject, of course, to the certification clause, namely, Cl. (6) of Art. 31 of the Constitution. It was argued on behalf of the Government that, since after the coming into force of the Constitution, the Courts are debarred, by virtue of the provisions of Cl. (6) of Art. 31, from going into the question of the validity of the impugned Act; as it comes within the purview of Part 1 of Cl. (6), as the Act was enacted in October 1949; and was certified by the President on 11th March 1950. The certificate is in these terms :

> "Whereas the law of the State of Bihar known as the Bihar State Management of Estates and Tenures Act 1949, being Bihar Act XXI [21] of 1949, enacted not more than 18 months before the commencement of the Constitution of India has, within three months of such commencement, been submitted to the president for his certification;
>
> Now, therefore, in exercise of the powers conferred by Cl. (6) of Art. 31, Constitution of India, I, Rajendra Prasad, hereby certify that the said Act shall not be called in question in any Court on the ground that it contravenes the provisions of Cl. (2) of the said Article or has contravened the provisions of sub-s. (2) of S. 299, Government of India Act, 1935.
>
> Rajendra Prasad, President."

The argument of the learned Government Pleader is that, as the certificate prevents the investigation by the Courts of the validity or otherwise of the Act, the Court is not competent to go behind the Act, and pronounce upon its validity. The argument further was that the very purpose of the certification as contemplated in Cl. (6) of Art. 31 is to cure any illegality that there may be in the Act, and such an illegality, if any, must be there from its very inception. If this Court were to go into the question of the validity of the Act, the argument further is, it will be rendering Cl. (6) aforesaid wholly nugatory.

[36] Mr. P. R Das, for the plaintiff, answered this contention of the learned Government Pleader by pointing out that the certification by the President is not, and could not have been, in absolute terms, that is to say, the president has not certified that the impugned Act shall not be called in question on *any* ground. The certification by the president, the argument is, even if valid, applies to the limited ground, namely, the contravention of the provisions of Cl. (2) of Art. 31, or the corresponding provisions of sub-s. (2) of S. 299, Government of India Act, 1935. Mr. Das further argued that the very fact that the field of certification by the President has been limited by the Constitution makes it clear that it is open to the Court to go into the question whether the President has or has not exceeded the power given to him by the Constitution. Mr. Das argued that it is not a case

of the Constitution vesting the President with unlimited power of certification which would have the effect of making it non-justiceable.

[37] Mr. Das argued that, so far as the suit was concerned, it had been instituted, as already indicated, on 22nd December 1949, before the Constitution came into effect. He contended that the rights of the plaintiff claimed in the suit could not be affected by the Constitution, and, therefore, the certification by the President was of no avail, so far as the present plaintiff is concerned. He made reference to the decisions in the *Midland Rly. Co.* v. *Annie Pye,* (1861) 142 E. R. 419 : (30 L. J. C. P. 314), *Moon* v. *Durden,* (1848) 154 E. R. 389 at p. 398 : (12 Jur. 138), *Knight* v. *Lee,* (1893) 1 Q. B. 41 : (62 L. J. Q. B. 28), *Young* v. *Adams,* 1898 A. C. 469 : (67 L. J. P. C. 75), *Smithies* v. *National Association of Operative Plasterers,* (1909) 1 K. B. 310 : (78 L. J. K. B. 259), *Henshall* v. *Porter,* 1923-2 K. B. 193 : (92 L. J. K. B. 866) and other cases. In my opinion, there is no substance in this contention raised on behalf of the plaintiff. Clause (6) itself, in terms, makes it clear that the clause not only applies to the state of affairs at the date of the coming into effect of the constitution but also anterior to that, when S. 299, Government of India Act, was still in force. Furthermore, a Court must have jurisdiction throughout the proceedings until termination of those proceedings by the judgment of the Court. If the Court had jurisdiction to go into the question at the date of the institution of the suit, the jurisdiction will continue until something has happened to take away that jurisdiction. In the present case, the coming into effect of the Constitution has brought into operation Art. 31, cl. (6). If this clause has the effect of taking away the pre-existing jurisdiction of the Court to go into that matter, the Court will cease to have jurisdiction to render judgment.

[38] But there are other more effective answers to the contention raised on behalf of the Government based on the provisions of cl (6) of Art. 31 of the Constitution. The opening words of the clause are "Any law of the State". They are not "Any Act passed by the State". Hence, in order to attract the operation of the clause, the first essential condition is that it must be a valid law of the State. In other words, the certification by the President may cure an irregularity or an illegality in some details of the law in a valid piece of legislation; but it cannot cure a nullity. If the impugned Act was a nullity, the certification by the President could not give life to something which was void *ab initio*, and a law which is void *ab initio* is something which was never in existence—see in this connection the following observations of the Supreme Court of America in the case of *Norton* v. *Snelby County,* 30 U. S. S. C. L. Ed. 178 at p. 186 :

> "An unconstitutional Act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

The powers conferred by the Constitution on the State of Bihar to legislate are, for the purposes of the present case, practically the same as those conferred by the Government of India Act of 1935. But the learned Government Pleader wanted to take advantage of the new words which speak of taking "possession". He contended that, though the impugned Act may not have as its objective the acquisition of property, it certainly had the objective of taking possession of estates and tenures. But taking possession occurs in Art. 31 (2) which does not contain the power of the State Legislature but is a restraint on that power. The power is contained in the Items in List II, of Sch. VII which, but for the addition of the word "requisition", is in the same terms as in the previous list under the Government of India Act of 1935 "Requisition", as I understand the word, implies the taking of temporary possession of private property by the State for its own purposes of State, like the defence of the realm, etc., in time of emergency, e. g., war or disturbance of internal peace by revolt or insurrection. We are familiar with the examples of exercise of this power during the last World War, in the shape of the Defence of India Act and Rules framed thereunder, as also the many Orders passed by the Provincial Government. Certainly the term "requisition" cannot apply to the impugned Act, if the term "acquisition" cannot apply to it. Hence, all the considerations, already referred to in relation to the Government of India Act of 1935, apply with equal force to the position as it is now, except for the certification by the President. Now, as already pointed out, the impugned Act is not a law of the State, if it was void *ab initio*. The conclusion, therefore, is that the certification by the President is meant to cure an irregularity or an illegality in a certain provision of an Act, which is otherwise good law, but is not meant to cure a nullity. I put the question directly to the learned Government pleader whether he claimed that by virtue of certification by the President under cl. (6) of Art. 31 not only the defect of not making a provision for compensation would be cured but also absence of public purpose, and he answered that the certification by the President would cure only the illegality in the matter of compensation, and not the inherent defect of absence of public purpose.

Mr. P. R. Das, on the other hand, contended that the certification by the President could cure, if at all, only a defect in the matter of determination of compensation but not a complete want of compensation, because, according to him, the complete absence of compensation would go to the root of the matter, and render the Act a nullity.

[39] Mr. Das further contended that the contravention of cl. (1) of Art. 31 of the Constitution is not covered by the President's certification. But that clause only lays down the general guarantee of rights to private property, and adds a rider "save by authority of law". Mr. Das's contention has already been noticed that "law" here means not the impugned Act but general law. "Law" in cl. (1) of Art. 31, as already indicated, must mean valid law. Mr. Das also contended that the impugned Act nullifies a general guarantee of right to property contained in Art. 19 (1) (f), and, therefore, is void, as laid down in Art. 13 (1) of the Constitution. It was argued on behalf of the Government that Art. 31 is in the nature of an exception to the general rule laid down in Art. 19 (1) (f). Article 31 cannot be read as an exception to the fundamental rights as declared in Art. 19 (1) (f). But certainly the two articles have got to be read together in order to give full effect to the intention of the Constituent Assembly. Article 31 is as much a part of the fundamental rights contained in Part III of the Constitution as Art. 19; but, whereas Art. 19 comes under "Right to Freedom," Art. 31 comes under "Right to Property." Hence, according to the well-established rule of interpretation, where the same statute makes general provisions in respect of a particular subject-matter, and makes specific provisions with respect to special category, the latter must prevail over the general. It is also well settled that different provisions of the same statute, which are apparently inconsistent with each other, should be so construed as to give effect to all the provisions, so as to avoid a repugnancy. Applying these general rules to the provisions of Part III relating to "Fundamental Rights," containing both Arts. 19 and 31, the position appears to be that a citizen may be deprived of his property by the State either taking possession of it or acquiring it for public purposes, if provision is made for making compensation to the person deprived of his property, or for determining the amount of compensation according to certain prescribed rules. But then intervenes cl. (6) of Art. 31 providing for certification by the President. The terms of the President's certificate have been quoted above. As already pointed out those terms are not wide enough to cover each and every contravention of the Constitution but only of cl. (2) of Art. 31. Hence, if the impugned Act is inconsistent with Art. 19 (1) (f), it must be held to be invalid notwithstanding the certification by the President. Mr. Das rightly contended that Arts. 19 (1) and 31 (1), being in the nature of declaration of guaranteed rights, should not be frittered away unless the words of the statute make it absolutely necessary to do so. He referred in this connection to the following observations of their Lordships of the Judicial Committee of the Privy Council in the case of *James v. Commonwealth of Australia*, 1936 A.C. 578 at p. 631: (105 L. J. P. C. 115):

> "It is the declaration of a guaranteed right; it would be worthless if the Commonwealth was completely immune and could disregard it by legislative or executive Act. It is difficult, if not impossible, to conceive that any one drafting a statute, especially an organic statute like the Constitution, would have written out S. 92 in its present form, if what was intended was a constitutional guarantee limited to the States but ineffective so far as regards the Commonwealth."

In that case their Lordships of the Judicial Committee were considering the validity of a Commonwealth legislation laying down regulations restricting inter-State trade with reference to S. 92, Commonwealth of Australia Constitution Act, 1900, which provides that trade, commerce and intercourse among the States shall be absolutely free. Their Lordships held that that declaration of guaranteed right of absolutely free trade bound not only the States but the Parliament of the Commonwealth of Australia also.

[40] It was further argued by the learned Government Pleader that the guarantee of the right of private property contained in sub-cl. (f) of cl. (1) of Art. 19 of the Constitution is subject to the exceptions contemplated in cl. (5) of the same Article, which is in these terms:

> "Nothing in sub-cls. (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the potection of the interests of any Scheduled Tribe."

But can it be said that the provisions of the impugned Act impose "reasonable restrictions" on those guaranteed rights? The restrictions imposed by the impugned Act on the right of private property cannot be said to be reasonable, inasmuch as they leave the owner of the property practically without any rights during the period of State management without conferring any corresponding benefits upon him. Another essential ingredient in sub-cl. (5) is that the restrictions should be in the interests of the general public or for the protection of the interests of any Scheduled Tribe. The impugned Act does not pretend that it is for the protection of the interests of any Scheduled Tribe. But are the restrictions in the interests of the general public? I have already discussed, at some length, the question whether the impugned Act was intended for a public purpose, and come to the conclusion that it was not so intended. If I am right in that conclusion, it is manifest that the restrictions cannot be said to be in the interests of the general public. Hence, the provisions of cl. (5) of Art. 19 do not save the impugned Act from being invalid under the general provisions in Art. 19 (1) (f).

[41] Mr. Das also argued that the certification by the President was a "fraud on power," and made reference to certain passages in Farwell on powers. But, in the view I have already indicated of the effect of the certification by the President, it is not necessary to consider that extreme argument of Mr. Das. I have already held that the certification by the President has not the effect of saving the impugned Act from invalidity, because it was void *ab initio* both before and after the coming into force of the Constitution. In this view, it is also not necessary to consider the argument of the learned Government Pleader that, if the Act is invalid in certain parts, it could be valid in others. I have already indicated that the whole scheme and purpose of the Act are vitiated, because the Provincial Legislature acted beyond its legislative competence. In the words of Lord Atkin in the case of *Attorney-General for British Columbia* v. *Attorney-General for Canada*, 1937 A. C. 377: (A.I.R. (24) 1937 P. C. 93), "the whole texture of the Act is inextricably interwoven," so that it will serve no useful purpose to separate the valid from the invalid.

[42] For the reasons given above, I would decree the suit with costs. The declaration and the permanent injunction prayed for are granted. The applications in the several miscellaneous judicial cases will be dismissed but without costs, without going into the question whether the petitioners, or any of them were entitled to any of the writs prayed for.

[43] **Das J.**—I have had the privilege of discussion with, and the advantage of reading the judgments prepared by my learned brethren, Shearer and Sinha JJ. In a case of so great constitutional importance, it is, for me, a matter of some satisfaction that I have reached the same final conclusion as they have reached, though on somewhat different grounds. The facts having been fully stated by them, I can plunge "in medias res" and proceed at once to the reasons for my conclusions without any prefatory or introductory statement of facts or pleadings.

[44] The impugned legislation in this case is the Bihar State Management of Estates and Tenures Act, 1949 (Bihar Act XXI [21] of 1949), to be hereinafter referred to as the impugned Act. This Act received the assent of the Governor-General on 29th September 1949, which assent was first published in the Bihar Gazette, Extra-ordinary, of 17th October 1949.

[45] In Title Suit No. 3 of 1950, a notification, purporting to be in exercise of the powers conferred by sub-s. (1) of S. 3 of the impugned Act, was made on 18th November 1949 and published in the Bihar Gazette, Extra-ordinary, of 26th November 1949. This notification purported to say that the estate, known as the Darbhanga Raj Estate, of which the plaintiff is admittedly the proprietor, was placed under the management of the Provincial Government for a period of twenty years, and the management was to vest in one Mr. A. J. Khan, Additional Collector of Darbanga. Similar notifications were issued in respect of other estates or tenures, which are the subject-matter of the miscellaneous cases heard along with the title suit.

[46] On the coming into force of the Constitution of India on 26th January 1950, referred to in the Constitution as the commencement of the Constitution, the impugned Act was certified by the President of India in exercise of the powers conferred by cl. (6) of Art. 31 of the Constitution of India. This certificate was published in notification No. 43/3/50-Judicial, dated 11th March 1950. The certificate repeats the words of cl. (6) of Art. 31, and states

> "that the said Act (meaning the impuged Act) shall not be called in question in any Court on the ground that it contravenes the provisions of cl. (2) of Art. 31, or has contravened the provisions of sub-s. (2) of S. 299, Government of India Act, 1935."

[47] It is now necessary to refer to some of the provisions of the impugned Act in order to get an idea of its nature, scheme and purpose. The Act is described as "an Act to provide for the State management of estates and tenures in the Province of Bihar", and the preamble merely states that it is expedient to provide for such management. No other indication is given in the preamble as to the purpose of the impugned Act. Section 2 gives the definition of certain terms or expressions used in the impugned Act. One such expression is "date of the commencement of management". This expression means in relation to any estate or tenure specified in a notification under sub-s. (1) of S. 3 the date immediately following the date of the expiration of the period of one month from the date of the publication of such notification in the official Gazette. Section 3 is important, particularly sub-ss. (1) and (2). I must read those sub-sections in full :

> "3. (1) The Provincial Government may, by notification, declare that the estates or tenures of a proprietor or tenure-holder, specified in the notification, shall

> be placed under the management of the Provincial Government, and on the publication of the said notification, the estates or tenures of such proprietor or tenure-holder shall, so long as the notification remains in force, be deemed to have been placed under the management of the Provincial Government with effect from the date of the commencement of management.
>
> (2) The notification under sub-s. (1) shall—
>
> (a) specify such particulars of the estates or tenures as may be prescribed ; (b) specify the period for which the estates or tenures shall be placed under the management of the Provincial Government, and (c) vest the management of such estates or tenures in a person who shall be an officer not below the rank of a Deputy Collector (hereinafter called the Manager)."

The important thing to note about these two sub-sections is that while sub-section (1) states that the estate or tenure shall be deemed to have been under the management of the Provincial Government with effect from the date of the commencement of management, sub-s. (2) (c) vests the management of the estate or tenure in a person who shall be an officer not below the rank of a Deputy Collector, to be called the Manager, who will

> "stand responsible in law for fidelity in the discharge of the entire duties of management disposal, realisation and restoration, with regard to the estate under his care" vide *Hukum Chand* v. *Ran Bahadur Singh*, 51 I. A. 208 at p. 214 : (A. I. R. (11) 1924 P. C. 156)."

[48] Section 4 enumerates the consequences of the placing of an estate or tenure under the management of the Provincial Government in six clauses, numbered (a) to (f) ; the important of these consequences are : (a) the proprietor or tenure-holder shall cease to have any power of management of his estate or tenure ; (b) subject to certain other provisions, the manager shall take charge of such estates or tenures to together with such buildings, papers and other properties appertaining to the estates or tenures as in the opinion of the manager are essential for the proper management of the estates or tenures; (c) the proprietor or tenure-holder shall be incompetent to mortgage or lease the estates or tenures or any portion thereof or to grant valid receipts for the rents and profits arising or accruing therefrom including arrears of rent and profits which were payable to the proprietor or tenure-holder in respect of the estates or tenures on the date of the commencement of management; (d) all rents and profits arising or accruing from the estates or tenures including arrears of rents and profits shall be payable to the manager, and the manager shall, upon receiving such rents and profits be competent to grant valid receipts therefor which shall operate as full discharge of dues mentioned in such receipts ; (e) all suits and proceedings which may be pending at the date of the commencement of management in any Court in respect of any debts or liabilities of the proprietors or tenure-holders the payment of which is secured by the mortgage of, or is a charge on, the estates or tenures or any portion thereof, shall be barred ; and all processes and executions for attachment and sale of such estates or tenures or any portion thereof etc., for, or in respect of, any debt or liability of the proprietor or tenure-holder, whether the payment of such debt or liability is or is not secured by the mortgage of, or is a charge on, such estates or tenures or any portion thereof shall become null and void ; and (f) the estates or tenures shall not be liable for attachment or sale under processes of any Court except for or in respect of debts due, or liabilities incurred, to the Crown. It would appear from the provisions of s. 4 summarised above that certain very important rights of, and incidental to ownership are taken away, e. g., the right to hold and manage the property, the right to mortgage or lease the property (the right to sell or make a gift is apparently not affected) and the right to receive rents and profits, etc. Furthermore, certain liabilities on the estate in the shape of a mortgage or a charge, and other debts and rights arising therefrom in persons other than the proprietor or tenure-holder, are put an end to at least, partially, if not in full.

[49] Chapter III of the impugned Act contains special provisions regarding trust estates or tenures, homesteads, lands used for agricultural and horticultural purposes and certain buildings comprised in estates or tenures, which the manager is not authorised to take charge of.

[50] Chapter IV gives the manager power to order the removal of mortgagees and lessees in possession of any estate or tenure. Chapter V provides for the filing of claims by secured creditors and other persons in possession of the estate or tenure, determination of liabilities and preparation of a scheme for their liquidation. Chapter VI deals with filing of claims by creditors other than secured creditors. Chapter VII contains only one section which affords protection from sale for arrears of Government revenue.

[51] Chapter VIII deals with the management, and some of the provisions in this Chapter must be read in full. Section 22 states that every manager shall manage the property committed to him diligently and faithfully and shall, in every respect, act to the best of his judgment. Section 23 states, *inter alia*, that every manager shall continue liable to account to the Provincial Government, after he has ceased to be manager, for his receipts and disbursements during the period of his management. Section 25 is important : it shows how the monies received by the manager in respect of the estates or tenures shall be applied, and for what purposes. The scheme

of the section is that certain purposes, nine in number, for which the monies received by the Manager can be applied, are mentioned in a particular order: that order gives a priority list which cannot be changed unless the Provincial Government specially otherwise directs. *First* in the order of priority comes the payment of Government revenue and all cesses and other public demands etc ; *second* is the payment of chaukidari taxes, municipal taxes, etc ; *third* is the payment of costs of management and supervision, the rates of such costs to be fixed by rules made under the Act ; *fourth* is the payment of a quarterly allowance to the proprietor or tenure-holder, the rate of allowance not exceeding twenty per cent of the monies received by the manager, to be fixed by rules made for estates or tenures falling within different income groups; *fifth* is the maintenance of buildings in a proper state of repairs; *sixth* is the payment of costs of irrigation works for the benefit of the tenantry of such estates or tenures at such rates as may be fixed by rules ; *seventh* is the liquidation of debts and liabilities in accordance with a scheme approved by the Provincial Government; *eighth* is the payment of incidental and unforeseen charges; and *ninth* is the liquidation of debts or liabilities other than those mentioned in cl. 7. After all the aforesaid disbursements have been made in the order of priority mentioned above any surplus remaining shall be paid to the proprietor or tenure-holder at the end of each financial year. The manager is given power to deduct from the surplus any sum which he may consider necessary to retain as a working balance for the management of the estate or tenure. Section 26 gives the manager power to contract loans on the security of the estate or tenure.

[52] Chapter IX provides for an appeal against orders of the manager, and the appeal is to be heard by such authority as may be empowered by the Provincial Government. It is stated that the decision of the appellate authority shall be final and shall not be questioned in any Court.

[53] Chapter X provides for the constitution of an Advisory Committee and its functions.

[54] Chapter XI seems to bar the jurisdiction of Courts, and states that the declaration of the Provincial Government under sub-s. (1) of S. 3 and the order of the manager under sub-s. (1) of S. 13 or where an appeal had been preferred, the order of the appellate authority shall not be questioned in any Court and it shall not be lawful for any Court to pass any order or do anything which may in any way interfere or have the effect of interfering with such management by the Provincial Government. Chapter XII deals with suits and appeals by and against a proprietor or tenure-holder during the management of the estate or tenure by the Provincial Government, and Chap. XIII gives the Provincial Government power to relinquish management at any time.

[55] In Chap. XIV, S. 34 gives the power to appoint a new Manager, and S. 37 provides for delegation of powers. Chapter XV deals with the power to make rules, and Chap. XVI deals with penalties and amendments.

[56] I had failed to notice that S. 29 in Chap. X gives the proprietor or tenureholder a right to inspect the audited accounts of his estate or tenure once a year or cause the same to be inspected at the end of every year. The proprietor or tenureholder has no remedy if the accounts are not audited, and the right to inspect the audited accounts may be rendered illusory if the accounts are not audited every year. If the proprietor or tenure-holder discovers any irregularity or defect in maintaining the accounts or in managing the estates or tenures, he may bring the matter to the notice of the Provincial Government through the Advisory Committee. It is then left to the Provincial Government to take such action as it thinks fit, and the action of the Provincial Government shall not be questioned in any civil Court.

[57] The above is a brief summary of the important provisions of the impugned Act in so far as they show its nature, scheme and purpose. The constitutional questions argued before us have a close connection with, and are dependant upon, the nature, scheme and purpose of the impugned Act. These constitutional questions may be thus formulated at this stage; (1) Whether the impugned Act was within the legislative competence of the authority making it; (2) whether the impugned Act was hit by the restrictive provisions in S. 299, Government of India Act, 1935; (3) whether the impugned Act is inconsistent with any of the provisions in Part III of the Constitution of India, dealing with Fundamental Rights, and therefore, void to the extent of such inconsistency under Art. 13 (1) of the Constitution; (4) what is the legal effect of the certificate given by the President under cl. (6) of Art. 31 of the Constitution; and (5) if some of the provisions only are inconsistent with any Fundamental Rights, can the inconsistent provisions be severed from the rest of the impugned Act ? The arguments advanced before us for, and against, the impugned Act may be said to fall under the five general questions formulated above, though there are many subsidiary points or topics under each question which will be stated and dealt with at the appropriate stage. The issues framed in the suit, though differently worded, raise in substance the same five

questions. In formulating the constitutional questions, I have not been unmindful of the necessity of keeping scrupulously within the domain appropriate to judicial action, and the principle that the Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied", *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 8 L. Ed. 688.

[58] For convenience of discussion, I shall take each general question separately and deal with all the topics arising thereunder, and thereafter give my answer to the question. Such an arrangement will, I venture to think, avoid tautology or overlapping, and give point, consistency and logical sequence to the discussion.

[59] I proceed now to consider the first question. At the time of the enactment of the impugned Act, the constitution charter was the Government of India Act, 1935, as amended up to that date and as modified, adapted or varied by the Indian Independence Act of 1947, and the India (Provisional Constitution) Order, 1947. The question of legislative competence of the Bihar Legislature which made the impugned Act has, therefore, to be considered with reference to the provisions of the Government of India Act, 1935. Mr. Lalnarain Sinha appearing for the State of Bihar, has addressed us as to the way in which such a question has to be approached. So far back as 1878, in the celebrated case of *Queen* v. *Burah*, 5 I. A. 178: (4 Cal. 172 P. C.), Lord Selborne indicated the proper way of approaching such a question. He said :

> "The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation as large, and of the same nature as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions."

Therefore, I would be chary of introducing notions based on general theories and thereby reading more into the terms of the instrument by which the legislative powers were created or restricted, unless the very terms used in the constitutional instrument or charter compel the introduction of such notions or theories. In America, where there are written constitutions, the principle that an Act of the Legislature could be held invalid because in conflict with a law of superior authority was no innovation, when it was first propounded by Marshall C. J. in *Marbury* v. *Madison*, 1 Cranch 137, though the decision came at a time when there was much acrimonious controversy between the Federalists and the Republicans as to the appropriate domain of judicial action. It was always recognised that in litigation before a Colonial Court, the contention might be made that an enactment of the local legislature was in excess of its powers and so void. In England, in *Dr. Bonham's case*, 8 Coke's Rep. at p. 118a Lord Coke made the exaggerated claim that

> "the common law would control Acts of Parliament, and sometimes adjudge them to be utterly void ; for when an Act of Parliament is against common right and reason, or repugnant or impossible to be performed the common law would control it, and adjudge such Act to be void."

Lord Coke spoke at a time when the authority respectively of the King, the Parliament, and the common law as declared by the Judges was a matter of high controversy, and he was an active participant in that struggle As one writer has put it, "Coke fudged badly in vouching precedent for his bold statement". As we know, history has settled it that the King in Parliament is supreme in England, and the Judges must obey the statute. But the idea that a statute, contrary to common right or reason, is void, and that it pertains to the Judges to apply the test, entered into the American political heritage and exercised a great influence in the incorporation of constitutional guarantees in a written Constitution and in promoting the practice of judicial review of legislation.

[60] There cannot be any doubt, however, that it is the duty of the Court to pronounce on the validity of a law (when such a question really arises for determination), made by a legislature whose powers are created, controlled or limited by a written, constitional instrument. Writing on the power of the federal judiciary under the Constitution of America, Hamilton wrote in the Federalist (No. 78) :

> "The interpretation of the laws is the proper and peculiar province of the Courts. A constitution is, in fact, and must be regarded by the Judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular Act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred ; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."

[61] I have made these observations with regard to the method of approach and the nature of our task, because, as will presently appear, there has been much discussion before us as to what the provisions of S. 299, Government of India Act, 1935, and the Fundamental Rights guaranteed by the provisions in Part III of the Constitution of India really mean. The discussion has ranged over a wide field embracing such topics as principles of natural justice, principles and purpose of legislation, the principles of English Common law, and the principles of economics as to earned and unearned income, etc. Some of these topics really need no consideration, as they fall outside the domain appropriate to judicial action.

[62] I would accordingly approach the first question from the point of view expressed and explained in the words of Lord Selborne quoted above. I have already stated what the impugned Act seeks to provide for. One of our main difficulties in this case has been that the impugned Act seeks to provide for so many things by one piece of legislation that it is difficult to classify it under one head or item, either with regard to its nature or its purpose and effect. The impugned Act, amongst other things, provides for: (1) transference of management of estates and tenures from the proprietor or tenure-holder, either to Provincial Government or a Manager under the Provincial Government ; (2) taking away the right of the proprietor or tenure-holder to mortgage or lease ; (3) taking away the right to realise rents and profits including the right to realise arrears of rents and profits ; (4) barring of suits and proceedings in respect of any debts or liabilities of the proprietor or tenure-holder the payment of which is secured by the mortgage of, or is a charge on, the estates or tenures or any portion thereof ; (5) a declaration of nullity of processes and execution for attachment and sale of such estates or tenures for or in respect of any debt or liability of the proprietor or tenure-holder whether the payment of such debt or liability is or is not secured by the mortgage of or is a charge on, such estates or tenures or any portion thereof ; and (6) the prevention of the estate or tenure being sold or attached in respect of any debts or liabilities except for or in respect of debts due, or liabilities incurred, to the Crown.

[62a] It has been contended by Mr. Lal Narain Sinha that in pith and substance, the impugned Act merely provides for possession of estates and tenures, and does not amount to a compulsory acquisition of land. He has referred us to item 21 of List II in Sch. 7, Government of India Act, 1935, and has contended that that item, supplemented, if necessary, by item 2 of List II and items 4, 8, 9 and 10 of List III, completely covers the impugned Act. It is pointed out that under S. 100, Government of India Act, 1935, the Bihar Legislature had full power to make a law with respect to any of the matters enumerated in lists II and III. It is further pointed out that no question of inconsistency or repugnancy to any existing Indian law or earlier federal law can arise within the meaning of S. 107, Government of India Act, inasmuch as the impugned Act had received the assent of the Governor-General. Mr. P. R. Das, appearing for the plaintiff, has contended that the impugned Act in so far as it acquires rights in or over land is really a piece of legislation authorising compulsory acquisition of land but without payment of any compensation; in other words, his contention is that the impugned Act is really a piece of confiscatory legislation, which takes away every important right of an owner of land except the empty husk of proprietorship, and does not, therefore, come under any of the items in the three Lists of Sch. 7, Government of India Act, 1935.

[63] Item 21 of List II reads :

> "Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents; transfer, alienation and devolution of agricultural land ; land improvement and agricultural loans ; colonization; Courts of Wards ; encumbered and attached estates; treasure trove."

This item has been the subject of judicial consideration of the highest authority. In *Jagannath Baksh Singh* v. *United Provinces*, A. I. R. (33) 1946 P. C. 127 : (I. L. R. (1946) Kar. P. C. 129), their Lordships of the Judicial Committee had occasion to pronounce on the validity of the United Provinces Tenancy Act, 1939, which sought to regulate and secure the rights of the tenants in various respects, and in doing so impugned on the powers which, but for such a measure, the taluqdars might have exercised within their estates. The appellant to the Privy Council, who was a descendant of such a taluqdar, claimed that the impugned Act created rights and interests in land in favour of other persons contrary to the sanad granted to the appellant's predecessor by the Crown, and thus derogated from the terms of the Crown grant. Their Lordships referred to item 21 of List II, and said that the enumeration made in that item covered all the subjects in the Act there impugned. They further pointed out that S. 299 had no application, inasmuch as regulating the relation of landlord and tenant, thereby diminishing rights hitherto exercised by the landlord in connection with his land was different from compulsory acquisition of land. In a later decision in *Megh Raj* v. *Allah Rakhia*, 74 I. A. 12: (A. I. R. (34) 1947 P. C. 72), it was observed that the key to item 21 was to be found in the opening word "land". Their Lordships then stated :

> "That word is sufficient in itself to include every form of land, whether agricultural or not. . . . Item 24 is part of a constitution and would, on ordinary principles, receive the widest construction, unless for some reason it is cut down either by the terms of item 21 itself or by other parts of the constitution, which has to be read as a whole. As to item 21, 'land', the governing word, is followed by the rest of the item, which goes on to say, 'that is to say'. These words introduce the most general concept 'rights in or over land'. 'Rights in land' must include general rights like full ownership or lease-hold or all such rights. 'Rights over land' would include easements or other collateral rights, whatever form they might take. Then follow words which are not words of limitation but of explanation or illustration, giving instances which may furnish a clue for particular matters; thus there are the words 'relation of landlord and tenant, and collection of rents'. These words are appropriate to lands which are not agricultural equally with agricultural lands. Rent is that which issues from the land. Then the next two sentences specifically refer to agricultural lands, and are to be read with items 7, 8 and 10 of List III. These deal with methods of transfer or alienation or devolution, which may be subject to federal legislation, but do not concern the land itself, a sphere in which the provincial and federal powers are concurrent, subject to the express exception of the specific head of agricultural land which is expressly reserved to the provinces. The remainder of item 21 specifies important matters of special consequence in India relating to land. The particular and limited specification of agricultural land proves that 'land' is not used in item 21 with restricted reference to agricultural land but relates to land in general. Item 2 is sufficient to give express powers to the provinces to create and determine the powers and jurisdiction of Courts in respect of land, as a matter ancillary to the subject of item 21."

Dealing with the question that there was no express provision in the Constitution Act referring by name to mortgages, their Lordships said that a constitution did not generally deal with particular transactions or types of transactions, and in their Lordships' judgment mortgages of land would, as a matter of construction, properly fall under item 21 in so far as they are mortgages of land, though in certain respects they would include elements of transfer of property and of contract. In *Ten Bug Taim* v. *Collector of Bombay*, A. I. R. (33) 1946 Bom. 216 : (47 Cr. L. J. 594), a single Judge of the Bombay High Court had occasion to consider item 21 of List II in connection with an order of requisition made by the Collector of Bombay in respect of a property known as the Dhanraj Mahal. The view there taken of item 21, particularly of the expression "that is to say", occurring in the item was different from that of their Lordships of the Judicial Committee; but it is only fair to add that this Bombay decision was earlier in time than the decision in *Megh Raj* v. *Allah Rakhia*, 74 I. A. 12 : (A. I. R. (34) 1947 P. C. 72).

[64] Looking at the question merely from the affirmative point of view and ignoring for the time being the restrictive provisions of S. 299, it seems to me that item 21 of list II, supplemented by item 2 of that List and items 4, 8, 9 and 10 of List III, would cover most of the provisions of the impugned Act. With regard to unsecured creditors, whose right to bring suits and obtain decree, etc., is affected by some of the provisions of the impugned Act, it may be necessary to fall back upon another item of List II, namely, item 27 which, amongst other subjects, mentions moneylending and money-lenders. It is worthy of note that compulsory acquisition of land is an item by itself in List II. It is item 9 in that List. Whether the impugned Act merely provides for taking possession of estates and tenures for a public purpose without acquiring them, as contended by Mr. Lalnarayan Sinha, or whether it provides for compulsory acquisition of land without payment of compensation and without a public purpose, as has been argued by Mr. P. R. Das, is a question which I shall presently consider when I come to the negative aspect of the question, with particular reference to the restrictive provisions in S. 299, Government of India Act, 1935. Solely from the affirmative point of view, I do not think it matters whether the impugned Act provides for mere taking of possession or for compulsory acquisition without payment of compensation. The impugned legislation would, in either view, be covered by the various items already referred to in List II and List III.

[65] The second question brings us at once to the negative aspect, namely, the restrictive provisions in S. 299, Government of India Act, 1935. I am reading S. 299 :

> "*299.* (1) No person shall be deprived of his property in British India save by authority of law.
>
> (2) Neither the Dominion nor a Provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purpose of any land, or any commercial or industrial undertaking, or any interest in, or in any company owning, any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, it is to be determined.
>
> (3) No Bill or amendment making provision for the tranference to public ownership of any land or for the extinguishment or modification of rights therein, including rights or privileges in respect of land revenue shall be introduced or moved in the Dominion Legislature without the previous sanction of the Governor-General, or in a Chamber of a Provincial Legislature without the previous sanction of the Governor.
>
> (4) Nothing in this section shall affect the provisions of any law in force at the date of the passing of this Act.

(5) In this section "land" includes immovable property of every kind and any rights in or over such property, and "undertaking" includes part of an undertaking."

[66] There has been an elaborate and interesting discussion as to the meaning of the expression "save by authority of law" occurring in sub-s. (1) of S. 299. Mr. P. R. Das has contended that the expression has the same meaning, which expressions like "due process (or course) of law" and "the law of the land" have in the State Constitutions of America or the Constitution of the United States. Dr. Cooley in his well-known Treaties on Constitutional Limitation (Vol. II, page 736, 8th Edition) has quoted the definition given by Mr. Webster in the *Dartmouth College case* 4 Wheat. 591: 4 L. ED. 629, which stated :

> "By the law of the land is most clearly intended the general law ; . . . the meaning is that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land."

Commenting on this Dr. Colley observed :

> "The words 'by the law of the land' do not mean a statute passed for the purpose of working the wrong. . . . . Nor do they mean anything which the legislature may see fit to declare to be such ; for there are certain fundamental rights, which our system of jurispudence has always recognised, which not even the legislature can disregard in proceedings by which a person is deprived of life, liberty or property" (Colley's Constitutional Limitations, Vol. II, 8th Edn., pp. 737-38)."

Mr. P. Das's contention is that the word "law" in the expression "save by authority of law" does not mean the particular enactment in question, but the general law, the "law of the land" including the entire body of statute and common law. It is further contended that under the common law of England, where a statute authorises the compulsory acquisition of property, it is the invariable practice to provide for the payment of compensation. Furthermore, it is an established rule of construction that express words are required to authorise the taking of property without payment of compensation. Mr. P. R. Das has argued that these principles of the common law of England are applicable to India as rules of justice, equity and good conscience. Mr. Das has cited a large number of decisions in support of his contentions. *Attorney General* v. *De Keyser's Royal Hotel Ltd.*, 1920 A. C. 508 : (89 L. J. Ch. 417) ; *Attorney-General* v. *Horner*, (1885) 14 Q. B. D. 245 at pp. 256-57 : (54 L. J. Q. B. 227) ; *Colonial Sugar Refining Co. Ltd.* v. *Melbourne Harbour Trust Commissioners*, 1927 A. C. 343 at p. 359 : (96 L. J. P. C. 74) ; *Newcastle Breweries* v. *The King*, (1920) 1 K. B. 854 : (89 L. J. K. B. 392) ; *Western Countries Rly. Co.* v. *Windsor and Annapolis Rly. Co.*, (1882) 7 A. C. 178 at pp. 188-89 : (52 L.J.P.C. 43) ; *Waghela Rajsanji* v. *Masluddin*- 14 I. A. 89 at p. 96 : (11 Bom. 551 P. C) and *Maharaja of Jeypore* v. *Rukmini Pattamadevi*, 46 I. A. 109 at pp. 118-19 : (A. I. R. (6) 1919 P. C. 1).

[67] In the view which I take of S. 299, it is unnecessary to embark on an investigation of the common law of England on this subject or to apply the principles of that common law on the basis of justice, equity and good conscience. That in my opinion, would be reading something more into the words of S. 299, and I propose to interpret S. 299 confining myself to the words used therein without reading anything more into the words. The word "law" in sub-s. (1) must, at least, mean "valid law". Sub-s. (1) of S. 299 has taken the shape of a general declaratory statement, in the negative form, which must surely mean that no person shall be deprived of his property by a mere executive, administrative, or prerogative act. If the executive takes the property of any person, it must be prepared to justify that act under the authority of a valid law. Sub-section (2) is clearly a restrictive clause on the power of legislation. Part 1 of the sub-section states, *inter alia*, that neither the Dominion nor a provincial legislature shall have power to make any law authorising the compulsory acquisition for public purposes of any land (I am omitting portions which are not relevant for our present purpose), unless a particular requirement is fulfilled ; the second part of the sub-section contains the requirement, the requirement being the payment of compensation, either by fixing the amount or specifying the principles and the manner in which the compensation is to be determined. If this requirement is fulfilled, then and then only the law authorising compulsory acquisition for public purposes of any land etc., can be made and will be valid. The effect of the two parts of the sub-section read together is clearly this : it is not open to any legislature to make any law authorising the compulsory acquisition of land unless the following two conditions are fulfilled. The first or rather inherent condition is that the compulsory acquistion must be for public purposes. It is true that sub-s. (2) of S. 299, as worded, does not, strictly speaking, make 'public purposes' a condition precedent, but rather assumed that compulsory acquisition can be for public purposes only; it makes 'public purposes' inherent in compulsory acquisition. Regulation I [1] of 1824 perhaps the earliest regulation relating to acquisition of property by Government recognised the principle that such acquisition is made 'for purposes of general convenience to

community or arrangement of public utility.' In the Land Acquisition Acts which followed, right up to Act I [1] of 1894, the same principle finds recognition. Section 299 (2) must be construed in the light of the then existing state of the law in this country. It was, perhaps, this historical background which the Joint Parliamentary Committee had in mind when it said :

> "We think that some general provision should be inserted in the Constitution Act, safeguarding private property against expropriation in order to quiet doubts which have been aroused in recent years by certain Indian utterances. It is obviously difficult to frame any general provision with this object without unduly restricting the powers of the Legislature in relation particularly to taxation; in fact, much the same difficulties would be presented as those which we have discussed above in relation to fundamental rights. We do not attempt to define with precision the scope of the provision we have in mind, the drafting of which will require careful consideration for the reasons we have indicated ; but we think that it should secure that legislation expropriating, or authorising the expropriation of, the property of particular individuals should be lawful only if confined to expropriation for public purposes and if compensation is determined, either in the first instance or on appeal, by some independent authority. General legislation, on the other hand, the effect of which would be to transfer to public ownership some particular class of property, or to extinguish or modify the rights of individuals in it, ought, we think to require the previous sanction of the Governor-General or Governor (as the case may be) to its introduction ; and in that event he should be directed by his Instrument of Instructions to take into account as a relevant factor the nature of the provisions proposed for compensating those whose interest will be adversely affected by the legislation."

[68] The second condition is that it must provide for compensation and either fix the amount of compensation or specify the principles on which the payment of compensation is to be determined. Sub-section (3) in my opinion, relates to a procedural matter, and provides as additional safeguard in respect of any proposed legislation for the transference to public ownership of any land or for the extinguishment or modification of rights therein, including rights or privileges in respect of land revenue. I do not think that sub-s. (3) is in derogation of sub-s. (2). Sub-section (3) covers, perhaps, a wider field, and applies also to proposed legislation which merely modifies rights in land without acquiring them. But if any law authorises compulsory acquisition of land or of any right in land, that law must provide for compensation in accordance with the provisions of sub-s. (2). I do not think that sub-s. (3) affects that position. Sub-section (4) saves any pre-existing law, such as the Land Acquisition Act of 1894. Sub-section (5) is important, as it explains what is meant by the expression "land" in S. 299. The word "land" includes immovable property of every kind and any rights in or over such property.

[69] If the view which I have taken of S. 299, Government of India Act, 1935, be correct, then it follows that the validity of the impugned Act depends on : (i) whether it authorises compulsory acquisition of any right in land ; (ii) whether such acquisition was for a public purpose ; and (iii) whether it provides for compensation. On each of the aforesaid three questions, there has been a controversy. The third question is, I think, easy of solution. The only payment which the impugned Act provides for is the payment of a quarterly allowance to the proprietor or tenure holder, and the payment of a surplus, if any, under sub-s. (2) of S. 25 of the impugned Act, subject to the provisos mentioned therein. Such payment does not, in my opinion, amount to compensation: firstly because, according to the scheme of S. 25, it is the proprietor's own money which is being paid to him; secondly, because the payment is hedged in with so many conditions that in effect there may be no payment at all.

[70] The other two questions are not amenable to an easy solution. First, as to the question whether the impugned Act authorises compulsory acquisition of land within the meaning of S. 299, I find it very difficult to accept the contention of Mr. Lalnarain Sinha that the impugned Act provides for nothing more than mere possession of an estate or a tenure. There are many provisions in the impugned Act which go a good deal beyond mere possession. Take, for example, those provisions which relate to a mortgagee or a lessee on the land. The power of the proprietor or tenure-holder to lease or motgage the property is taken away. The lessee or mortgagee can be removed by an order of the manager. The mortgagee loses his right as a mortgagee, and has to file a claim like an ordinary creditor. The right to arrears of rent and profits is taken away. The proprietor or tenure-holder cannot even ask for accounts. All these provisions go much beyond mere possession. Ordinarily, if possession of a particular piece of land is taken, possession is taken subject to the assets and liabilities. What the impugned Act provides for is the taking of possession, after depriving the owner of several of his rights, in part or whole, and after repudiating, in part or whole, many of the liabilities existing on the estate or tenure or against the proprietor or tenure-holder. The impugned Act is, therefore, a combination of possession *cum* deprivation of many important rights in land; *cum* repudiation or reduction of liabilities, secured or unsecured; *cum* barring of jurisdiction of Courts; etc. It is true that if the test of compulsory acquisition were the transference or deprivation of the totality of rights of an owner, then the impugned Act falls short of acquisition. I

do not, however, think that is the proper test under S. 299. Most of the provisions of the impugned Act are apparently borrowed from the Chota Nagpur Encumbered Estates Act, 1876, and if one is permitted to use an expression without casting any reflection on anybody, the 'inspiration' behind the impugned Act seems to have been derived from the Chota Nagpur Encumbered Estates Act. The scheme of the impugned Act follows closely the scheme of latter Act with one very important difference. The basic principle of the Chota Nagpur Encumbered Estates Act is that the holder, whose estate is taken over, suffers from some disqualification or disability, and asks for the application of the Act to his estate; or the Deputy Commissioner is satisfied that the estate has been attached and is liable to be sold in execution of a decree or order of a civil Court or a revenue Court or the holder has entered upon a course of wasteful extravagance likely to dissipate his property. This basic principle—this *raison d' etre* of the Chota Nagpur Encumbered Estates Act—has been ignored in the impugned Act and what was applied in the case of a sick proprietor is being applied to all, healthy or otherwise.

[71] Be that as it may, in view of the terms of sub-s. (5), S. 299 would apply to compulsory acquisition of immovable property of every kind, including any rights in or over such property. It seems clear to me that the impugned Act provides for the acquisition or deprivation of several rights in land, even though the entire bundle of rights of a proprietor or tenure holder is not taken away. A very similar question arose for decision in the *Minister of State for the Army* v. *Dalziel*, 68 Comm. L. R. 261, where the Commonwealth of Australia took possession of a piece of land, by virtue of Regn. 54 of the National Security (General) Regulations, of which one Arthur Dalziel was the occupier as a weekly tenant. The question that arose for decision was whether the taking under Regn. 54 for an indefinite period of the exclusive possession of the land constituted an acquisition of property within the meaning of S. 51 (xxxi) of the Constitution of Australia. Section 51 (xxxi) of the Constitution empowered the Commonwealth Parliament to make law with respect to

> "the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws."

Latham C. J. answered the question in the negative and held that the possession under the regulation was akin to that of a licensee. The majority of Judges, however, held that the taking of possession under Regn. 54 constituted an acquisition of property within the meaning of S. 51 (xxxi) of the Constitution. The arguments for and against the two views have been very carefully considered in the decision, and no useful purpose will be served by re-stating those arguments. It is, I think, sufficient to state that I am in entire agreement with the majority view. Rich J. pointed out that property, in relation to land, was a bundle of rights exercisable with respect to the land, and the tenant of an un-encumbered estate in fee simple in possession had the largest possible bundle. He further pointed out that there was nothing in the Constitution to suggest that the legislature was intended to be at liberty to free itself from the restrictive provisions of the placitum by taking care to seize something short of the whole bundle owned by the person whom it was expropriating. It was rightly observed that a right to possession was a right of property, and was the most characteristic and essential of those rights. Williams J. referred to the decision of the House of Lords in *Attorney General* v. *De Keyser's Royal Hotel Ltd.*, 1920 A. C. 508 : (89 L. J. Ch. 417), and pointed out that the permanent and temporary acquisitions of property were dealt with in the Defence Act of 1842 in the same way, and both transactions were treated as concerning property which was being acquired from the owners or any other person or persons interested therein, and in both cases the statute provided for a purchase or hiring by agreement. Therefore, on principle, no distinction can be made between possession for a temporary period and acquisition for all time. In *Bug Tain* v. *Collector of Bombay*, A. I. R. (33) 1946 Bom. 216 : (47 Cr. L. J. 594), Bhagwati J. preferred the view of Latham C. J. That decision is entitled to respect, but is not binding on us. It appears that after Bhagwati J.'s decision, an ordinance was made (No. 5 of 1947) under the authority conferred on the Provincial Legislature to enact laws with respect to requisition of land by a notification of the Governor-General of India under S. 104, Government of India Act, 1935. In *Ratanchand Hirachand* v. *D. R. Pradhan*, A.I.R. (36) 1949 Bom. 93 : (50 Bom. L. R. 614), it was held that the Governor General had authority to issue a notification whereby he conferred on the provincial legislature power to enact laws with respect to requisition of land. It appears that to put the matter beyond any doubt, Item 36 of List II and Item 42 List III of the Constitution of India mention both acquisition or requisitioning of property. Article 31 (2) of the Constitution of India, which corresponds more or less to S. 299 (2), Government of India Act, 1935, also mentions both taking possession of or acquiring property for public purposes.

[72] Looking at the impugned Act from the point of view of S. 299, Government of India Act, 1935, as I am doing now, it seems to me that the impugned Act cannot be justified in the way Mr. Lalnarain Sinha has sought to do it, by holding that it provides merely for possession of land and not acquisition. In my opinion, the impugned Act is a piece of confiscatory legislation which deprives a proprietor or tenure-holder of several of his important rights in land without providing for compensation to him. The principle that an increase of the amount of land revenue payable for estates does not involve acquisition of right in or over immovable property laid down in *Kunwar Lal Singh* v. *Central Provinces and Berar*, 1944 F. C. R. 284 : (A.I.R. (31) 1944 F. C. 62) has no application here. In that case, Spens C. J. pointed out that the word 'acquisition' implies that there must be an actual transference of and it must be possible to indicate some person or body to whom is or are transferred, the land or rights in land. In the case before us, important rights in land are transferred by the impugned Act to the State Government or the Manager named in the vesting order. Therefore, the impugned Act is hit by S. 299, and was made in contravention of the provisions of that section.

[73] There is, I think, an additional ground for its invalidity. The impugned Act does not show on the face of it that the acquisition is for a public purpose. I have referred to the preamble and the various provisions of the impugned Act. Except for a reference to the payment of costs of irrigation works for the benefit of the tenantry of the estates and tenures in the sixth clause of S. 25 (1), there is nothing in the impugned Act to indicate that the purpose of acquisition is a public purpose. Mr. Lalnarain Sinha has referred us to various Acts passed in the last five years for the benefit of the tenantry, such as the Bihar Tenancy Amendments Act of 1946 to 1948, the Bihar Privileged Persons Homestead Tenancy Act of 1948, the Bihar Bakasht Disputes Settlement Act, etc. He has stressed that we should take judicial notice of those Acts and hold that the purpose of the impugned Act is similar to the purpose of those other Acts, viz., to eliminate conflicts between landlords and tenants, to give larger rights to tenants, to make it easier for tenants to cultivate their lands, etc.

[74] It should be stated here that a Court of law is not called upon to determine the expediency or otherwise of State policy; nor is it concerned with motives of legislation. The simple point for decision by a Court of law is whether the constitutional charter imposes a restriction on the power of legislation, and if so, whether the restriction has been exceeded. There is no doubt that one of the restrictions imposed by S. 299 is that a law authorising acquisition of property must be for a public purpose. It is, I think, beyond dispute that the State cannot take possession of the property of A and make it over to B, without reference to some use to which it is to be applied for the public benefit. There has been a good deal of discussion before us as to the power of the State to take private property, by virtue of an authority existing in every sovereignty, which the American jurists call the right of eminent domain. As Dr. Cooley has put it (Cooley's Constitutional Limitations, Vol. II, p. 1119, Edn. 8) :

> "The right to appropriate private property to public uses lies dormant in the State, until legislative action is had, pointing out the occasions, the modes, conditions, and agencies for its appropriations. Private property can only be taken pursuant to law; but a legislative act declaring the necessity, being the customary mode in which that fact is determined, must be held to be for this purpose 'the law of the land' and no further finding or adjudication can be essential, unless the constitution of the State has expressly required it. When, however, action is had for this purpose, there must be kept in view that general as well as reasonable and just rule, that whenever in pursuance of law the property of an individual is to be divested by proceedings against his will, a strict compliance must be had with all the provisions of law which are made for his protection and benefit, or the proceeding will be ineffectual. Those provisions must be regarded as in the nature of conditions precedent, which are not only to be observed and complied with before the right of the property owner is disturbed, but the party claiming authority under the adverse proceeding must show affirmatively such compliance."

[75] It is clear that S. 299, sub-S. (1) and sub-S. (2) read together, imposes a restriction, or to put it in the words of Dr. Cooley, imposes a condition that a law authorising acquisition of property must be for a public purpose, and on payment of compensation. There is no authority in the State to take private property except for a public purpose. What then is a public purpose? It is impossible to define the expression "public purpose," and Dr. Cooley rightly said,

> "we find ourselves somewhat at sea when we undertake to define, in the light of the judicial decisions, what constitutes a public use (Cooley's Constitutional Limitations, Vol. II, Edn. 8, p. 1129).

In *Hamabai Framjee* v. *Secy. of State*, 42 I. A. 44 : (A.I.R. (1) 1914 P. C. 20) two suits were instituted to recover possession of certain lands situated in Malabar Hill, Bombay. In one of the suits, the land had been leased by the East India Company in 1854 for a term of ninety-nine years with a proviso that

"In case the said company shall for any public purpose be at any time desirous to resume possession of the premises,"

they should be at liberty to re-enter. In the second suit, the land was granted by a sanad in 1839 at a small annual rent subject to a stipulation, "the said ground to be at any time resumable by Government for public purposes." The Government of Bombay gave notice that they desired to resume possession of the lands for a public purpose stating that they proposed to utilise the land for the residences of Government officers. It was found on evidence that owing to the dearth of suitable houses in Bombay and the high rents demanded, officials were reluctant to accept appointment there, and that this was prejudicial to the efficiency of the various public services. The question for decision in the Privy Council case was whether the aforesaid purpose was a public purpose. The argument of the appellant before the Privy Council was that

> "there cannot be a public purpose in taking land if that land when taken is not some in way or other made available to the public at large "

Their Lordships did not accept this argument. While deprecating an attempt to define precisely the extent of the phrase "public purposes" in the lease, they laid down the following test:

> "Whatever else the expression may mean, it must include a purpose, that is, an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned."

At page 1139 (Constitutional Limitations, Vol. II, 8th Edn.) Dr. Cooley has thus stated the problem:

> "No satisfactory definition of the term 'public use' has ever been achieved by the Courts. Two different theories are presented by the judicial attempts to describe the subjects to which the expression would apply. One theory of 'public use' limits the application to 'employment'—'occupation.' A more liberal and more flexible meaning makes it synonymous with 'public advantage'—'public benefit.' A little investigation will show that any definition attempted would exclude some subjects that properly should be included in and include some subjects that must be excluded from, the operation of the words 'public use.' As might be expected, the more limited application of the principle appears in the earlier cases, and the more liberal application has been rendered necessary by complex conditions due to recent developments of civilization and the increasing density of population. In the very nature of the case, modern conditions and the increasing interdependence of the different human factors in the progressive complexity of community make it necessary for the government to touch upon and limit individual activities at more points than formerly."

[76] Applying the tests indicated above, it seems to me that mere State policy or policy of the party in power is not the same thing as public purpose; secondly, though *prima facie*, the Legislature or the Government are good judges of whether a particular purpose is a purpose in which the general interest of the community is concerned, they are not absolute judges, particularly where the constitutional charter or instrument creating the legislative power imposes a restriction by saying that a law relating to compulsory acquisition must be for a public purpose. As Lord Dunedin put it in *Hamabhai Framjee Petit* v. *Secretary of State*, 42 I. A. 44 at p. 47 : (A. I. R. (1) 1914 P. C. 20), "they cannot say *'sic volo sic jubeo,'* but at least a Court would not easily hold them to be wrong." I have very carefully considered the provisions of the impugned Act, but find it very difficult to hold that the acquisition or deprivation of rights in land therein provided was for a public purpose. No public purpose as is envisaged by the tests mentioned above is apparent either from the preamble or the provisions of the impugned Act. The provisions of the impugned Act do not benefit the State pecuniarily. It is conceded by Mr. Lalnarain Sinha that the State gets no benefit. The tenants get no benefit either: the provision for irrigation costs is highly problematic or hypothetical. I can find nothing in the provisions to avoid conflicts between landlords and tenants or give larger rights to tenants. As far as one can make out, the impugned Act is intended either as an experiment, without incurring any cost, of large-scale management of estates, or as a confiscation of rights in land without payment of compensation.

[77] I wish to guard myself against saying that in no circumstances can there be a public purpose in acquiring zamindaries or in acquiring the interest of intermediaries or rent collectors, either in exercise of the right of eminent domain or in exercise of the police powers of the State. It would not be correct to make such a sweeping or general statement, and I must not be understood to have arrived at any such conclusion. All that I have said about a public purpose relates solely to the provisions of the impugned Act, and all that I am called upon to determine in this case is whether the impugned Act provides for acquisition of rights in land for a public purpose. My answer is that neither the preamble nor the provisions of the impugned Act show that the acquisition is for a public purpose. It can hardly be said that it is necessary for a public purpose to repudiate liabilities, to prevent the proprietor from getting account, to remove mortgagees and lessees, to bar executions etc. by ordinary creditors, when there is benefit neither to the State, nor to the tenants, nor the general public. In the absence of any clear indication as to the purpose of the impugned Act, Mr. P. R. Das has not unnaturally characterised the impugned Act as a cloak by

which the real purpose is concealed, namely, to take away everything from a proprietor or tenure-holder without payment of compensation, leaving only the empty husk of proprietorship.

[78] The nett result of the aforesaid discussion is that the impugned Act contravened the provisions of S. 299, both sub-section (1) and sub-section (2), and was, therefore, *ultra vires* and void at the time when it was made.

[79] Assuming that it was valid on the date when it was made, it clearly infringes the fundamental right guaranteed to a citizen under Art. 19 (1) (f) of the Constitution of India. That Article reads:

> "*19.* (1) All citizens shall have the right —
>
> * * * * *
>
> (f) to acquire, hold and dispose of property."

Article 13 (1) of the Constitution states:

> "All laws in force in the territory of India immediately before the commencement of this constitution in so far as they are inconsistent with the provisions of this part shall to the extent of such inconsistency be void."

[80] There cannot be any doubt that the impugned Act is inconsistent with the provisions of Art. 19 (1) (f) in Part III of the Constitution. The question is whether the impugned Act is saved by Art. 19 (5), Art. 31 (2) or by reason of the certificate under Art. 31 (6) of the constitution. Clause (5) of Art. 19 which is in the nature of an exception to the general right given by Art. 19 (1) (f) clearly does not save the impugned Act. Clause (5) of Art. 19 refers to two conditions; the first condition is that the restrictions imposed on the exercise of the right guaranteed by Art. 19 (1) (f) must be reasonable; the second condition is that the restrictions must be in the interest of the general public or for the protection of the interest of any Scheduled Tribe. It is clear enough from what I have stated above that the restrictions are neither reasonable nor in the interest of the general public. Article 19 (5) cannot, therefore, save the impugned Act, assuming that the impugned Act was a valid piece of existing law on 26th January 1950, when the Constitution of India came into force.

[81] As to the provisions of Art. 31 of the Constitution, it is not in dispute that the provisions in Art. 19 (1) (f) should be read with the provisions in Art. 31. Article 19 (1) (f) refers to the right as a right of freedom. Article 31 relates to the right to property. The provisions in the two articles must be read together in order to avoid any apparent inconsistency or conflict. The constitution is an organic whole and must be so interpreted as (not?) to bring one part in conflict with another. This proposition has not been disputed, and has both authority and principle in support of it. I do not wish to overburden this judgment by citing authority for a proposition which is not really in dispute. The provisions of Cls. (1) and (2) of Art. 31 have the same effect as sub-ss. (1) and (2) of S. 299. The effect is this; every citizen has the right to acquire, hold and dispose of property. Under Cl. (5) of Art. 19, reasonable restrictions can be imposed on that right either in the interests of the general public or for the protection of the interests of any Scheduled Tribe. Under Art. 31, any right of property may be taken possession of or acquired by the State for public purposes on payment of compensation. When that is done, the right mentioned in Art. 19 (1) (f) disappears. Therefore, the provisions of Art. 31 are in the nature of special provisions, and the general right to freedom must yield to the special provisions relating to right to property. That, in my opinion, is the only way of reconciling the provisions of Art. 19 (1) (f) with the provisions of Art. 31.

[82] The question then is: is the impugned Act saved by the provisions of Art. 31? Mr. Lalnarain Sinha conceded that if the impugned Act were held to authorize possession or acquisition of property or any interest in property without a public purpose, then the impugned Act would not be saved by the provisions of Art. 31. I have aready examined the question whether the impugned Act provides for mere possession or acquisition. I have also examined the question whether the acquisition or possession is for a public purpose. I have further examined whether it provides for compensation. In view of my findings on these questions it is clear that the impugned Act is not saved by the provisions of Art. 31.

[83] The certificate under Cl. (6) of Art. 31 is also of no help. Mr. P. R. Das has contended that the certificate cannot save the impugned Act, because (a) the suit was brought before the commencement of the Constitution, and the certificate cannot affect the right of action which had already accrued; (b) the certificate is a fraud on S. 299; (c) the certificate is a fraud on the exercise of power, inasmuch as it seeks to do indirectly what could not be done by the Legislature directly; and (d) the impugned Act being a nullity *ab initio*, the certificate cannot revive it or make it valid. We have been taken through a large number of decisions in support of the aforesaid contentions. I do not propose to examine them, because I think that there is a shorter and simpler answer. Therefore, I am expressing no final opinion on all the above contentions, except to state my view that Art. 31 (6), as worded, would prevent the Court from calling into question a law, coming within the purview of that clause, even in a pending action, and a law which is liable to be challenged only on the ground covered by

that clause, must be held to be valid law, because it cannot be called into question on that ground which renders it invalid; thus there will be no question of reviving something which is dead or validating a nullity. A law passed by a competent Legislature is valid unless it is declared invalid by a competent Court of law. If the Court cannot call it into question on a particular ground, that ground cannot be urged for its invalidity either at the inception or at a subsequent stage; for to do so would nullify the provisions for Art. 31 (6) of the Constitution.

[84] But it is clear to me that the concluding words of Cl. (6) of Art. 31, namely —

> "it shall not be called in question in any Court on the ground that it contravenes the provisions of cl. (2) of Art. 31 or has contravened the provisions of sub-s. (2) of S. 299, Government of India Act, 1935",

limit the effect of the certificate; in other words, the effect of the certificate is that the impugned Act shall not be called in question on the only ground that it contravenes the provisions of cl. (2) of Art. 31 or has contravened the provisions of sub-s. (2) of S. 299, Government of India Act, 1935. It leaves it open to a party to challenge the validity of the impugned Act on other grounds. The certificate does not say that the impugned Act shall not be called in question on *any* ground; on the contrary, Cl. (6) of Art. 31, in express terms, limits the effect of the certificate to one and one ground only. In that view of Cl. (6) of Art. 31, it is open to the plaintiff to challenge the impugned Act on the ground that it contravenes Art. 19 (1) (f), or even Cl. (1) of Art. 31 of the Constitution. Like sub-ss. (1) and (2) (sic) of Art. 31 have to be read together. So read, the effect of the provisions of Cls. (1) and (2) of Art. 31 is that no property can be acquired or taken possession of except for public purposes and on payment of compensation. The mere defect as to non-payment of compensation may, I think, be cured by a certificate under Cl. (6) of Art. 31, but I do not think that a certificate under Cl. (6) of Art. 31 can make valid a piece of legislation which authorises the acquisition of private property without a public purpose; for such legislation would be in contravention not merely of Cl. (2) but of Cl. (1) as well. Moreover, such deprivation of property as is provided for in the impugned Act, contravenes the fundamental right guaranteed under Art. 19 (1) (f). The certificate under Cl. (6) of Art. 31 will not cure such a contravention.

[85] I shall be most reluctant to whittle away by judicial decision the fundamental rights guaranteed by the provisions in Part III of the Constitution. In *James v. Commonwealth of Australia*, 1936 A. C. 578 : (105 L. J. P. C. 115), their Lordships of the Privy Council had to consider whether S. 92, Commonwealth of Australia Constitution Act 1900, which provides that trade, commerce and intercourse among the States shall be absolutely free, binds the Parliament of the Commonwealth of Australia equally with the States. Their Lordships observed :

> "It is the declaration of a guaranteed right; it would be worthless if the Commonwealth was completely immune and could disregard it by legislative or executive act. It is difficult, if not impossible, to conceive that any one drafting a statute, especially an organic statute like the Constitution, would have written out S. 92 in its present form, if what we intended was a constitutional guarantee limited to the States but ineffective so far as regards the Commonwealth."

On the same principle, the declaration of guaranteed rights in Art. 19 (1) (f) and Cl. (1) of Art. 31 cannot be frittered away by reading something more in Cl. (6) of Art. 31 than what the words in that clause say. My conclusion, therefore, is that the certificate granted under Cl. (6) of Art. 31 does not save the impugned Act.

[86] Lastly, there is the question if some of the provisions of the impugned Act can be severed from the rest, and supported either under Cl. (5) of Art. 19 or Cl. (2) of Art. 31. This question does not really arise in view of my finding that the whole Act was *ultra vires ab initio* by reason of the contravention of the provisions of S. 299, Government of India Act, 1935. Even if it were permissible to examine this question, it seems to me that the provisions of the impugned Act are so inextricably interwoven that one set of provisions cannot be separated or severed from the rest. On this doctrine of severability, the leading decision is the one in *Attorney General for British Columbia v. Attorney General for Canada*, 1937 A. C. 377 : (A.I.R. (24) 1937 P. C. 93). Their Lordships there pointed out that the whole texture of the Act being inextricably interwoven, one part could not be said to exist independently of the other part; secondly, their Lordships pointed out that where the severable sections were incidental or ancillary to the main legislation, they could not be severed from the rest of the enactment. In my opinion, the impugned Act in this case is of the same nature; the whole texture of the Act is inextricably interwoven, and a large number of the provisions relating merely to possession are ancillary and incidental to the main legislation. It would be impossible to sever some of the provisions from the rest. Such a severance would disturb and defeat the whole scheme of the Act.

[87] For the reasons given above, the suit must succeed, and the plaintiff will get a declaration that the Bihar State Management of Estates and Tenures Act 1949, is *ultra vires* and

wholly void. The plaintiff is also entitled to an order of injunction in the terms asked for. The plaintiff is further entitled to his costs against the State of Bihar.

[88] As to the applications in the miscellaneous cases, I agree with my learned brethren that they be dismissed without costs, for the reasons given by them.

D.H. *Suit decreed.*

A. I. R. (37) 1950 Patna 432 *[C. N. 109.]*

SINHA AND RAI JJ.

Murli Prasad Gupta — *Appellant* v. *Sheo Kishore Narain and others* — *Respondents.*

A. F. A. D. No. 135 of 1948, D/- 23-3-1950, from decision of Addl. Sub-Judge, Motihari, D/- 13-12-1947.

Calcutta Survey Act (I [1] of 1887), S. 3—Survey Khasra—Entry in—Evidentiary value—Right to pass on parti land—Easements Act (1882), S. 28—Evidence Act (1872), S. 35.

Where persons pass through a plot which is a parti land, by taking a short cut for going from one road to another, the only right which the persons can claim to have acquired is the right to pass through the plot on foot and not a right that the plot is a *gairmazrua am sarak.* An entry in the Survey Khasra that the plot is *gairmazrua am sarak* prepared under the Calcutta Survey Act which is not finally published is not conclusive proof of such right. **[Paras 7, 9]**

Annotation: ('46-Man.) Easements Act, S. 28, N 1; Evidence Act, S 35 N 11, 12.

L. K. Jha and Balbhadra Prasad Singh — for Appellant.

J. C. Sanyal and Baidyanath Prasad I — for Respondents.

Rai J. — This is an appeal by defendant 1 against the judgment and decree passed by the Additional Subordinate Judge of Motihari confirming those of the Munsif of the same place.

[2] The plaintiffs had filed a title suit in a representative capacity representing the residents of mohalla Miscott in the town of Motihari for a declaration that plot No. 1154 measuring 16 dhurs is *gairmazrua am sarak* and that the defendants have got no right or title to construct any building thereon or to encroach upon, or obstruct any portion of the land in suit. They further prayed for a direction against defendants 1 and 2 for removal of the bricks kept and the structures constructed on the said plot. They further claimed a permanent injunction against defendants 1 and 2 restraining them from constructing any building or encroaching on or obstructing any portion of the land in suit.

[3] The plot in dispute is within the zamindari of defendant 3. Defendant 2 took settlement of the plot from defendant 3. Defendant 2 on his part sold 10 dhurs out of the plot in dispute by a registered sale deed, dated 28th January 1946, for Rs. 815 to defendant 1. Defendant 1, however, took a settlement from defendant 3 of the area purchased by him in order to remove any defect of title that may be found in him. Defendants 1 and 2 contended that plot No. 1154 was *gairmazrua khas malik* land and it was never *gairmazrua am sarak* as claimed by the plaintiffs and that they had no right to claim the reliefs sought for in the present suit. They further contended that they had every right to build upon the piece of land. It appears that there was a municipal survey of the lands comprised within the municipality of Motihari sometime in the year 1914-15. The survey was conducted under the provisions of the Bengal Survey Act I [1] of 1887 (the Calcutta Survey Act, 1887). The plaintiffs had brought on record a true copy of the survey khasra which has been marked as Ex. 5 after objection by the defendants. According to the entry in Ex. 5, the plot in dispute is mentioned as "gairmazrua am sarak kham". Apart from this document, the plaintiffs filed several other papers, and examined a number of witnesses to prove that they had been using this plot for going from the municipal road to the District Board road. It may be mentioned here that on the east of plot No. 1154 there is a District Board road and on the west a municipal road. To the north of plot No. 1154 is plot No. 1153, and towards the south-west of plot No. 1154 is plot No. 1155. On this plot No. 1155 there stands a building which was purchased by Kanti Bhushan Banerji, plaintiff 5, sometime in the year 1943 or 1944. At present this house has been given on rent for storage of grains. It is said that a door and windows of the house on plot No. 1155 open on to plot No. 1154.

[4] The trial Court decreed the suit, and the decree passed by the trial Court was affirmed by the lower appellate Court. The trial Court relying upon Ex. 5 held that the plot in dispute was *gairmazrua am* and in that view of the matter, relying upon two decisions of this Court in the cases of *Muhammad Waliul Haq* v. *Ludpud Upadhaya*, 18 P. L. T. 348 : (A. I. R. (24) 1937 Pat. 388) and *Amiruddin Sheikh* v. *Sone Lal Jha*, 18 P. L. T. 820 : (A. I. R. (24) 1937 Pat. 669), came to the conclusion that defendant 3 had no right to grant any lease in respect of *gairmazrua* lands in favour of defendant 2 or defendant 1, and, as such, the latter had acquired no right to build upon the land in question. The appellate Court, however, has further held that the claim, if any, of defendant 3 over the land in dispute would be barred by S. 22, Calcutta Survey Act. For that purpose, it relied upon two decisions of a single Judge of this Court in the cases of *Jagan Koeri* v. *Chairman, Gaya Municipality*, 18 P. L. T. 464 : (A. I. R. (24) 1937

Pat. 567) and *Municipal Commissioner, Gaya Municipality* v. *Mt. Rupkalia*, 18 P. L. T. 466: (A. I. R. (24) 1937 Pat. 516). The lower appellate Court was further of opinion that the plot in dispute would be deemed to be the property of the Motihari Municipality, and as the Municipality, though it had previously sanctioned the building of the structures, had, by a later order, prohibited defendant 1 from further constructing the building, it would be deemed to have opposed the right of defendant 1 to build upon the land. It may be mentioned that, while erecting the building defendant 1 has left a pathway about 3 feet wide in the southern portion of plot No. 1154.

[5] In this Court, the learned Advocate for the appellant has contended that no reliance should be placed on the entries in Ex. 5 as the municipal survey khasra had not been published by P. W. 17. He also contended that as the original khasra, produced in Court, did not bear any seal showing its final approval, it should not be made the basis for deciding the points in dispute. This raises the question whether an entry in Ex. 5 showing plot No. 1154 as *gair-mazrua am sarak kham* destroyed in any way the title of defendant 3 to the land in suit which admittedly lies within the ambit of his zamindari. The record prepared under Bengal Act, I [1] of 1887 (the Calcutta Survey Act, 1887) is different in nature from survey record-of-rights prepared under the Bihar Tenancy Act. Section 3, Bengal Act, I [1] of 1887 runs as follows:

> "The local Government may, whenever it thinks fit, order, by a notification in the Calcutta Gazette, that a survey shall be made of the lands situated in the town of Calcutta, and for such purpose may appoint a Superintendent of Survey, and one or more Assistant Superintendents of Survey."

The section does not contemplate preparation of any record-of-rights in respect of the lands which are to be surveyed under this Act. If one compares the relevant provisions of the Bihar Tenancy Act there is a distinct difference between the survey and the settlement as conducted according to the provisions of the Bihar Tenancy Act and that conducted under the provisions of the Calcutta Survey Act. Some of the sections of Chap. A, Bihar Tenancy Act, deal with the preparation of the record-of rights under the provisions of that Act. Section 102, Bihar Tenancy Act, runs as follows:

> 'Where an order is made under S. 101, the particulars to be recorded shall be specified in the order and may include, either without or in addition to other particulars, some or all of the following, namely,
>
> (a) the name of each tenant of occupant;
>
> (b) the class to which each tenant belongs, that is to say, whether he is a tenure-holder, raiyat holding at fixed rates, settled raiyat, occupancy raiyat, non-occupancy raiyat or under-raiyat, and, if he is a tenure-holder or not, and whether his rent is liable to enhancement during the continuance of his tenure;
>
> (c) the situation and quantity and one or more of the boundaries of the land held by each tenant or occupier;
>
> (d) the name of each tenant's landlord;
>
> (dd) the name of each proprietor in the local area or estate;
>
> (e) the rent payable at the time the record-of-rights is being prepared;
>
> (f) the mode in which that rent has been fixed—whether by contract, by order of a Court, or otherwise;
>
> (g) if the rent is a gradually increasing rent, the time at which, and the steps by which, it increases;
>
> (gg) the rights and obligations of each tenant and landlord in respect of—
>
> (I) the use by tenants of water for agricultural purposes, whether obtained from a river, jhill, tank or wall, or any other source of supply, and
>
> (II) the repair and maintenance of appliances for securing a supply of water for, the cultivation of the land held by each tenant, whether or not such appliances be situated within the boundaries of such land;
>
> (b) the special conditions and incidents, if any, of the tenancy;
>
> (i) any right of way or other easement attaching to the land for which a record-of-rights is being prepared;
>
> (j) if the land is claimed to be held rent-free whether or not rent is actually paid, and, if not paid, whether or not the occupant is entitled to hold that land without payment of rent, and if so entitled, under what authority."

[6] Section 103 runs as follows:

> "On the application of one or more of the proprietors or tenure-holders, or of a large proportion of the raiyats, of an estate or tenure, and on the applicant or applicants depositing or giving security for the required amount for expenses, a Revenue Officer may, subject to and in accordance with rules made in this behalf by the Local Government, ascertain and record all or any of the particulars specified in S. 102 with respect to the estate or tenure or any part thereof."

Section 103A runs as follows:

> "(1) When a draft record-of-rights has been prepared the Revenue-officer shall publish the draft in the prescribed manner and for the prescribed period, and shall receive and consider any objections which may be made to an entry therein or to any omission therefrom, during the period of publication.
>
> (2) When such objections have been considered and disposed of according to such rules as the Local Government may prescribe, and if a settlement of land-revenue is being or is about to be made the Settlement Rent-roll has been incorporated with the record under S. 104F, sub-s. (3), the Revenue Officer shall finally frame the record, and shall cause it to be finally published in the prescribed manner; and the publication shall be conclusive evidence that the record has been duly made under this Chapter.
>
> (3) Separate draft or final records may be published under sub-s. (1) or sub-s. (2) for different local areas estate, tenures or parts thereof."

And S. 103B runs as follows:

> "(1) In any suit or other proceeding in which a record-of-rights prepared and published under this Chapter, or a duly certified copy thereof or extract therefrom, is produced, such record-of-rights shall be presumed to have been finally published, unless such publication is expressly denied; and a certificate, signed by the Revenue Officer, or by the Collector of any district in which the local area, estate or tenure

> or part thereof to which the record-of-rights relates is wholly or partly situate, stating that a record-of-rights has been finally published under this Chapter shall be conclusive evidence of such publication.
>
> (2) The Local Government may, by notification, declare with regard to any specified area, that a record-of-rights has been finally published for every village included in such area; and such notification shall be conclusive evidence of such publication.
>
> (3) Every entry in a record-of-rights so published shall be evidence of the matter referred to in such entry, and shall be presumed to be correct until it is proved by evidence to be incorrect."

So, it appears from the provisions of the Bihar Tenancy act that it is really a record-of-rights and the right so recorded after various checks is presumed to be correct until it is proved by evidence to be otherwise. So far as the survey under the Bengal Act I [1] of 1887 is concerned, it does not contemplate the recording of rights as contemplated by the Bihar Tenancy Act. It mostly deals with the situation and extent of the various pieces of land within a municipality for the purpose of the preparation of a map giving a correct location of the various plots. Section 28 of the Act no doubt refers to certain rules to be framed by the Local Government. It runs as follows:

> "The Local Government may lay down rules not being inconsistent with this Act to provide for the preparation of maps and for the collection and record of any information in respect of any land to be surveyed under this Act, and generally for the proper performance of all things to be done and for the regulation of all proceedings to be taken under this Act."

The section no doubt speaks of the power of the Local Government to frame rules, but no rule framed under this Act, which was in vogue at the time when the survey in question took place, has been placed before us. In absence of any such rule, it can be safely assumed that the authorities appointed to survey the lands within the municipal area had not been vested with powers to prepare a record-of-rights in respect of the area in question, and, as such, the entry "gairmazrua am sarak" has no presumptive value. Until the plaintiffs establish by some other cogent evidence that the public has a right either by grant or by prescription to prevent the defendants from erecting the building in question, their right by settlement would stand. So apart from the reliability of the survey khasra which has admittedly not been finally published and has, therefore, not much evidentiary value, the entry itself cannot, in law, create any right in favour of the plaintiffs in order to hold that the plot in dispute can be called "gairmazrua am."

[7] The decision in the case of *Municipal Commissioner, Gaya Municipality* v. *Mt Rupkli*, 18 P. L. T. 466 : (A. I. R. (24) 1937 Pat. 576) relied upon by the Courts below has been overruled by a Division Bench of this Court in the case of *Hardeo Missir* v. *Commrs. of Gaya Municipality*, A. I. R. (36) 1949 Pat. 132 : (27 Pat. 701). The case of *Jagan Koeri* v. *Chairman, Gaya Municipality*, 18 P. L. T. 464 : (A. I. R. (24) 1937 Pat. 567), relied upon in the Courts below, has also been decided on a different basis. There the plot in question had been claimed by the municipality under S. 58, Bihar and Orissa Municipalities Act, and it had been found in that case that the municipality had exercised acts of possession over the plot in dispute since a long time, and, in that view of the matter, the claim of the municipality was upheld by this Court. The learned Judge while deciding the case observed as follows:

> "On the second question the Subordinate Judge has relied on the entries in the Municipal Survey Map and khasra which were prepared under a different procedure from that associated with the preparation of map and record-of-rights in rural areas under the Bengal Tenancy Act. In the Municipality the map was prepared under the Calcutta Survey Act which was made applicable to mufassil Municipalities by virtue of S. 223A, Bengal Municipal Act, 1884. The Calcutta Survey Act has been referred to at the hearing and no doubt it contains no provision for a statutory presumption of correctness to attach to the entries in the maps. At the same time, it still remains a fact that the map is a map prepared under the authority of Government and a presumption of correctness attaches to it under S. 93, Evidence Act; while similarly, the entries made in the khasra being entries made in an official record by public officers in the discharge of their duties are themselves relevant facts and may be considered by the Courts as evidence of possession from which the Courts, may, if they think fit, draw an inference as to title and, therefore, if from these entries the lower appellate Court has thought fit to find that possession has all along been with the Municipality and from that he has drawn the inference that title is with the Municipality, it does not seem to me that I can say that there is any error of law committed in coming to the finding."

In the present case, the circumstances are different. The survey khasra itself has, admittedly, not been finally published, and one cannot be certain as to what would have been the final view of the survey authorities. The survey khasra may be admissible in evidence, but it loses much of its value not having been finally published. Besides, as I have said above, the survey officers, under the Calcutta Survey Act, had no power to prepare a record-of-rights, and as such, any note made in that khasra that plot 1154 is "gairmazrua am" will not help the plaintiff.

[8] Now, let us see the evidence that has been led in this case on behalf of the plaintiffs to establish their claim. A number of witnesses have been examined to prove that they have taken a short cut for going from the municipal road to the District Board road through this plot No. 1154 by walking over it. It is admitted that no vehicular traffic passes through this

plot No. 1154. It has been used by pedestrians only. It is also admitted that there are roads connecting the District Board road with municipal roads a little to the north and south of the plot in dispute. Thus, it appears that plot No. 1154 being parti was used by persons who wanted to go from the municipal road to the District Board road as a short cut. Muhammad Ismail (P. W. 13) has admitted in his evidence: "the disputed land during the rainy seasons becomes a little dirty and is overgrown with grass." Thus it is clear that plot No. 1154 cannot be said to have been used as a *sarak*. It was a parti piece of land, and it appears that the owner, defendant 3, had not objected to pedestrians passing through this plot from the municipal road to the District Board road. From the evidence of P. W. 10, it appears that the disputed plot is 10 to 12 cubits broad and about 20 cubits long. Now, what kind of right can be claimed by persons who pass through such parti land by taking a short cut for going from one road to another? A similar question was considered by a Division Bench of this Court in the case of *Nasiruddin* v. *Deokali*, A. I. R. (16) 1929 Pat. 124 : (115 I. C. 884). Courtney-Terell C. J., with whom Jwala Prasad J. concurred, while delivering the judgment observed as follows:

> "In English law the exercise of a right of way and similar positive easements for a prolonged period gives rise to the presumption that such exercise was 'of right,' that is to say, it is presumed that the right of passage was exercised without any permission, express or implied, on the part of the owner of the servient tenement. This is because social conditions and the nature of landed property in England are such that landowners are particularly jealous of their exclusive right and the familiar appearance of the notice boards to be seen in England bearing the inscription 'trespassers will be prosecuted' is an indication of the views held by the owners of property. Accordingly, it is to be presumed that if the owner of the dominant tenement has for a long period passed over the servient tenement that he did it from the beginning with a claim of right, for, it is unlikely that if he had not such a right that the owner of the servient tenement would have allowed him to pass. In India, however, and it may be in other countries where such views of the exclusiveness of landed property do not prevail a mere period of long user will not give rise to the presumption. It is customary for the owner of a piece of waste land not to raise any objection to the passage of strangers over such land. It was pointed out by the Calcutta High Court in the leading case of *Shaikh Khoda Buksh* v. *Shaikh Tajuddin*, 8 C. W. N. 359, that in such circumstances mere long user gives rise to no such presumption as is to be inferred in England and that whether or not long user creates the presumption that its beginning was founded on a claim of right will depend upon the locality, the customs of the people, and it may be, the relationship between the respective owners of the dominant and servient tenements."

The above observation depicts the true position in this part of the country. In fact nobody objects to any person passing over a parti piece of land as long as it remains unoccupied. But it cannot be said that when the owner wants to use that parti piece of land in some other way, say by erecting building on it, he will be precluded from doing so.

[9] The learned advocate for the respondents referred us to the case of *Chairman, Howrah Municipality* v. *Khetra Kristo Mitter*, 4 C.L.J. 343 : (33 Cal. 1290). In that case the dispute related to the claim of compensation in respect of a burning ghat which had been acquired under the provisions of the Land Acquisition Act. Their Lordships of the Calcutta High Court in that case observed as follows :

> "When the owner sets apart land for the use of the public and formally declares that such is his intention, or where he conveys land to a municipality or to trustees to hold for the use of the public, the dedication is an express one. An implied dedication arises by operation of law from the acts of the owner and is really founded upon the principle of estoppel; it proceeds not upon the principle that a grant has actually been made, but rather on the principle that the owner having allowed the public to enjoy the user for any particular purpose, is estopped from denying the right of the public to the enjoyment of such user. It is not necessary for our present purposes to consider what would amount to acquiescence on the part of the owner sufficient to raise the presumption; but it is quite clear that exclusive and continuous user by the public with the owner's knowledge and acquiescence for the prescriptive period will raise the presumption of a grant or dedication to the public."

So, from this judgment also, it is quite clear that in any view of the matter, the right which the plaintiffs can claim to have acquired is the right to pass through this plot of land on foot. The claim of acquisition of any right by lost grant can only be limited to this extent only, and, as long as there has been some space left for a person to walk through this plot from the municipal road to the District Board road, that right cannot be said to have been infringed. In this case defendant 1 has left a passage about three feet wide while erecting his building, and, in my judgment, this is sufficient for the passage of a person on foot from one road to the other. The plaintiffs can claim no higher right; nor can they claim removal of the building that has been constructed by defendant 1.

[10] As for the right of air and light claimed by the owner of the house on plot No. 1155, suffice it to say that the evidence adduced in the case does not establish a perfected right by lapse of time. Besides this as defendant 1 has left a space of 3 feet it is sufficient for the enjoyment of the right of air and light by the owner and occupier of the house standing on plot No. 1155.

[11] As regards the right, if any, having vested in the municipality, it cannot be considered in this suit as framed. The municipality, it appears

had never claimed this piece of land as belonging to it and the municipal authorities had, in fact, given sanction to defendant 1 to construct this building. The right of the municipalily, however, does not fall to be considered in the present suit as framed.

[12] In the view that I have taken, as mentioned above, the plaintiffs are not entitled to the reliefs sought in the present action, and the suit is liable to be dismissed.

[13] The result, therefore, is that the appeal is allowed, the judgments and decrees of the Courts below are set aside, and the suit of the plaintiffs is dismissed with costs throughout.

[14] **Sinha J.** — I agree.

D.H. *Appeal allowed.*

A. I. R. (37) 1950 Patna 436 *[C. N. 110.]*

MEREDITH C. J. AND RAI J.

Santosh Kumar Jain — Petitioner v. *The State.*

Criminal Revn. No. 960 of 1949, D/- 22-3-1950, against order of S. J., Patna, D/- 14-5-1949.

(a) Essential Supplies (Temporary Powers) Act (1946), S. 3 (2) (f) and (j)—Order under, authorising search of stock and seizure of certain amount of sugar from stock — Legality of.

Provincial Government of Bihar passed an order under S. 3 (2) (j) of the Act authorising a District Magistrate and a Special Rationing Officer to search the stock of sugar held by a certain company and directing them to seize 5000 maunds of sugar out of the stock. The validity of the order was questioned on the ground that S. 3 (1) only contemplated passing of rules and not an *ad hoc* order like the one in question :

Held, that S. 3 (2) (f) read with other provisions of the Act made it clear that such an *ad hoc* order could be passed and that framing of rules before passing of such an order was not necessary under the Act. [Para 11]

(b) Penal Code (1860), S. 186 – Obstruction — Nature of.

The word 'obstruction' does not mean 'physical obstruction' and differs according to the nature of duty that a public servant has to discharge. Thus, where a public servant has to search the stock of sugar and has to seize certain quantity of it, placing of obstacles on the way to sugar godown making any vehicular traffic to it impossible and the attitude of resistance on the part of the accused who is the general manager of the Company amounts to 'obstruction' within the meaning of S. 186, even though he has actually used no physical force and the stocks are in fact seized and removed with the help of police : *Case law referred.* [Paras 15, 17]

Annotation : ('46-Man.) Penal Code, S. 186, N. 1.

P. R. Das, Gorakhnath Singh, Devendra Prasad and Akbar Imam — for Petitioner.
Government Advocate — for the State.

Rai J. — This revision petition arises out of the conviction of petitioner Santosh Kumar Jain under S. 186, Penal Code. Santosh Kumar Jain is one of the Directors and the General Manager of Jagdishpur Zamindari Company, which Company holds the Bihta Sugar Factory as a lessee under a lease. The petitioner was prosecuted for offering obstruction to Mr. T. C. Puri, the then District Magistrate of Patna, and Mr. H. N. Thakur, the then Special Officer in charge of Rationing, Patna, in the discharge of their public function when they wanted to execute a seizure order passed by the Government of Bihar, Supply and Price Control Department.

[2] According to the prosecution case, Jagdishpur Zamindari Company had deliberately failed to comply with the direction issued by the Chief Controller of Prices and Supplies, Bihar, for supply of sugar to approved dealers under allocation orders made from time to time. Subsequently, the Government of Bihar had to pass an order dated 5th December 1947 for the seizure of 5000 maunds of sugar out of the stock held by the Company. It was further said that Mr. Puri, the then District Magistrate of Patna, and Mr. Thakur, the then Special Officer in charge of Rationing, Patna, went to the premises of the Bihta Sugar Factory on 5th December 1947, for the purpose of carrying out the order passed by the Government of Bihar as aforesaid. R. C. Jain and some other employees of the Company refused to accept a copy of the seizure order whereupon the copy of the order had to be left on a table in the office of the factory. On 6th December 1947, when the two officers went to remove the sugar seized, they found that a number of obstructions had been placed on the roads leading to the factory godown, and they also found that rails and fish plates had been removed from the siding which went near the factory godown with the result that it was not possible for them to arrange for the removal of the seized sugar. It was further said by the prosecution that sugar had been decontrolled from 8th December 1947, and to obstruct the removal of the sugar till the decontrol order had come into force was the motive which had led the petitioner to arrange for the obstructions as aforesaid.

[3] The case for the prosecution further was that Santosh Kumar Jain had told Mr. Puri that he was determined to resist the taking away of the sugar by all conceivable means. This attitude of the petitioner led the said officers to seek help of the police, and it was with the assistance of the police that the obstructions placed on roads leading to the factory godown and the railway line which had been tampered with could be removed and the carrying out of the order made possible. On these allegations the petitioner along with one R. C. Jain had been placed on their trial before Mr. K. K. Dutta Subordinate Judge, Magistrate, first class, Patna.

[4] The defence of the accused was that the order passed by the Government of Bihar dated 5th December 1947, was illegal, and, as such,

Mr. Puri and Mr. Thakur were merely trespassing the factory premises and resistance to them was not punishable under S. 186, Penal Code. Regarding the obstructions, the case of the accused was that they had not been intentionally put for the purpose of obstructing public officers concerned in the discharge of their duties, but the situation as found on 6th December 1947, was such as was possible in the ordinary course of events.

[5] The trial Court accepted the case of the prosecution, disbelieved the explanation given by the accused and convicted the petitioner under S. 186, Penal Code, and sentenced him to undergo simple imprisonment for three weeks. The other accused, R. C. Jain, was however acquitted.

[6] An appeal filed by the petitioner before the Sessions Judge of Patna was dismissed. The learned Sessions Judge held that the order passed by the Government of Bihar dated 5th December 1947, was perfectly legal and that the petitioner had no justification for causing the obstruction as has been found in the present case. The learned Sessions Judge also did not accept the explanation of the accused to the effect that the obstruction said to have been caused to the road, rail and passage leading to the factory godown had not been arranged intentionally to obstruct the public servants in the discharge of their duties, but had been occasioned in the ordinary course of management. Holding this view, the learned Sessions Judge upheld the conviction and sentence passed by the trial Court.

[7] In this Court Mr. P. R. Das, learned counsel for the petitioner, contended that the order passed by the Government of Bihar dated 5th December 1947, was illegal, and, as such, obstruction to the carrying out of such an order by the petitioner could not make him guilty under the provisions of S. 186, Penal Code, which runs as follows :

> "Whoever voluntarily obstructs any public servant in the discharge of his public functions shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both."

[8] He had also placed before us some of the irregularities committed in the previous directions issued to the Company for the supply of sugar, in support of his contention that really there was no valid reason for the Government of Bihar to have passed the order dated 5th December 1947, (Ex 1 (a)), which ran as follows :

> "GOVERNMENT OF BIHAR SUPPLY AND PRICE
> CONTROL DEPARTMENT.
> ORDER
>
> No. 29871/Sugar 32/47 P. C
>
> Patna, the 4th/5th December 1947.
>
> In exercise of the powers conferred on the Central Government by cl. (j) of sub s. (2) of S. 3, Essential Supplies (Temporary Powers) Act, 1946 (XXIV [24] of 1946), which have been delegated to the Provincial Government in relation to food stuffs in the notification of the Government of India, Department of Food, No. PY. 603 (2)-1, dated 21st October 1946, the Governor of Bihar is pleased: (i) to authorise the District Magistrate, Patna and/or the Special Officer, in charge of Rationing, Patna to search the stock of sugar held by Messrs. Jagdishpore and Co., Bihta, in the district of Patna which is about to commit a contravention of the order of the Chief Controller of Prices and Supplies, Bihar, made under Cl. 7 (i) (ii), Sugar and Sugar Products Control Order, 1947 and issued in order No. 1613 P. C. R., dated 27th September 1947, in so far as the said order relates to the said Company and (ii) to direct that 5,000 (five thousand) maunds of sugar held in stock by the said Company shall be seized.
>
> By order of the Governor of Bihar,
> Sd. T. P. Singh,
> Secretary to Government."

But ultimately, he conceded that if the above order is legal then it is not necessary to consider the events which lead to the passing of such an order; it has, therefore to be seen whether the order dated 5th December 1947, passed by the Government of Bihar was legal.

[9] Now, the order dated 5th December 1947, was published in the Bihar Gazette Extraordinary of the same date. Mr. Das challenges the validity of this order on the ground that the Government of Bihar had no power to pass an *ad hoc* order as the one under consideration in the present case. According to him, S. 3 (1) and S. 3 (2) (j), Essential Supplies (Temporary Powers) Act, 1946 (Act XXIV [24] of 1946) contemplated the framing of rules only, and it did not contemplate the passing of an *ad hoc* order like the one dated 5th of December 1947, passed by the Government of Bihar. Some of the sections of the Essential Supplies (Temporary Powers) Act, 1946 which would be considered in this judgment, may be quoted below:

> "3 (1). The Central Government so far as it appears to it to be necessary or expedient for maintaining or increasing supplies of any essential commodity, or for securing their equitable distribution and availability at fair prices, may by notified order provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein.
>
> (2) Without prejudice to the generality of the powers conferred by sub-s. (1) an order made thereunder may provide:
>
> * * *
>
> (f) for requiring any person holding stock of an essential commodity to sell the whole or a specified part of the stock at such prices and to such persons or class of persons or in such circumstances, as may be specified in the order:
>
> * * *
>
> (j) for any incidental and supplementary matters, including in particular the entering and search of premises, vehicles vessels and aircraft, the seizure by a person authorised to make such search of any articles in respect of which such person has reason to believe that a contravention of the order has been, is being or is about to be committed, the grant or issue of licenses, permits or other documents, and the charging of fees therefor.

> *7.* (1). If any person contravenes any order made under S. 3, he shall be punishable with imprisonment for a term which may extend to three years or with fine or with both, and if the order so provides, any Court trying such contravention may direct that any property in respect of which the Court is satisfied that the order has been contravened shall be forfeited to His Majesty:
>
> Provided that where the contravention is of an order relating to foods stuffs which contains an express provision in this behalf, the Court shall make such direction, unless for reasons to be recorded in writing it is of opinion that the direction should not be made in respect of the whole or as the case may be, a part of the property.
>
> (2) If any person to whom a direction is given under sub-s. (4) of S. 3 fails to comply with the direction he shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.
>
> *15.* Where any person is prosecuted for contravening any order made under S. 3 which prohibits him from doing an act or being in possession of a thing without lawful authority or without a permit, license or other document, the burden of proving that he has such authority, permit, license or other document, shall be on him."

[10] According to Mr. Das if the provisions of the Essential Supplies (Temporary Powers) Act, 1946, could be construed as to empower the relevant authorities to pass *ad hoc* orders, then in that case the order, Ex. 1 (a) might be said to be legal. He, in this connection, contended that the orders as contemplated by S. 3, sub-s. (1) of this Act were analogous to the rules contemplated by the Defence of India Act, 1939. I am afraid I am not in a position to accept this contention of Mr. Das. The Defence of India Act, 1939, had clearly made provisions for making of rules. Section 2 (1) of the said Act ran as follows:

> "The Central Government may, by notification in the official Gazette, make such rules as appear to it to be necessary or expedient for securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of war or for maintaining supplies and services essential to the life of the community."

[11] In pursuance of such provision, the Defence of India Rules were framed. In the present case, however, it cannot be said that S. 3, sub-ss. (1) and (2), Essential Supplies (Temporary Powers) Act, 1946, contemplated only publication of orders containing rules to be framed for the carrying out of the various provisions of the said Act. In my opinion, Section 3 (2) (f) read with Ss. 7 and 15 of the said Act leave no room for doubt that *ad hoc* orders as the one under consideration in the present case could be passed and in that view of the matter, it cannot be said that the order dated 5th December 1947, passed by the Government of Bihar was illegal. The argument of the learned counsel for the petitioner that premises of the factory could not be subject to a search, and the sugar could not be seized until rules had been published previously for that purpose, does not appeal to me.

[12] Mr. Das further suggested that the order, Ex. 1 (a) purports to have been passed in the exercise of the powers conferred on the Government of Bihar by cl. (j) of sub-s. (2) of S. 3, Essential Supplies (Temporary Powers) Act, 1946, and it does not mention specifically sub-s. (1) of S. 3 of the said Act. But, in my judgment the omission to mention sub-s. (1) of S. 3 of the Act does not make the order illegal. The provisions of the Essential Supplies (Temporary Powers) Act, 1946, as mentioned in the order, Ex. 1 (a), are sufficient to clothe the officers concerned with legal power to execute that order, and I do not think such omission as contended by Mr. Das makes the order illegal.

[13] Mr. Das then contended that the alleged obstruction would not amount to an obstruction as contemplated by S. 186, Penal Code. Both the Courts below had found the following obstructions placed on the rail and road leading to the factory godown which had been intended to so block the way that the order could not be carried out :

(a) All the gates of the factory except the main entrance were locked up.

(b) A huge truck with all the four wheels removed and placed on jacks had been so placed as to block the road leading to the sugar godown.

(c) Heaps of coal firewood and tins had been kept on the road leading to the door of the godown making it impossible for any vehicular traffic to reach the godown doors.

(d) Some of the rails and fish plates of the railway siding leading to the godown had been removed.

[14] Both the Courts below have accepted the evidence of Mr. T. C. Puri and Mr. Thakur wherein they had said that they had met Santosh Kumar Jain and had tried to persuade him not to adopt such attitude of resistance but he was, however, adamant and had told that as far as he was concerned he was determined to resist the taking away of the sugar by all conceivable means. Mr. Thakur in his evidence had further said that though the 6th December 1947, was not a holiday, S. K. Jain had declared it to be a holiday, and when asked about it he told him that he had declared that day to be a holiday in honour of some leader whose name he did not remember. It was, therefore, clear, as he has been found by both the Courts, that every attempt was made to obstruct Mr. Puri and Mr. Thakur to seize the sugar which they were lawfully entitled to seize. It has also been found by both the Courts that when the two

officers found that they would be resisted by force they had to seek police aid, and it was after the arrival of an armed force that the various obstructions placed on the road leading to the godown could be removed and the rail track could be repaired.

[15] Mr. Das further argued that the obstructions as found by the Courts below do not amount to an obstruction as contemplated by S. 186, Penal Code. According to him, as no physical obstruction was used and as the two officers had ultimately succeeded in removing the sugar, and as Mr. Jain had left the mill premises when the two officers went to police station to seek aid of the police, he cannot be held responsible for any obstruction. In support of his contention, Mr. Das has cited several authorities. He relied upon the case of *Mt. Darkan* v. *Emperor*, A.I.R. (15) 1928 Lah. 827 : (29 Cr. L. J. 645). In that case, a learned single Judge of the Lahore High Court had held that the conviction under S. 186 could not stand because there was no proper complaint in that case either by the process-server on the senior subordinate Judge, and in that view of the matter, according to him, the Court had taken cognizance of the case without jurisdiction. Regarding the obstruction said to have been made to the process-server, the learned Judge said as follows:

> "All that the Magistrate finds is that Mt. Darkan abused process-server and said that she would not let him attach the cattle. Now the word 'obstruction' as used in S. 186 means 'physical obstruction' i. e., actual resistance or obstacle put in the way of a public servant. The word implies the use of criminal force, and it appears that mere threats or threatening language would seem to be insufficient."

The other case relied upon by the petitioners was the case of *Gopal Mahton* v. *Emperor*, 21 P. L. T. 716 : (A I.R. (28) 1941 Pat. 161 : 41 Cr.L.J. 819) which was decided by my learned brother Meredith J. (as he then was). In that case it was found by this Court that the warrant which was sought to be executed was wholly without any legal force and as such an obstruction to the execution of such a warrant did not attract the operation of S. 186, Penal Code. His Lordship, while dealing with the matter, further held that

> "they resisted a warrant which was illegal and without force. The resistance, therefore, constituted no offence. The incident amounted at the most to threats on their part. No one was obstructed or hurt. In the circumstances I am not prepared to sustain the conviction."

Another case referred to by Mr. Das was the case of *Emperor* v. *Tohfa*, 55 ALL. 985 : (A I.R. (20) 1933 ALL. 759 : 34 Cr. L. J. 1211). In that case the warrant which was sought to be executed was illegal and on that basis the acquittal of the accused was upheld by the High Court, and, in fact, the decision in that case on the question of obstruction was not necessary. In fact, the nature of "obstruction" within the meaning of S. 186, Penal Code, might be different with the kind of work that a public servant is attempting to perform. Another case relied upon by the petitioner was the case of *Queen-Empress* v. *Sommanna*, 15 Mad. 221 : (2 M.L.J. 120). In that case the District Judge of Cuddapah had issued a commission to a pleader to search the house of the accused and remove certain properties. The Commissioner went to the village of the accused and having read out the order, asked him to allow it to be executed. The accused remained inside his house and closing the doors against the commissioner obstructed the execution of the commission in spite of repeated requests addressed to him. The accused was convicted under S. 186, by the Courts below, but the High Court took a contrary view and it held as follows:

> "All that is found is that the commissioner who appears to have acted throughout in a very injudicious manner, read out the order and asked the petitioner to be allowed to carry it out and that the petitioner, without giving any answer remained inside his house with closed doors. We do not think that mere failure to comply with the request of the commissioner amounts to such obstruction as is contemplated in S. 186. The use of the word 'voluntarily' seems to us to indicate that the Legislature contemplated the commission of some overt Act of obstruction, and did not intend to render penal mere passive conduct."

Another case relied upon by the petitioner was the case of *Thimmakka* v. *Emperor*, 201 I. C. 627 : A. I. R. (29) 1942 Mad. 552 : 1942-1 M. L. J. 583: (43 Cr. L. J. 757). But this case is against the petitioner. There, it was held that shutting the door in the officer's face amounted to obstructing him in the performance of his duty and the accused were liable to be convicted for an offence under S. 186, Penal Code. The petitioner also relied upon the case of *Nagarmal* v. *Emperor*, A. I. R. (19) 1932 Pat. 279 : (33 Cr. L. J. 883), but the facts of that case were different. In that case it was held that the public officers who were executing the order of attachment had no right to attach articles in possession of the accused of that case and any obstruction to such attachment was not illegal.

[16] The learned Government Advocate in opposing the application referred to the case of *Nanhua* v. *Emperor*, A. I. R. (25) 1938 ALL. 118: (39 Cr. L. J. 363), wherein it had been held that the word "obstruction" in S. 186, does not mean "physical obstruction". He further relied upon the cases of *In re Thimmakka* A. I. R. (29) 1942 Mad. 552 (2): (43 Cr. L. J. 757), *Dukhan Sahu* v. *Emperor*, A. I. R. (24) 1937 Pat. 633: (39 Cr. L. J. 100). *Emperor* v. *Babulal*, I. L. R. (1936) Nag. 50 : A. I. R. (23) 1936 Nag. 86 : (37 Cr. L. J. 587) and *Sajan* v. *Emperor*, 159

I. C. 665: (A. I. R. (22) 1935 Sind 245: 37 Cr. L. J. 148). In my judgment, the obstruction would differ according to the nature of duty that a public servant is to discharge. In the present case the obstructions as found by both the Courts are sufficient to bring the operation of S. 186, Penal Code, and in this view of the matter, the above contention of Mr. Das is also not tenable.

[17] Mr. Das further contended that as the stock of sugar could not be sold without the permission of the Bank of Bihar which was financing the enterprise and as excise duty had to be paid before removal of any stock, the petitioner was justified in obstructing the removal, as admittedly no arrangements had been made to pay the price and the excise duty when Mr. Puri and Mr. Thakur went to remove the sugar on 6th December 1947. But this argument is of no avail when both the Courts below found that the two officers had taken care to take with them a representative of the Bank of Bihar and another officer of the Excise Department who had no objection to the removal of sugar, and as such, this does not seem to be the real reason. The real intention of the petitioners seems to be that they were determined to obstruct the seizure and removal of the sugar till the time for its decontrol would have come, and then it would be possible for them to sell the sugar for whatever amount they pleased.

[18] It was also found by both the Courts below that large amounts of funds were received by the Jagdishpur Zemindari Company from various authorised dealers from time to time in connection with the supply of sugar, but they had not been supplied any in spite of their repeated requests. That matter really is not very relevant for the purposes of the present case. In my judgment the order passed by the Government of Bihar dated 5th December 1947, was legal and the obstruction to its execution was certainly punishable under S. 186, Penal Code.

[19] Mr. Das further referred to the various directions given to Jagdishpur Zamindari Company and the Bihta Sugar Factory for supply of sugar to authorised dealers from day to day and he pointed out some mistakes of procedure committed by the authorities concerned while issuing those directions. He, however, conceded that those irregularities would not affect the conviction of the petitioner if the order, Ex. 1 (a) was legal and if the obstructions proved to have been put were such as were contemplated by the provisions of S. 186, Penal Code. He submitted that he was referring to those irregularities in order to get a reduction of the sentence passed on the petitioner. But in the view that I have taken I do not consider the sentence too severe.

[20] The result, therefore, is that the petition is rejected, and the rule discharged. The petitioner must now surrender to serve out the remaining part of his sentence.

[21] **Meredith C. J.**—I agree.

D.R.R. *Rule discharged.*

A. I. R. (37) 1950 Patna 440 *[C. N. 111.]*

RAMASWAMI AND NARAYAN JJ.

Badri Prasad — Appellant v. *Brindaban Bihari Lal — Respondent.*

A. F. A. O. No. 151 of 1949, D/-23-3-1950, from order of A. D. J., Patna, D/-7-5-1949.

Civil P. C. (1908), S. 38, O. 23, R. 3 — Execution of consent decree.

In a suit for ejectment, the plaintiff claimed certain amount as damages for the period from the date of the determination of the tenancy till the date of delivery of possession. The parties entered into a compromise by which the plaintiff agreed to accept a sum as damages at a reduced rate. The Court passed a decree in terms of the compromise, in which it described this sum as rent. No costs were to be awarded, but on the defendant's failure to pay the dues in time fixed the decree stated that the plaintiff would be entitled to realise the amount with costs and interests through Court:

Held, that though the order of the Court described the claim for damages as rent it was not without jurisdiction on the ground that the order related to the matter extraneous to the compromise. The order of the Court entitling the plaintiff to realise the amount through Court on defendant's failure to pay in time was implicit in the agreement between the parties and could not be questioned in execution proceedings. The decree was therefore executable. The clause for payment of costs and interest was, however, too vague to be enforced. [Paras 3, 4]

Annotation: ('50-Com). Civil P. C., S. 38, N. 8; O. 23 R. 3, N. 17.

Mahabir Prasad and B. B. Saran — for Appellant.
Raja Ramchandra Prasad and Shivanugrah Narain—for Respondent.

Narayan J.—This is a judgment-debtor's second appeal arising out of an execution proceeding. The judgment-debtor was occupying a house belonging to the decree-holder as his tenant, and on 14th September 1943 the decree-holder instituted a suit for ejectment and for arrears of rent. There was a further claim for damages at the rate of Rs. 5 per day from the date the tenancy had terminated and up till the date of delivery of possession. The suit was heard and disposed of on 23th July 1946, The decree-holder and the judgment-debtor examined themselves, and they agreed to certain terms which were recorded by the learned Munsif. The order of the learned Munsif recording the terms of the compromise runs as follows:

"The parties have agreed to compromise the case. The defendant agrees to pay to the plaintiff Rs. 528-5-0 as rent till August 1943 setting up all his claims, within three months from to-day. He also promises to pay rent of the plaintiff at Rs. 33-5-0- per month from September 1943 to July 1946 by the end of January 1947. He is also ready to vacate the house. The plaintiff agrees to forgo his claim for costs, interests and damages in this suit if the dues are paid in time. It is, therefore, ordered that the suit be decreed according to the terms stated above. No cost shall be awarded. A money decree for Rs. 528-5-0 shall be prepared. The defendant is also to vacate the house by 2nd August 1946. He was also to pay to the plaintiff by January 1947 all the arrears of rent for the period between September 1943 and July 1946. On his failure to pay up the dues in time, the plaintiffs will be entitled to realise the same with costs and interest, through Court on his depositing proper court fees."

The suit was thus disposed of on compromise, and the terms of the compromise were incorporated in a decree which was drawn up on 9th August 1946. It would appear from the terms of the compromise that Rs. 528-5-0 had to be paid by the judgment-debtor to the decree-holder as arrears of rent till August 1943, and it is common ground that this amount has been paid up. On 18th November 1946, the decree-holder filed an application for execution which was registered as Execution Case No. 27 of 1946, in which he sought to execute the decree for ejectment. This application for execution was, however, dismissed on 14th March 1947 and probably at the instance of the judgment-debtor. The present application for execution was filed on 10th April 1948, and it is for the realisation of Rs. 33-5-0 per month for the period September 1943 till July 1946 with interest and costs. This execution case is still pending and has been registered as Execution Case No. 56 of 1948. On 2nd June 1949, the judgment-debtor filed a petition purporting to be a petition under Ss. 47, 151 and 152, Civil P. C., in the aforesaid execution case, and the contentions raised by the judgment-debtor were (1) that the decree was inexecutable in law, (2) that the order of compromise is without jurisdiction as it relates to matters "extraneous to the agreement", and (3) that the judgment-debtor is not liable to pay interest or damages. It appears from the judgments of the Courts below that the only question seriously canvassed before them was that the terms in the decree relating to the payment of Rs. 33-5-0 per month from September 1943 till July 1946 were beyond the scope of the suit and that, as such, these terms could not be enforced in the execution case filed by the decree-holder. Mr. Mahabir Prasad for the judgment-debtor-appellant did not seriously press this contention, but as this was practically the only point urged before the Courts below, I must express my opinion with regard to it. The claim in the suit in which the decree sought to be executed was passed can be classified under the following three heads: (1) A decree for Rs. 599-11-6 as arrears of rent; (2) a decree for the ejectment of the defendant from the house as his tenancy had been terminated by a notice; and (3) a decree for damages or mesne profits for the period commencing from the expiration of the tenancy and up till the date of delivery of possession at the rate of Rs. 5 per day over which the plaintiff had undertaken to pay the court-fee as assessed by the Court.

[2] By the compromise the defendant became liable to pay Rs. 528-5-0 as arrears of rent, and this portion of the claim has already been satisfied.

[3] The learned Additional District Judge says that the

"consent order of the learned Munsif dated 3rd July 1946 shows that the appellant in view of the order of the Commissioner of Patna Division directing to vacate the house by August 1946 agreed to vacate the house by 2nd August 1946 and that consequent on his being in possession of the house subsequent to the termination of the tenancy from 1st September 1943 to July 1946 after which he agreed to vacate the house, he was liable to pay damages, and this was fixed at Rs. 33-5-0 per month with the consent of the parties."

It is manifest that when the judgment-debtor agreed to pay Rs. 33-5-0 per month for the period commencing in September 1943 and terminating by the end of July 1946 he conceded that he was liable to pay damages since after the date on which the tenancy had terminated. The decree-holder had made the claim for damages at the rate of Rs. 5 per day, but this portion of the claim was substantially reduced by the compromise, the decree-holder having agreed to receive and the judgment-debtor having agreed to pay only Rs. 33-5-0 per month for this period. In the order of the learned Munsif, this amount of Rs. 33-5-0 per month has been described as 'rent', but it is really of the nature of compensation, and evidently the amount was described as 'rent' in the order, because the rent for the house was payable at this rate and at no other rate. The claim for damages at the rate of Rs. 5 per day was certainly quite exorbitant, and when the parties entered into the compromise it was agreed that the judgment-debtor instead of paying damages at any higher rate will be liable to pay damages only at that rate at which the rent had been paid. Because by the compromise the damages had to be paid at the rate at which the rent had been paid, they were described in the order of the learned Munsif as 'rent'. But whether it is called rent, damages, or compensation, it was certainly within the scope of the suit to allow something to the plaintiff as compensation for the period commencing from September 1943, inasmuch as the tenancy of the judgment-debtor had terminated in August 1943. There was a specific claim for damages, though at a very high rate from September 1943 till the date of delivery of possession, and this portion of the claim was reduced by the compromise to Rs. 33-5-0 per month. There can be no substance in the contention that the terms of the compromise by which Rs. 33-5-0 is payable by the judgment-debtor to the decree-holder for the period September 1943 till July 1946 are beyond the scope of the suit, when there was a definite claim for damages from September 1943 till the date of delivery of possession. When these terms are to be regarded as terms within the scope of the suit, the question does not arise whether in this suit we should follow the decision of a Full Bench of this Court in *Charu Chandra* v. *Shambhu Nath*, 3 Pat. L. J. 255 : (A. I. R. (5) 1918 Pat. 507 (F.B.)) or a decision of a Division Bench of this Court in *Muhammad Ismail* v. *Bibi Shaima*, 13 Pat. 17 : (A. I. R. (21) 1934 Pat. 203). In the former case it was held that when the compromise deals with matters directly within the scope of the suit the Court must accept the compromise and record it and having so accepted and recorded it, he must prepare and draw up a decree in accordance with it so that the same may be executed in the due and ordinary course of procedure, and that even if the compromise contains matters outside the scope of the suit, the Court must record the entire compromise and draw up a decree giving the parties the right to execute it in respect of the matters which fall within the scope of the action, leaving it to the parties to enforce by whatever means they like that portion of the compromise which refers to the matters outside the scope of the suit. It will be preposterous to contend in this case that the compromise relating to the payment of Rs. 33-5-0 per month is outside the scope of the suit and that though it has been accepted and recorded, the decree-holder is not able to execute this part of the decree in the due and ordinary course of procedure. In my opinion, this Full Bench case is an authority against the judgment-debtor and not in his favour. In *Muhammad Ismail* v. *Bibi Shaima*, 13 Pat. 17 : (A. I. R (21) 1934 Pat. 203), it was held by Courtney-Terrell C. J., with whom Saunders J., agreed that the executing Court had no power to go behind the decree which it was ordered to execute and that it was not open to it to consider that any of the terms of the compromise was outside the scope of the suit. The proposition of law as laid down in this case may or may not be regarded as too wide, but even if it is regarded as too wide, that will be immaterial for the purposes of this case in which the terms in question would be deemed to be absolutely within the scope of the suit. In *Mohamad Yahia* v. *Mt. Bibi Soghra*, A. I. R. (24) 1937 Pat. 232 : (169 I. C. 741), Wort J., with whom Agarwala J. agreed observed that the question whether the matter was the subject-matter of the suit would depend primarily upon the circumstances of each case and this decision appears to me to be important, because in this case even an agreement to obtain a partition from the Court in a suit by the plaintiff for accounts with regard to the whole property was held to be a valid agreement within the scope of the suit. Their Lordships held that the arrangement having been arrived at to facilitate management and being in consideration of the plaintiff's giving up her right to an account was one directly connected with the subject-matter of the suit and therefore within the scope of the suit. It is unnecessary to multiply authorities on this point and especially when Mr. Mahabir Prasad did not like to press the contention that the agreement with regard to the payment of Rs. 33-5-0 per month should be regarded as an agreement beyond the scope of the suit.

[4] But Mr. Prasad contended that the order of the learned Munsif that on his failure to pay up his dues in time, the plaintiff will be entitled to realise the same with costs and interest through Court on his depositing proper court-fees is not based on any agreement between the parties, and that, as such, if this agreement is to be enforced, it can only be enforced by means of a regular suit. In other words, the learned counsel meant to urge that there was no decree in this case for the payment of Rs. 33-5-0 per month which could be executed without recourse to another regular suit. With the greatest respect for the arguments advanced by the learned counsel, I do not find any merit in this contention, it being another point whether the decree-holder is entitled to recover interest on the aforesaid amount and the amount of costs claimed in the execution case. If there is any stipulation for the payment of money, the condition that the amount which, according to the terms of the agreement, the judgment-debtor is liable to pay, would be realised by execution in the event of his failure to pay the amount is implicit. As I have already pointed out, the compromise recorded by the learned Munsif is based on statements made by the decree-holder and the judgment-debtor, and the judgment-debtor who happens to be an Advocate has stated before the learned Munsif that he had "promised to pay rent to the plaintiff at Rs 33-5-0 per month from September 1943 to July 1946." It is also clear from his deposition that he has promised to pay this amount by the end of January 1947. The amount was, however, not paid, and therefore this execution case was filed. In the presence of the parties and their

lawyers the order must have been recorded by the learned Munsif, and it was open to the judgment-debtor to move higher Courts against the order of the learned Munsif, if he was convinced that the learned Munsif had misunderstood the agreement and had made a wrong note in his order that on the failure of the judgment-debtor to pay up the amount the same could be realised through Court. Both parties felt satisfied by this order, and the order cannot be questioned now in the execution proceeding when on the face of it it purports to be an order based on the agreement entered into between the parties which agreement was meant to be an enforceable agreement. There is no reason for supposing that the decree declared only the rights of the parties and was incapable of being executed. On reading the statements of the parties and the order of the learned Munsif, I fail to appreciate the contention that the decree was only a decree declaring or creating rights which could not be enforced in execution and which could be enforced only by another regular suit. It need hardly be said that the operative part of the decree which is confined to the subject-matter of the suit can without any difficulty be enforced as between the parties to the suit by taking recourse to an execution proceeding. It is only a matter which is extraneous to the suit which can be enforced by taking recourse to another regular suit. Certainly the terms of this compromise not only gave the right to the decree-holder to realise Rs. 33-5-0 per month but it also gave him the right to claim this amount in an execution pursuant to the decree. I am, therefore, of the opinion that the decree-holder is entitled to realise the amount of Rs. 33-5-0 per month allowed by the decree by execution. But I agree with the appellant's learned counsel that the clause in the decree for the payment of costs and interest is too vague to be enforced. The rate of interest is not disclosed, and the respondent's learned counsel had to concede that it was difficult for the Court to fix the rate of interest when the rate had not been disclosed. But the respondent's learned counsel faintly suggested that when the rate of interest had not been disclosed, the usual rate of interest, that is, 6 per cent. per annum, should be allowed. Of course, there are cases in which a decree awarding plaintiff's claim with usual interest has been interpreted to mean interest at the rate of 6 per cent. per annum. But even if such an interpretation can be placed upon the orders of a Court, it cannot be placed upon the agreement entered into by the parties. The agreement must be clear and specific, and the respondent's learned counsel pointed out to us that in this suit interest had been claimed at 18 per cent. per annum. If interest had been claimed at 18 per cent. per annum and if the decree does not disclose the rate of interest which the judgment-debtor has to pay, then the logical inference will be that the judgment-debtor has made himself liable to pay interest at the rate of 18 per cent. per annum. But even the decree-holder is not claiming the rate of 18 per cent. per annum. The Court cannot make out a new contract for the parties, and there is no good ground for allowing interest at the rate of 6 per cent. per annum as suggested by the respondent's learned counsel. In my opinion, therefore, no interest can be awarded on the amount claimed in this execution case.

[5] The order of the learned Munsif says that no costs shall be awarded, and it further says that the plaintiff will be entitled to realise the amount of Rs. 33-5-0 per month with costs and interest. The costs as claimed in this execution case consist of two items, namely, the item of Rs. 107-8-0 mentioned in the decree and the amount of Rs. 178-2-0 which has been paid by the decree-holder as court-fee on the claim of Rs. 1165-15-0 which is the total sum payable for the period September 1943 to July 1946. When there is a clear order that no costs shall be awarded I do not understand how the decree-holder can claim Rs. 107-8-0 which is the amount of costs mentioned in the decree, and there is no direction in the decree for the realisation of the amount of court-fee paid by the decree-holder on Rs. 1165 15-0. In this view I am of the opinion that costs as claimed by the decree-holder cannot be awarded.

[6] In the result the appeal is allowed in part and the order of the Courts below is varied only to this extent that the decree-holder will not be entitled to recover from the judgment-debtor the amount of interest and the amount of costs as claimed in Execution Case No. 56 of 1948. Parties will bear their own costs of this Court as well as of the lower appellate Court.

[7] **Ramaswami J.**—I agree.

D.H. *Appeal partly allowed.*

A. I. R. (37) 1950 Patna 443 *[C. N. 112.]*

RAMASWAMI AND SARJOO PRASAD JJ.

Rajballam Singh—Petitioner v. *Madhusudan Prasad Singh—Opposite Party.*

Civil Revn. No. 599 of 1949, D/- 24-3-1950, from order of D. J., Arrah D/- 16-7-1949.

Civil P. C. (1908), Ss. 2 (2), 96 and 151 — Appeal dismissed for default—Application to restore appeal —S. 151, if applies.

An order rejecting the memorandum of appeal for failure to furnish copy of judgment does not constitute a decree and is not appealable. An application for restoration of appeal under S. 151 is, therefore, competent. [Paras 2 and 3]

Annotation: ('50-Com.) Civil P. C., S. 2 (2), N. 16; S. 151, N. 2.

Angad Ojha—for Petitioner.
Shambhu Pd. Singh—for Opposite Party.

Ramaswami J.—It appears that the petitioner had filed an appeal in the lower Court together with a petition for dispensing with copy of judgment because an appeal had been filed in an analogous case disposed of by the same judgment, a copy of which had been attached to the memorandum of appeal in that case. The applicant was nevertheless directed to file a copy of the judgment within five days and upon his default the memorandum of appeal was rejected. He then filed an application under O. 41, R. 19, Civil P. C. and S. 151, for restoration of the appeal. The lower Court rejected the application on the ground that S. 151 was not applicable. Against this order the applicant has obtained the present rule.

[2] The question to be determined in this case is whether the order rejecting the memorandum of appeal for failure to furnish copy of judgment constitutes a "decree" within the meaning of S. 2, cl. (2), Civil P. C.

[3] Section 2 (2) defines a decree as

> "the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within S. 47 or S. 144, but shall not include . . . . . . (b) any order of dismissal for default."

In support of this rule Mr. Angad Ojha addressed the argument that in the present case the order of the learned District Judge rejecting the memorandum of appeal would not be a decree. In support of his argument he referred to *Ramdhari Ahir* v. *Khedu Ahir*, 17 Pat. 245 : (A. I. R. (25) 1938 Pat. 461). In that case a Judge being of opinion that the memorandum of appeal presented before him was argumentative and not in accordance with the provisions of O. 41 R. 1, Civil P. C., called upon the appellant to remove the defect and on his failure to do so rejected the same. A Bench of this Court held that the order was not appealable as it did not finally dispose of the rights of the parties. Wort J. added that it could not be laid down as a universal proposition that an order rejecting a memorandum of appeal was appealable. On behalf of the opposite party Mr. Shambhu Pd. Singh made reference to *Surajpal* v. *Uttim Pandey*, 6 Pat. L. J. 625 : (A. I. R. (9) 1922 Pat. 281), in which it was held that an order rejecting a memorandum of appeal before the appeal was admitted, for insufficiency of court-fee, did amount to a decree and was appealable as such. In another case *Ramsawari Kuer* v. *Motiraj Kuer*, 17 Pat. 687 : (A. I. R. (26) 1939 Pat. 83), also a Bench of this Court decided that an order of rejection of a memorandum of appeal on the ground that it was insufficiently stamped was a decree and was appealable as such. The learned Judges observed that the provisions of O. 7, R. 11 applied to appeals and therefore it was the duty of the Court, in cases coming under cl. (c), to require the appellant to make up the deficiency in court-fee within a time to be fixed by the Court before rejecting the memorandum of appeal. Reliance was also placed by the learned counsel on an unreported decision dated 30th March 1949 in S. A. 503 of 1947. In my opinion all these cases must be distinguished for the reason that they dealt with a case of rejection of a memorandum of appeal for failure to make good the deficit court-fee for which specific provision is made in O. 7, R. 11 cl. (c), Civil P. C The decision in the Full Bench case *Ramkhelawan Singh* v. *Monilal Sahu*, 19 Pat. 159 : (A. I. R. (26) 1939 Pat. 673 F. B.), is relevant in this context. In that case an application was made to set aside an order of dismissal of an appeal for failure to file the appellant's list within the time allowed. The stamp reporter suggested that the application was in fact one for a review of the order dismissing the appeal and that a court-fee of about Rs. 405 was leviable. On behalf of the petitioner on the contrary, it was contended that this was an application for restoration of the appeal on which Rs. 3 stamp was leviable. The Full Bench after exhaustive review of the authorities held that the application could not be treated as one for review under O. 47, R. 1, but the High Court had power to restore the appeal in a proper case. Apart from this decision I consider that the present case is fully covered by the authority of *Ramdhari Ahir* v. *Khedu Ahir*, 17 Pat. 245 : (A. I. R. (25) 1938 Pat. 461), to which the material facts of the present case are closely parallel. Since we are bound by the ratio of this decision it must be held that in the present case an application under S. 151, was competent.

[4] As regards the merit also it was contended by the learned counsel for the opposite party that the inherent jurisdiction of the Court ought not to be invoked since the applicant had made default in carrying out the order of the Court. But upon the admitted facts it is manifest that the Court ought to have dispensed with the copy of judgment and ought not to have required the petitioner to furnish a copy within the short time of five days. It is therefore necessary that the order of dismissal of the appeal should be set aside by this Court under its inherent jurisdiction. The appeal should now be restored

to file and should be disposed of in accordance with law.

[5] Accordingly this rule is made absolute and the application is allowed but I do not propose to make any order as to costs.

[6] **Sarjoo Prasad J.**—I agree.

V.R.B. *Rule made absolute.*

A. I. R. (37) 1950 Patna 445 *[C. N. 113.]*

RAMASWAMI AND SARJOO PRASAD JJ.

Jai Gobind Singh and another—Petitioners v. Bagal Lal Singh—Opposite Party.

Civil Revn. No. 691 of 1949, D/- 23rd March 1950, from decision of D. J., Santal Parganas, D/- 26th July 1949.

(a) Civil P. C. (1908), O. 23, R. 3—Compromise, when can be recorded.

Under O. 23, R. 3 before a Court can order agreement or compromise to be recorded and pass a decree in accordance therewith it has to be satisfied that the suit has been adjusted wholly or in part by such agreement or compromise. Where the parties agree to abide by the award of arbitrators the agreement is still in the nature of a contract and so long as arbitrators have not made the award the contract has not been carried out and there is yet no adjustment of the suit. In other words, the matter has not proceeded beyond the domain of an agreement and stage of the adjustment of the claim has not yet been reached. [Para 5]

Where in a petition of compromise the parties intended that all the disputes relating to their *Sardari Jagir* land, as also the other lands, ought to be finally settled by arbitrators and in consideration of this settlement the plaintiff agreed to give to the defendants certain lands out of the *Jagir* lands, and the arbitrators by their award settled the disputes relating to the *Jagir* land but not the disputes relating to other lands:

Held, that there was no complete adjustment of the suit within the meaning of O. 23, R. 3 and therefore, the compromise could not be recorded. [Para 5]

Annotation : ('44 Com.) Civil P. C., O. 23, R. 3, N. 7, Pts. 1 and 2 and N. 9.

(b) Civil P. C. (1908), O. 23, R. 3—Ambiguity in agreement—Agreement, if enforceable — Contract Act (1872), S. 2 (h).

Where a compromise petition stated: "The following five gentlemen shall decide (all matters) relating to our movable and immovable property and the said 20 bighas of land:"

Held, that the terms of this clause were so vague that it could not amount to an enforceable agreement or a contract. [Para 6]

Annotation : ('44-Com.), Civil P. C. O. 23, R. 3, N. 8; ('46-Man.) Contract Act, S. 2 (h), N. 1.

B. C. De and *S. R. Ghosal*—for Petitioners.
Lalnarain Sinha and *N. Chatterji*—for Opposite Party.

Ramaswami J.—The question for decision in this case is whether the lower Courts committed any error of jurisdiction in refusing to record an alleged compromise under the provisions of O. 23, R. 3, Civil P. C.

[2] The plaintiff opposite party instituted a suit declaring his title and for recovery of possession of certain *Sardari Jagir* land alleging that the rule of primogeniture governed and that he being the eldest son was entitled to it in preference to the defendants who are his younger brothers. Defendant 1 contested the suit on the ground that the ordinary rule of succession applied and the land belonged in equal shares to the plaintiff and two defendants. Defendant 2, however, alleged that the land in dispute being *Sardari Jagir* belonged to the holder of the office of the *Sardar* and since defendant 2 was the *Sardar*, the land belonged to him. On 19th February 1948 the defendants filed a petition before the Subordinate Judge to the effect that the suit had been compromised and that it should be decreed in terms thereof. The lower Courts refused to record the compromise on the ground that there was no adjustment of the suit. Against this order the defendants have obtained a rule from this Court.

[3] On their behalf Mr. B. C. De submitted the argument that by virtue of the compromise there was a complete adjustment of the suit and the lower Courts improperly exercised their jurisdiction in refusing to record it under O. 23, R. 3, Civil P. C. It is necessary to examine the terms of the alleged compromise in order to test the correctness of this argument. On 21st January 1948 the parties filed the petition (Ex. A) which is to the following effect :

"The plaintiff and the defendants of this suit are full brothers. We both the parties having come to an agreement have compromised the aforesaid suit in presence of ten gentlemen on the following terms ;

1. I, Bagal Lal Singha, the plaintiff, give 10 bighas of 1st class, 2nd and 3rd class paddy lands, out of my *Sardari Jagir* property, to each of the defendants, in all 20 bighas. I remain bound to give (such) Plot Nos. etc. of this land as may be duly determined by five gentlemen. The following 5 gentlemen shall decide (all matters) relating to our movable and immovable property and the said 20 bighas of land, to which none of the parties shall be competent to make any plea or raise any objection. 21-1-48

1. Sri Dhananjoy Ghosh of Garia
2. " Narayan Chandra Mitra of Garia
3. " Shibkinkar Sarkar of Sitamuri
4. " Asuthosh Mitra of Dumdumi (?)
5. " Nibaran Chandra Ghosh of Garia.

Signed to-day
K. Prasad, B. C.
Sub-Judge, Deoghar,
20-2-48
Sd. Joy Gobind Singha,
20-2-48.

We shall remain bound by whatever shall be done by the aforesaid arbitrators. No one shall be competent to make any plea or raise any objection.

Sd. Bagal Lal Singha
Sd. Atul Chanda Singha
21-1-48

Scribed by Narayan Chandra Mitra of Garia,
20-1-48."

[4] On 24th January 1948 an award was filed by the arbitrators to the following effect:

> "The arbitrators mentioned below beg to state as follows :
>
> That on 21st January 1948 the aforesaid plaintiff having definitely expressed his desire to amicably settle the said suit and filed a petition before the S. D. O. Jamtara, we, the arbitrators, made both the defendants agree to it. We met together at Karaiya and demarcated 10 bighas of paddy land to each of the defendants as mentioned in schedules A and B given below with their revisional survey settlement plot numbers. The plaintiff and the defendants have partitioned their movable properties. Paddy lands mentioned below in the schedules are given (allotted) according to the arbitrators' award and it is prayed that the suit may be finally disposed of (accordingly). Be it stated that the parties shall not be competent to claim anything as costs of the suit.
>
> Be it stated that the petition filed by the plaintiff and the defendants before the S. D. O. is filed herewith.
>
> Details of Schedule.
>
> Mauza Kariya No. 15, Khewat No. 2, Jot. No. 109.
>
> (Ka) Jai Gobind Singha, defendant 1.

Plot No.	A. D.	Class.
504	1·88	1st
505/1564	·24	2nd
499	·98	2nd
395	·46	3rd
503	·69	3rd
	4 acres 25 decimals.	

> (Kha) Atul Chandra Singh, defendant 2.

504	1·89	1st
443	·18	2nd
499	1· 4	2nd
395	·46	3rd
503	·68	3rd
	4 acres 25 decimals.	

> Arbitrators.
>
> 1. Narayan Chandra Mitra of Geria.
> 2. Dhananjoy Ghosh of Geria.
> 3. Ashutosh Mitra of Dumdumi.
> 4. Shib Kinkar Sarkar of Sitamuri.
> 5. Nibaran Chandra Ghosh of Geria, 24th January 1948."

[5] It cannot be disputed that under O. 23, R. 3 before a Court can order agreement or compromise to be recorded and pass a decree in accordance therewith it has to be satisfied that the suit has been adjusted wholly or in part by such agreement or compromise. Where the parties agree to abide by the award of such arbitrators the agreement is still in the nature of a contract and it is manifest that so long as arbitrators have not made the award the contract has not been carried out and there is yet no adjustment of the suit. In other words, the matter has not proceeded beyond the domain of an agreement and stage of the adjustment of the claim has not yet been reached. Mr. B. C. De did not dispute this statement of the law but he contended that as soon as arbitrators made the award on 24th January, there was a complete adjustment of the suit between the parties. This argument would have been valid if upon the construction of the compromise of 21st January, it is held that the question of allotment of 20 bighas out of the *Sardari Jagir* was separate and severable from the question of settlement of the dispute with respect to the other movable and immovable properties which is mentioned in the petition of compromise. On this part of the case, the learned District Judge has, in my opinion, correctly held that the compromise was ambiguous and oral evidence of the conduct of the parties was admissible to prove what was the real intention. After examining the evidence he reached the conclusion that the parties intended that all the disputes relating to *Sardari Jagir* land, as also the other lands, ought to be finally settled and in consideration of this settlement the plaintiff agreed to give to each of his brothers 10 bighas out of the *Jagir* lands. In other words, both the clauses in the petition of compromise were interdependent and interwoven and the plaintiff had agreed to grant a portion of the *Sardari Jagir* to the defendants only in consideration of the settlement of all the outstanding disputes. Mr. B. C. De contended that upon a proper construction of the terms and the oral evidence it ought to be held that the two clauses were independent. But in my opinion there is no good reason for differing from the construction placed by the District Judge upon the terms of his document. If that be so, it is obvious that cl. (2) with respect to the settlement of the disputes by the arbitrators was not acted upon and so had not proceeded beyond the domain of agreement and there was no complete adjustment of the suit within the meaning of O. 23, R. 3, Civil P. C. In this context reference should be made to *Bishambhar* v. *Shri Thakurji Maharaj*, 53 ALL. 673 : (A. I. R. (18) 1931 ALL. 557), in which the parties to a suit had stated in Court that they agreed that a certain pleader might be appointed referee and that the case might be decided in accordance with the statement which he might make, without any oath being given to him. On the date on which the statement was made in Court, but before it was made, the plaintiff intimated to the Court that he resiled from the agreement to abide by the referee's statement. The Court, however, dismissed the suit in accordance with the referee's statement. The plaintiff preferred an appeal to the High Court who held that the agreement did not amount to an adjustment of a suit under O. 23, R. 3 but only amounted to an agreement on a procedure which might eventuate in an adjustment, and until the referee had given his statement there could be no question of any adjustment. In a subsequent Full Bench case *Akbari Begum* v. *Rahmat Hussain*, 56 ALL. 39:

(A. I. R. (20) 1933 ALL. 861 (S. B.)), Sulaiman C. J. reiterated the same principle :

> "Strictly speaking, an agreement is not identical with a compromise of the suit and may amount to a mere contract. But as no decree can be passed forthwith in terms of a mere contract to abide by the statement of a third person, I am prepared to hold that there can be no adjustment of the suit by such a contract until the statement has been made. But as soon as the agreement has been fully carried out by the Court and the referee has made his statement in favour of one party or the other, it is too late for either party to go back upon the agreement; and at this stage the agreement must be deemed to have eventuated into an adjustment of the claim in accordance with the statement already made. A party cannot be allowed to retract his solemn promise for consideration made before the Court after he has come to know the nature of the statement by which he had agreed to abide. It is no longer a question of the carrying out of a promise or the specific performance of a contract. The compromise must be deemed to have been carried out and accordingly the claim already adjusted."

[6] There is also another difficulty in holding that there was any complete adjustment of the suit between the parties. Clause (2) of EX. A, the comromise petition, states :

> "The following five gentlemen shall decide (all matters) relating to our movable and immovable property and the said 20 bighas of land."

In my opinion, the terms of this clause are so vague that it cannot amount to an enforceable agreement or a contract. The ambiguity is patent and the phrase "all matters relating to our movable and immovable property" cannot be properly construed and it is impossible to find out what was the real intention of the parties in putting this clause in the compromise. In a recent case *Scammell and Nephew Ltd.* v. *H. C. and J. G. Ouston* 1941 A. C. 251 : (110 L.J.K.B. 197), the respondents had agreed to purchase from the appellants a new motor van but stipulated that "this order is given on the understanding that the balance of purchase price can be had on hire-purchase terms over a period of two years." The House of Lords held that this clause as to hire-purchase terms was so vague that no precise meaning could be attributed to it, and consequently there was no enforceable contract between the parties. For the same reasons cl. (2) of the compromise with respect to the matters relating to movable and immovable properties is so vague that no precise meaning can be attributed to it and the contract cannot be enforced between the parties.

[7] For the reasons assigned I hold that the lower Courts have committed no error of jurisdiction and this application must be accordingly dismissed. But in the special circumstances of this case I do not propose to make any order as to costs.

[8] **Sarjoo Prasad J.** — I agree. I would wish to add a few observations. As my learned brother has pointed out, before recording a compromise under O. 23, R. 3 the Court had to find whether there was really an adjustment of the dispute between the parties. The terms of the compromise indicated that certain contingencies had to be fulfilled before the rights of the parties could be finally adjusted. Some of those contingencies had not been fulfilled and parties were at variance as to whether the intention was that these contingencies had to be fulfilled before the compromise could be recorded. The Courts below, therefore, had to go into the evidence in order to find out what the real intention of the parties was and having gone into evidence the Courts below have come to a finding that it was not intended to be an adjustment between the parties so as to be capable of being recorded under O. 23, R. 3 and the contingencies which have not been fulfilled were an integral part of the compromise. This finding cannot be assailed in revision before this Court.

V.R.B. ***Revision dismissed.***

A. I. R. (37) 1950 Patna 447 *[C. N. 114.]*

SINHA AND RAI JJ.

Sheonandan Singh and another—Appellants v. *Mt. Maida Kuer and another — Respondents.*

A. F. A. D. No. 83 of 1948, D/- 17-3-1950, from decision of Sub-J., Arrah, D/- 11-10-1947.

(a) Limitation Act (1908), Art. 125 — Possession of Hindu or Muhammadan female — Nature of.

Article 125 applies when the possession is that of a Hindu or Muhammadan female as such, that is to say, by virtue of her being a Hindu or Muhammadan, and does not apply if her possession is by virtue of a grant or transfer made *inter vivos* or by virtue of a bequest, or, in other words, when her possession is irrespective of her being a Hindu or Muhammadan female. [Para 6]

Annotation : ('42-Com.) Limitation Act, Art. 125, N. 5, Pt. 2.

(b) Limitation Act (1908), Art. 125 — Suit by reversioner.

Only a presumptive reversioner has a right to bring a suit for declaration during the life time of a limited owner, who is in possession of the properties by inheritance, challenging an alienation made by her. That suit by a reversioner has to be brought in a representative capacity for the benefit of the actual reversioner when the reversion opens. [Para 10]

Annotation : ('42-Com.) Limitation Act, Art. 125, N. 8, Pt. 1.

(c) Limitation Act (1908), Art. 120 — Whether cause of action to set aside alienation arises from date of alienation or from date of knowledge of alienation *(Quære)*. [Para 7]

Annotation : ('42-Com.) Limitation Act, Art. 120, N. 3.

L. K. Jha and Ramananda Sinha —for Appellants.
D. N. Verma and Kanhaiyaji —for Respondents.

Rai J.—This is an appeal by defendants 1 and 2 against the judgment and the decree passed by the Subordinate Judge of Arrah dated 11th October 1947, reversing those of the Munsif of Sasaram dated 8th February 1946.

[2] The plaintiff filed the suit for a declaration that a rehan bond dated 27th April 1938, executed by defendant 1 in favour of defendant 3 and a sale deed dated 8th December 1937, executed by defendant 1 in favour of defendant 2 are inoperative and not binding upon the plaintiff. According to the case of the plaintiff, Ramdutt Rai and Sahdeo Rai were two brothers. Ramdutt Rai died about 12 years ago leaving his widow Mt. Maida Kuer, the plaintiff. Sahdeo Rai died leaving behind his widow Daulat Kuer, defendant 1, and his son Bishundeo Rai. The latter is said to have died about 14 years ago. The plaintiff's case further was that on 18th July 1937 certain properties were given by her to Daulat Kuar defendant 1, by way of maintenance by a registered document Ex. A. But now the plaintiff has come to learn that by practising fraud on her instead of a deed of maintenance, a deed of partition had been brought into existence. She further averred that defendant 1 in collusion with her brother Chulhan Singh had brought into existence the rehan bond and the sale deed in question which she had no right to execute and which are not binding upon the plaintiff. The sale deed had in fact been taken by Chulhan Singh in the farzi name of a relation of his.

[3] The case of the defendants, on the other hand, was that Ramdutt and Bishundeo were separate, and defendant 1 had inherited the properties of Bishundeo as his mother. The deed of partition dated 18th July 1936, was a genuine document. No fraud had been practised on the plaintiff at the time of the execution of the said document which was executed by the plaintiff after she had fully understood the same. The rehan bond had been redeemed by the sale deed which, according to the defendants, was a genuine transaction and was binding upon the plaintiff. According to the defendants the suit as framed was barred by limitation.

[4] The trial Court came to the conclusion that Ramdutt and Bishundeo had separated. The deed of partition dated 18th July 1936, had been validly executed by the plaintiff and defendant 1, and no fraud had been practised on the plaintiff as alleged by her. It was further of opinion that the deed of partition, Ex. A, was never meant to be a deed of maintenance. On the question of the plea of limitation as raised by the defendants, the trial Court came to the conclusion that the suit as framed was barred by limitation. According to it, the period of limitation applicable to the present suit was that provided by Art. 120, Limitation Act and, not Art. 125 of the same Act.

[5] On appeal by the plaintiff, the lower appellate Court accepted the finding of the trial Court disbelieving the case of the plaintiff that fraud had been practised upon her at the time of the execution of Ex. A. The lower appellate Court also came to the conclusion that no fraud had been practised upon her. It, however, came to the conclusion that Ramdut and Bishundeo had not separated, that Ramdut had died last of all, and in this view of the finding the document, Ex. A, might be construed to have been executed for maintenance of defendant 1. According to the lower appellate Court, the sale deed in question had been taken by Chulhan Singh, brother of defendant 1, in the farzi name of his relation, Sheonandan Singh. According to that Court, the suit was not barred by limitation, as the period of limitation applicable would be one provided by Art. 125, Limitation Act. According to the lower appellate Court the suit was not barred even if Art. 120, Limitation Act, applied as the plaintiff knew of the sale deed in question only six or seven months before the filing of the suit which was filed on 11th February 1944. According to it, the time would begin to run under Art. 120 from the date of knowledge. In that view of the matter, it reversed the decree passed by the trial Court and decreed the suit of the plaintiff resulting in the above mentioned second appeal by defendants 1 and 2.

[6] In this Court the learned Advocate for the appellants urged that the suit as framed was barred by limitation, as, according to him, the period applicable for such a suit would be the period provided by Art. 120, Limitation Act. In support of his contention the learned Advocate cited the case of *Kanhya Lal* v. *Mt. Hira Bibi*, 15 Pat. 151 : (A. I. R. (23) 1936 Pat. 323). Article 125, Limitation Act, runs as follows :

"Description of suit.	Period of limitation.	Time from which period begins to run.
125. Suit during the life of a Hindu or Muhammadan female by a Hindu or Muhammadan who if the female died at the date of instituting the suit, would be entitled to the possession of land, to have an alienation of such land made by the female declared to be void except for her life or until her re-marriage."	Twelve years.	The date of alienation.

Their Lordships of the Patna High Court in that case held as follows :

"It was contended on behalf of the defendants that the present suit comes within the four corners of this article as the plaintiff is a Hindu who claims a right to succeed on the death of a Hindu female and seeks a declaration that the alienations made by her are void. In our opinion, however, this article applies when the possession is that of a Hindu or Muhammadan female as such, that is to say, by virtue of her being a Hindu or Muhammadan, and does not apply if her possession is by virtue of a grant or transfer made *inter vivos* or by virtue of a bequest, or in other words, when her possession is irrespective of her being a Hindu or Muhammadan female."

[7] I respectfully agree with the view taken by the learned Judges. If the case of the plaintiff is true that Daulat Kuer, defendant 1, had not inherited any property from her son, Bishundeo Rai and that she derived all her interest by the document dated 18th July 1936, then in that case an alienation made by her would not attract the operation of Art. 125, Limitation Act, and the suit must be governed by the provisions of Art. 120, Limitation Act, which runs as follows

"Description of suit.	Period of limitation.	Time from which the period begins to run.
120. Suit for which no period of limitation is provided elsewhere in this schedule."	Six years.	When the right to sue accrues.

Mr. D. N. Varma, the learned advocate for the plaintiff-respondent, in reply, urged that the case would be covered by the provisions of Art. 125, Limitation Act, and in support of his contention he relied upon the case of *Mt. Nandan* v. *Wazira*, 8 Lah. 215 : (A.I.R. (14) 1927 Lah. 198). But this decision of the Lahore High Court was not accepted as laying down the correct law by the learned Judges who decided the case of *Kanhya Lal* v. *Mt. Hira Bibi*, 15 Pat. 151 : (A. I. R. (23) 1936 Pat. 323). Besides a later Full Bench decision of the Lahore High Court in the case of *Arura Mal* v. *Mt. Sandhuran*, A.I R. (34) 1947 Lah. 290: (49 P. L R. 167 F. B.), agreed with the decision of this Court reported in *Kanhya Lal* v. *Mt. Hira Bibi*, 15 Pat. 151 : (A.I.R. (23) 1936 Pat. 323). Mr. Varma further argued that even if Art. 120, Limitation Act applied, time would begin to run only from the date of knowledge of the plaintiff regarding the sale and the rehan deeds, which was about six or seven months before the filing of the suit. In support of his contention he cited the case of *Muruga Chetty* v. *Rajaswamy*, 30 I. C. 669 : (A. I. R. (3) 1916 Mad. 130). In that case persons interested in the trust had filed a suit for a declaration that an alienation made in respect of trust properties by a sale-deed in the year 1893 was not binding upon the trust. In that connection their Lordships of the Madras High Court came to the conclusion that the cause of action for a declaratory suit based on denial of title, did not arise until the plaintiff had knowledge of the denial. Mr. Varma next relied upon the case of "*In the matter of the Indian Companies Act*," 34 Bom. 533: (7 I. C. 452). But, in my view, that case has no application to the facts and circumstances of the present case. I do not find any question of the applicability of Art. 120, Limitation Act, having been discussed in that case which may be of any assistance to the plaintiff. The case of *Dattatraya Pandurang* v. *Lakshman Mahadev*, A. I. R. (19) 1932 Bom. 15 : (136 I. C. 161), however, has laid down that the cause of action for getting a declaration in respect of an alienation accrues when the document is executed and time does not begin to run from the date of knowledge. It is not necessary for me to give a decision as to which of the two views, one held by the Madras High Court and the other by the Bombay High Court, is correct, because I am going to hold that the plaintiff's suit is bound to fail on the other grounds as discussed below.

[8] Mr. Verma has further referred to the case of *Sri Gajapathi Nilamani* v. *Sri Gajapathi Radhamani*, 4 I. A. 212: (1 Mad. 290 P. C.) and the case of *Bhugwandeen Doobey* v. *Myna Baee*, 11 M. I. A. 487: (9 W. R. 23 P. C.), but both these cases are cases where the rights of two co-widows have been considered, and they are not relevant to the matter in dispute in the present suit. Mr. Varma also relied upon the case of *Bolo* v. *Koklan*, 57 I. A. 325 : (A. I. R. (17) 1930 P. C. 270). That case while considering the provisions of Sch. I, Art. 120, Limitation Act, concerning the expression "the right to sue accrues" held that it would accrue only when the defendant has infringed, or at least has clearly and unequivocally threatened to infringe, the right asserted by the plaintiff in the suit. In the light of the decision of the Privy Council the plaintiff's right cannot be considered to have been infringed. Her cause of action in that case would accrue only after the death of defendant 1, when the vendee will refuse to deliver possession to the rightful claimant. Mr. Varma also relied upon the cases of *Mohammad Umar* v *Muhammad Ibrahim*, A I. R. (20) 1933 Lah. 270 : (143 I. C. 725) and *Kandasami Pillai* v. *Munisami Mudaliar*, A. I. R. (19) 1932 Mad. 589 : (137 I. C. 707). In the former case it was held that under Art. 120, time would commence to run from the date when the mortgage was sought to be enforced by institution of a suit and not from the date on which the mortgage was executed. In the latter case also it was held that under Art. 120, Limitation Act, time begins to run from the date of the institution of a mortgage suit and not from the date of the execution of the mortgage which had been executed in respect of trust property. These two cases, in my opinion, do not help the plaintiff.

[9] The plaintiff's suit, however, is bound to fail on another ground. From a perusal of the deed of partition dated 18th July 1936, it appears that the document had been executed to settle a dispute between the two ladies, and the document clearly described that both of them were owners of the properties dealt with in that document. It further recited that one would have nothing to do with the properties that had been allotted to the share of the other and each of them had the right to deal in whatever way she liked with the properties allotted to her share. The document can safely be regarded as a deed of family arrangement, and the plaintiff, being a party to it cannot be allowed to turn round and say that the document had been executed to allow defendant 1 to have those properties by way of maintenance. The findings of the lower appellate Court that Ramdutt and Bishundeo were joint and Ramdutt had died last would not affect the arrangement that had been arrived at by EX. A. In this view of the matter, the plaintiff has no right to challenge the alienation made by defendant 1. The plaintiff's case all along had been that she was not entitled to claim the properties as long as Daulat Kuer, defendant 1 was alive. In my view, however, the plaintiff is not entitled to bring the present suit as framed.

[10] Only a presumptive reversioner has a right to bring a suit for declaration during the life-time of a limited owner, who is in possession of the properties by inheritance, challenging an alienation made by her. That suit by a reversioner has to be brought in a representative capacity for the benefit of the actual reversioner when the reversion opens. On a reference to the plaint I find that the present suit has not been filed as a representative suit. So, in any view of the matter, the suit as framed is not maintainable.

[11] The result is that the appeal is allowed judgment and the decree passed by the lower appellate Court are set aside and those of the trial Court restored, except as to costs. In the circumstances of the present case, each party is to bear its own costs throughout.

[12] **Sinha J.**—I agree.

G.M.J. *Appeal allowed.*

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*A. I. R. (37) 1950 Patna 450 *[C. N. 115.]*

SINHA J.

On a difference of opinion between

DAS AND SARJOO PRASAD JJ.

Tobacco Manufacturers (India) Ltd., Monghyr—Appellant v. *The State of Bihar—Respondent.*

Misc. Judicial Case No. 140 of 1949, D/-16-5-1950

(a) Bihar Sales Tax Act (VI [6] of 1944), S. 21—Reference on question of equity—Competency.

Under S. 21, a reference to the High Court is competent only on questions of law which arise out of the order. A question of equity cannot be referred to the High Court. [Para 3]

(b) Bihar Sales Tax Act (VI [6] of 1944), S. 21—Nature of jurisdiction of High Court.

The jurisdiction the High Court exercises in reference under S. 21 is of the nature of advisory jurisdiction, which should be limited ordinarily to the questions raised on the case stated and referred to the High Court. [Para 5]

(c) Government of India Act (1935), Sch. 7, List 2 item 48, List 1 item 45—Sales tax—Power of Provincial Legislature to levy—Extent of — Bihar Sales Tax Act (VI [6] of 1944), Ss. 4 and 5.

Per *Das and Sarjoo Prasad JJ.* — The power of a Provincial Legislature to levy a tax on the sale of goods extends to sales of every kind, whether first sales by the manufacturer or producer or not, and a tax levied on the first sale by the manufacturer or producer is levied on him *qua* seller and not *qua* manufacturer or producer. [Para 6]

The duty levied on the sale of goods immediately after their manufacture is not necessarily in the nature of excise duty. [Para 6]

Thus, a tax on a first sale by a manufacturer or a producer is not outside the scope of the Bihar Sales Tax Act. [Para 6]

✠**(d) Bihar Sales Tax Act (VI [6] of 1944), S. 5 (2) (a) (v) — Goods manufactured by dealer in Bihar and despatched to places outside at vendee's directions—Exemption from sales tax cannot be claimed unless despatch is on behalf of dealer — Commissioner's finding on question is final.**

Under a manufacturing agreement between *A* Company in Bihar (dealer) and *B* Company of Calcutta (vendee), *A* Company was to manufacture certain goods exclusively for *B* Company and to despatch all the manufactured goods on behalf of *B* Company and in their name, to destination inside and outside Bihar according to the directions of *B* Company. With regard to goods despatched to places outside Bihar, the question arose whether *A* Company was exempt from sales tax under S. 5 (2) (a) (v). It was not disputed that under the agreement the property in the goods passed to *B* Company before despatch. The Commissioner had found that the goods were despatched by the assessee but the despatch was on behalf of the vendee:

Held (Per *Sarjoo Prasad and Sinha JJ.*; *Das J.* contra) that no exemption could be claimed under S. 5 (2) (a) (v). [Paras 38, 47]

Per *Sinha and Das JJ*; *Sarjoo Prasad J.* contra.—The Legislature has made the question of despatch by or on behalf of the dealer one of the crucial conditions for the application of sub-cl. (v) advisedly because delivery of the goods within the Province of Bihar has been taken to be the essential condition of liability for the tax. [Para 45]

The crucial test, therefore, laid down by the sub-clause is where the goods have been delivered to the vendee. If they have been delivered within the Province, the dealer is liable to pay tax thereon. If they have been delivered outside the Province, then the dealer is entitled to the deduction provided for in the sub-clause in question. [Para 45]

The sub-clause in question has reference to sales and not to contract for sales in Bihar. [Para 47]

Per *Sarjoo Prasad J.* contra. — Under S. 5 (2) (a) (v) the deduction contemplated was in respect of that part of the dealer's turnover which related to sales of goods despatched for sale outside the province of Bihar. [Para 28]

The test is where has the sale taken place. If the sale has taken place in Bihar, then the legislature never intended in enacting this statute to exempt the sale prices of such sales from taxation. [Para 32]

The statute is not concerned as to what happens to the goods after the sale is effected. Whether the goods after the sale, in other words, after title in the goods has passed on to the vendee, are despatched by the vendor himself or by the vendee to any place outside Bihar is hardly of any moment. The despatch of the goods after their sale has nothing to do with the imposition of sales tax under the statute which is to be levied on the sale of goods in Bihar. [Para 24]

Per *Sinha J.* — The question of who despatched the goods, or on whose behalf the goods were despatched, is not a question of form but very much a question of substance, to determine which the legislature has constituted the Commissioner the sole authority. It is not open to the High Court to whittle down the findings of the Commissioner or to go behind them. [Paras 46, 47]

In view of the Commissioner's finding that the goods were *not* despatched on behalf of the dealer (*A* Company) but on behalf of the vendee (*B* Company), the provisions of sub-cl. (v) were not attracted. [Para 47]

Per *Das J.* contra. — The despatch was actually made by the assessee (dealer), though the property in the goods had passed to the vendee. Therefore, the dealer was entitled to claim deduction under S. 5 (2) (a) (v). [Paras 16, 17]

(e) Interpretation of Statutes—Taxing statute—Strict construction.

Per *Das J.* — A taxing statute must be construed strictly, and if an assessee gets an advantage which the Legislature may not have intended, but which he is entitled to on the construction of the statute, the Court should not deprive him of that advantage. [Para 11]

Annotation : ('50-Com.) Civil P. C., Pre. N. 7.

(f) Interpretation of Statutes—Proviso.

Per *Das J.* — The purpose and meaning of proviso will depend on the construction to be put on the words used in the proviso. The question is really one of construction of the terms of a proviso, and not of legislative theory or practice. [Para 13]

Per *Sarjoo Prasad J.*—Though ordinarily a proviso does not enlarge the meaning of the section, yet in many cases the effect thereof may be to add to the terms of the section and enlarge its connotation. The construction to be put on the words of a proviso would depend upon the context in which it is used. [Para 26]

Annotation : ('50-Com.) Civil P. C., Pre N. 14.

(g) Bihar Sales Tax Act (VI [6] of 1944), S. 7 — "Registered dealer"—Meaning—Company having several places of business, if can be deemed to be one unit.

Per *Das and Sarjoo Prasad JJ.* — The expression "registered as dealer" in the taxing statute has an artificial, statutory meaning, a meaning which must be consistent with the scheme and purposes of the taxing statute. [Para 18]

For the purposes of the taxing statute, the company having places of business inside and outside Bihar should not be deemed to be one unit, and the registration certificate issued to the Company with its place of business at Muzaffarpur in Bihar should not be taken as a registration certificate to the company with all its places of business inside and outside Bihar. That would render nugatory the provisions of S. 7 and the rules made under the taxing statute. [Para 19]

(h) Interpretation of Statutes — Each and every word used in a particular provision of the statute must be given its full effect and meaning. [Para 45]

Annotation : ('50-Com.) Civil P. C., Pre. N. 7.

P. R. Das and S. N. Bhattacharya—for Appellant.
Advocate-General and Rajeshwari Prasad
—for the State.

Das J.—This is a reference under S. 21 (3), Bihar Sales Tax Act, 1944 (hereinafter to be referred to as the taxing statute). The taxing statute was repealed by the Bihar Sales Tax Act, 1947, but the proviso to S. 32 of the said Act saved all proceedings under the taxing statute. Nothing, therefore turns upon the repeal, and this case has to be decided on the construction of the relevant provisions of the taxing statute.

[2] I give below a brief summary of the statement of the case on which the questions of law to be decided by us are raised. The assessee is the Tobacco Manufacturers (India) Limited, Monghyr (hereinafter to be referred to as the assessee). The opposite party was originally the Province of Bihar, now the State of Bihar. The accounting period for which the assessee is assessed is the period of six months from October 1944 to March 1945. The Superintendent of Commercial Taxes, Monghyr, by his order dated 26th July 1946, made an assessment against the assessee under S. 10 (2) (b) of the taxing statute. That assessment order shows that the gross turnover, as shown by the return submitted by the assessee, was Rs. 2,81,83,119-15-8. Making a deduction under S. 5 (2) (b) of the taxing statute, the taxable turnover was determined to be Rs. 2,76,19,458. On this taxable turnover, the amount of tax assessed was Rs. 4,33,116-0-6. Against this order of Assessment there was an appeal to the Commissioner of Bhagalpur division, such appeal being provided under S. 20 of the taxing statute. By reason of certain revised returns which the assessee was allowed to file during the pendency of the appeal, the gross turnover was increased to Rs. 3,41,98,134-1-2. Out of this gross turnover, the assessee, in his revised return, stated that the taxable turnover was only Rs. 57-5-0. Leaving out certain undisputed items to which the learned Commissioner has referred in his order dated 15th December 1947, the amount to which the present reference relates is Rs. 3,40,05,619-12-2 representing the price of sales of tobacco and cigarettes by the assessee to the Imperial Tobacco Company of India Limited (hereinafter to be referred to as the Company). Out of the aforesaid sum of Rs. 3,40,05,619-12-2, the assessee claimed a deduction in respect of Rs. 2,93,15,373-11-4 on two grounds. The first ground rested on S. 5 (2) (a) (v) of the taxing statute. The second ground, which was a ground in the alternative, rested on S. 5 (2) (a) (ii) of the taxing statute. In respect of the balance of Rs. 46,90,246-0-10, the assessee claim-

ed a deduction under S. 5 (2) (a) (ii) of the taxing statute. The learned Commissioner repelled both the grounds with regard to the deduction claimed in respect of the sum of Rs. 2,93,15,373-11-4. As to the other sum of Rs. 46,90,246-0-10, the learned Commissioner remanded the case with certain directions holding in effect that the assessee would be entitled to the deduction if the amount represented transactions which had passed through the Bihar depot of the Company. The learned Commissioner thus stated the directions:

> "I would even at this stage permit the appellant to produce a declaration in accordance with R. 36 (2) of the rules in support of his claim of exemption of this amount under S. 5 (2) (a) (ii) of the Act. This will be examined by the Sales Tax Officer and verified with the books of accounts of the Imperial Tobacco Company at Muzaffarpur either by himself or through the officer in charge of the Muzaffarpur Circle, and if the officer is satisfied of the genuineness of these transactions, this deduction may be allowed."

[3] Against the order of the learned Commissioner, there was an application in revision to the Board of Revenue. The Board, by its resolution dated 7th September 1948, rejected the application. Then, on 13th October 1948, the Board was moved to make a reference to the High Court under S. 21 (1) of the taxing statute on seven questions of law, which according to the assessee arose out of the order. By its order dated 15th May 1949, the Board refused to make a reference on the questions formulated by the assessee, but thought that the following question should be referred to the High Court:

> "Whether in view of the circumstances set forth above, the petitioner is entitled to exemption under S. 5 (2) (a) (ii) of the Act in respect of goods valued at Rs. 2,93 15,373-11-4, sold to Messrs. Imperial Tobacco Company of India Limited at Monghyr, and despatched to the branches of the said Imperial Tobacco Company Limited outside Bihar, even though these transactions did not pass through any registered branch of the said Imperial Tobacco Company of India Limited in Bihar."

The learned Member of the Board of Revenue thought that considerations of equity might justify some special treatment, though under the law the assessee was not entitled to any relief, and on that footing directed the reference of a question of equity to this Court for decision. I think that the learned Member was in error in thinking that a question of equity could be referred to this Court. An examination of the relevant provisions of S. 21 of the taxing statute makes it quite clear that a reference to the High Court is competent only on questions of law which arise out of the order. Sub-section (1) of S. 21 refers to "any question of law arising out of such order"; sub-s. (5) states that the High Court, upon the hearing of any such case, shall decide the question of law raised thereby. Thus, it seems clear to me that the learned Member of the Board of Revenue was not justified in referring a question of equity to this Court. It appears that, subsequently, when the Board of Revenue was required to state a case and refer it to the High Court under the provisions of sub-s. (3) of S. 21, the learned Member of the Board of Revenue himself realised that the original reference proposed by him was no longer necessary. However, this Court was moved against the order of refusal passed by the Board of Revenue, and this Court, then, formulated the following three questions, and called upon the Board of Revenue to state a case on them and refer it to the High Court; 1. Whether the assessee is entitled to claim deduction of Rs, 2,93,15,373-11-4 from the gross turnover by reason of the provisions of S. 5 (2) (a) (v), Bihar Sales-tax Act, 1944; 2. Or, in the alternative on the ground that the sales were made to registered dealers of goods, and therefore, exempted under S. 5 (2) (a) (ii); and 3. Whether the assessee is entitled to claim a deduction of Rs. 46,90,246-0-10 of sales from the gross turnover by reason of the fact that S. 5 (2) (a) (ii) entitles him to claim this deduction as the sales were made to a registered dealer of goods. The Board of Revenue stated a case accordingly on 14th September 1949.

[4] To complete the statement of the case it is necessary to state that the Commissioner accepted the case that the sum of Rs. 3,40,05,619-12-2 represented the sale of tobacco and cigarettes by the assessee to the Company in pursuance of an agreement dated 28th September 1943, some of the terms of which I shall presently mention. The aforesaid sale was certified by Messrs. Lovelockand Lewes, Chartered Accountants, Calcutta and verified by the Sales tax Officer. The Commissioner found that the agreement aforesaid was a manufacturing agreement, and the property in the goods (cigarettes and pipe tobacco manufactured under the agreement) had passed to the Company before despatch. It is not in dispute that cigarettes and tobacco of the price of Rs. 2,93,15,373-11-4 were despatched outside Bihar. The Commissioner gave two reasons for holding that a deduction of the amount could not be claimed under S. 5 (2) (a) (v) because (1) the property in the goods had passed before despatch, and (2) the despatch was made on behalf of the Company, viz., the purchaser, and not the assessee. As to the alternative claim of deduction under S. 5 (2) (a) (ii), the Commissioner found that the Company purchasing the goods through their Calcutta office (that is, at a place other than Muzaffarpur where it is a registered dealer) was not a registered dealer within the meaning of S. 7 of the taxing statute; the sale not being to a re-

gistered dealer, no deduction could be claimed under S. 5 (2) (a) (ii).

[5] Mr. P. R. Das, appearing for the assessee, has raised before us certain other questions of law which are not covered by the question on which the case has been stated and referred to us. Firstly, he has contended that on a true construction of the agreement dated 28th September 1943, the assessee is not a "dealer" within the meaning of the definition of that term in S. 2 (c) of the taxing statute, nor were the transactions between the assessee and the Company sales within the meaning of the taxing statute. This question was raised specifically for the first time when the Board was moved to refer the case to the High Court (*vide* questions 6 and 7 mentioned in the application to the Board). Prior to that, both before the Commissioner and the Board, the assessee proceeded on the footing that he was a dealer liable to assessment of tax; he submitted a return and claimed deduction on that footing. In the circumstances, we do not think that we shall be justified in enlarging the scope of the case stated, by including questions on which no case has been stated and which do not arise out of the order passed. The jurisdiction we exercise in cases of this kind is of the nature of advisory jurisdiction, which should be limited ordinarily to the questions raised on the case stated and referred to this Court. For the purpose of this case we must proceed on the footing that the assessee is a dealer and liable to assessment, leaving the new question now raised by Mr. Das to be decided hereafter if and when the occasion arises. To this course, Mr. Das has agreed on behalf of the assessee.

[6] Another question which Mr. Das raised was that a tax on a first sale by a manufacturer is, in substance, a duty of excise, and therefore, outside the scope of the taxing statute. On the first day of his arguments, Mr. Das relied on *Commonwealth Oil Refineries Ltd.* v. *State of South Australia*, 38 Com. L. R. 408 and certain observations made by Sir Maurice Gwyer C. J. (as he then was) in *Re the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938*, 1939 F. C. R. 18 : (A.I.R. (26) 1939 F. C. 1), with his usual fairness Mr. P. R. Das drew our attention, on the second day of his arguments, to the decisions of the Federal Court in *Province of Madras* v. *Boddu Paidanna & Sons*, 1942 F. C. R. 90: (A.I.R. (29) 1942 F. C. 33) and the *Governor General in Council* v. *Province of Madras*, 1943 F. C. R. 1: (A.I.R. (30) 1943 F. C. 11), which were against the view contended for by Mr. Das. The question ultimately went to the Privy Council in *Governor-General in Council* v. *Province of Madras*, 72 I. A. 91: (A.I.R. (32) 1945 P. C. 98). The Privy Council affirmed the view that the power of a Provincial Legislature to levy a tax on the sale of goods extends to sales of every kind, whether first sales by the manufacturer or producer or not, and a tax levied on the first sales by the manufacturer or producer is levied on him *qua* seller and not *qua* manufacturer or producer. Mr. Das concedes that the aforesaid decision, which is against his contention, is binding on this Court. It is, therefore, unnecessary to consider this question any further.

[7] I now come to the three questions on which a case has been stated and referred to us.

[8] *Question No. 1* — It is necessary to indicate very briefly the scheme of the taxing statute. Section 4 states, *inter alia*, that every dealer whose gross turnover during the year immediately preceding the commencement of the Act exceeded Rs. 5000 shall be liable to pay tax under the Act on sales effected after a notified date, the date being 1st October 1944. The expression "turnover" is defined in S. 2, and means

> "the aggregate of the amounts of sale-prices received and receivable by a dealer in respect of sale or supply of goods or carrying out of any contract, effected or made during a given period."

Section 5, which gives the rate of the tax, states, *inter alia*, that the tax payable by a dealer under the Act shall be levied at the rate of one quarter of an anna in the rupee on his taxable turnover. The expression "taxable turnover" is important for our purpose, and is explained in sub-s. (2) of S. 5. It means that part of a dealer's gross turnover which remains after making certain deductions therefrom. These deductions are stated seriatim in six sub-clauses under cl. (a) of sub-s. (2). Item 7 of deduction is mentioned in cl. (b) of sub-s. (2) of S. 5. The particular deduction which the assessee claimed and which has given rise to the first question, is stated to be under sub-cl. (v) of cl. (a) of sub-s. (2). Sub-clause (v) is in the following terms:

> "Sales of goods which are shown to the satisfaction of the Commissioner to have been despatched by, or in behalf of the dealer to an address outside Bihar."

The expression "dealer" is defined in S. 2, and means

> "any person who carries on the business of selling or supplying goods in Bihar, whether for commission, remuneration or otherwise and includes any firm or a Hindu joint family, and any society, club or association which sells or supplies goods to its members."

The expression "sale" is also defined in S. 2 in the following terms :

> "'Sale' means, with all its grammatical variations and cognate expressions, any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods involved in the execution of contract but does not include a mortgage, hypothecation, charge or pledge :
>
> Provided that a transfer of goods on hire-purchase or other instalment system of payment shall, notwith-

> standing the fact that the seller retains a title to any goods as security for payment of the price, be deemed to be a sale :
>
> Provided further that notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale of any goods which are actually in Bihar at the time when, in respect thereof, the contract of sale as defined in S. 4 of that Act is made, shall wherever the said contract of sale is made, be deemed for the purposes of this Act to have taken place in Bihar."

I have quoted in extenso the definition of the term "sale," as many of the arguments centered round the meaning of that term as used in sub-cl. (v) of cl. (a) of sub-s. (2) of S. 5.

[9] Let me now go back to sub-cl. (v). The question which we have to answer is whether the assessee is entitled to claim a deduction of Rs. 2,93,15,373-11-4 from his gross turnover by reason of sub-cl. (v). Sub-clause (v), when analysed, shows that three conditions must be fulfilled —(1) there must be sales of goods; (2) it must be shown to the satisfaction of the Commissioner that the goods have been dispatched to an address outside Bihar; and (3) the dispatch must be by the dealer or on behalf of the dealer. On the findings of the Commissioner and the Board, the first two conditions are clearly fulfilled. The question whether the third condition is fulfilled or not may present some difficulty to which I shall refer in due course. Mr. Das, appearing for the assessee, has very seriously contested the view of the Commissioner that sub-cl. (v) applies only to cases where the property in the goods is still retained by the despatching dealer at the time of the despatch. On this point, the Commissioner expressed himself as follows :

> "That clause obviously contemplates despatch of goods which at the time of despatch still is the property of the despatching dealer...... In my opinion S. 5 (2) (a) (v) of the Act only exempts, from the operation of the Sales Tax Act, those transactions in which property in the goods exported passes to the vendee outside Bihar, by the very act of despatch on the part of the despatching dealer."

The Advocate-General has supported the view of the Commissioner.

[10] In my opinion, the contention of Mr. Das is correct. The terms of sub-cl. (v) do not warrant the view expressed by the Commissioner. The sub-clause itself mentions "sales of goods." The word "which" following the expression "sales of goods" refers clearly to the "goods;" in other words, there is first a sale of goods; then a dispatch of the goods to an address outside Bihar. The sub-clause, in terms, does not speak of sales outside Bihar; but speaks of dispatch of the goods sold to an address outside Bihar. The learned Advocate-General has contended that his view of the sub-clause follows as a necessary corollary from the third condition imposed by the sub-clause, namely, that the goods must be despatched by or on behalf of the dealer. It is pointed out that in cases where the property in the goods has already passed to the buyer, the despatch of the goods cannot be by or on behalf of the selling dealer, but must be by or on behalf of the buyer himself. It is contended by the learned Advocate-General that the expression "sales of goods" occurring in sub-s. (v) really means agreement to sell at a future time or subject to some condition, or such contracts of sale as are referred to in S. 23, Sale of Goods Act ; in other words, the sub-clause applies in those cases only where the property in the goods has not passed to the seller prior to the despatch or even at the time of despatch, but will pass at some subsequent stage, outside Bihar. The learned Advocate-General has stated that the intention of the Legislature in enacting sub-cl. (v) was to exclude sales which took place outside Bihar.

[11] It is, I think, well settled that a taxing statute must be construed strictly, and if an assessee gets an advantage which the Legislature may not have intended, but which he is entitled to on the construction of the statute, the Court should not deprive him of that advantage. Therefore, the crucial question is not the intention of the Legislature in the abstract, but the intention as expressed in the statute ; in other words, the construction of the relevant clause of the taxing statute in accordance with well-recognised canons of interpretation. I have considerable doubt if the expression "sale" as used in the taxing statute includes an agreement to sell. The definition of the word "sale" makes it quite clear, I think, that the word, with all its grammatical variations and cognate expressions, means "any transfer of property in goods for cash or deferred payment, etc." Now, in an agreement for sale, there is no transfer of property. Under S. 4, Sale of Goods Act, 1930, to which we were referred, a contract of sale of goods is a contract whereby the seller either transfers or agrees to transfer the property in goods to the buyer for a price. The expression "contract of sale" thus includes (i) a sale, as well as (ii) an agreement to sell. Sub-clause (2) of S. 4, Sale of Goods Act says that a contract of sale may be absolute or conditional. Then, sub-s. (3) states that where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell. An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the

property in the goods is to be transferred. The argument of the learned Advocate is that sub-cl. (v) of S. 5 (2) (a) of the taxing statute is confined to cases where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled; that is, to cases where there is merely an agreement to sell without a transfer of the property in the goods—an agreement which will become a sale when the time elapses or the condition is fulfilled subject to which the property in the goods is to be transferred. The reply to this argument is that the definition of the term "sale", as given in the taxing statute, makes it clear that it means a "transfer of property in the goods". Therefore, the word 'sale" occurring in the taxing statute is not co-extensive with the expression "contract of sale" occurring in the Sale of Goods Act. One might say that the expression "contract of sale" is a wider circle within which are included two things; viz ; (1) a sale by a transfer of property in the goods, and (2) an agreement to sell where the transfer of property in the goods is to take place at a future time and subject to the fulfilment of some condition. In the taxing statute the word "sale" is used in the same sense, that is, where there has been a transfer of property in the goods.

[12] There has been some argument before us whether the second proviso to the definition clause of the term "sale", in any way enlarges the scope of the definition. The second proviso mentions the Sale of Goods Act, 1930, and also uses the expression "contract of sale". The learned Advocate-General has referred us to several American decisions where it has been stated that though, ordinarily, the purpose of a proviso is to provide some sort of an exception to the general rule mentioned in the substantive clause or to make the meaning of the substantive clause clear, a proviso may sometimes enlarge the scope and meaning of the substantive clause. I need refer to only one of the decisions to which the learned Advocate-General has drawn our attention. In *Inter-State Commerce Commission* v. *Daniel G. Baird*, 194 U. S. 360, Day J. quoted an earlier American decision to the following effect :

> "The general purpose of a proviso, as is well known, is to except the clause covered by it from the general provisions of a statute, or from some provisions of it, or to qualify the operation of the statute in some particular. But it is often used in other senses. It is common practice in legislative proceedings on the consideration of bills, for parties desirous of securing amendments to them to precede their proposed amendments with the term "provided", so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction "but" or "and" in the same place, and simply serving to separate or distinguish the different paragraphs or sentences."

[13] It may be conceded that the purpose and meaning of a proviso will depend on the construction to be put on the words used in the proviso. The question is really one of construction of the terms of a proviso, and not of legislative theory or practice. The second proviso to the definition clause of the term "sale" in the taxing statute, no doubt, mentions the expression "contract of sale"; but does the proviso, in any way, enlarge the meaning of the word "sale" as given in the definition clause ? In my opinion, it does not. The proviso itself says that there must be a sale of goods; but if the goods are actually in Bihar at the time when the contract of sale as defined in S. 4, Sale of Goods Act is made, the sale shall be deemed to be a sale in Bihar irrespective of the question where the contract for sale (which may be either an agreement to sell or contract transferring the property in the goods) is made in or outside Bihar. Clearly enough, the second proviso is meant to prevent an escape from the taxing statute of those sales where the goods are in Bihar, but the contract of sale is entered into outside Bihar. If this proviso were not there, such sales would have been held to have taken place outside Bihar, and thus would have fallen outside the scope of the taxing statute. Therefore, the proviso says : "*shall be* deemed for the purposes of this Act to have taken place in Bihar"; this means that under the Sales of Goods Act the sales legally took place outside Bihar, but they will be deemed to have taken in Bihar under the taxing statute. The proviso changes the place of sale in an artificial way, but not the conception of sale which still means a transfer of property in goods. The second proviso does not mean that a mere agreement to sell, which does not transfer property in the goods, is to be read as a sale for the purposes of the taxing statute. It is true that an agreement to sell ripens into a sale without a second contract, it ripens into a sale when the stipulated time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred. That does not, however, mean that an agreement to sell operates at once as a transfer of property in the goods. If that were so, there would be no difference in law between a sale and an agreement to sell. The distinction which sub-s. (3) of S. 4, Sale of Goods Act, 1930, draws will then disappear.

[14] The learned Advocate-General has referred us to some English decisions as to when property in the goods passes. I do not think that it is necessary to examine those decisions. The

finding of fact on which we are deciding the question of law is that the property in the goods in the case before us passed to the Company from the assessee before the dispatch of goods. There was, thus, a sale of goods, and if sub-cl. (v) relates to sales of goods and not to mere agreements to sell, then the first condition contemplated by sub-cl. (v) is fulfilled. In my opinion, sub-cl. (v) cannot be confined solely to agreements to sell or to sales outside Bihar, and the Commissioner was wrong in thinking that sub-cl. (v) applies only in cases where the property in the goods is still retained by the dispatching dealer before dispatch. The argument that sub-cl. (v) applies to those transactions only where property in the goods passes outside Bihar is open to these objections : (i) it gives the word "sales" in the first line of the sub-clause a meaning against the definition clause; (ii) the sub-clause loses its grammatical sense, and the relative pronoun "which" carries no meaning; (iii) the dispatch of goods to an address outside Bihar becomes meaningless, because the crucial test then becomes not where the goods are despatched but where the sale takes place; and (iv) it becomes difficult to reconcile the sub-clause with what is "deemed to be a sale in Bihar" under the Proviso 2 to the definition clause. Take this case, for example. A contract for sale is made outside Bihar, but the goods are in Bihar, Under Proviso 2, the sale shall be deemed to be in Bihar. If the goods are not dispatched outside Bihar, the assessee will be liable for tax. If the goods are despatched outside Bihar by the dealer, can he claim a deduction ? By a fiction of law the sale is deemed to be in Bihar: therefore, it cannot be said that the sale is outside Bihar. How can then such a dealer claim exemption under sub.cl. (v), unless the test is—where the goods are dispatched and by whom ? If sub-cl. (v) refers only to sales outside Bihar, then sales which are deemed to be sales in Bihar under Proviso 2 to the definition clause can never attract the operation of sub.cl. (v) even though the goods are despatched to an address outside Bihar by the dealer. To give relief to such a dealer, one must, perforce, hold that sub-cl. (v) has reference to where the goods are despatched and by whom. There may be more than one reason why the Legislature laid down such a test for exemption, viz., dispatch of goods by the dealer to an address outside Bihar. If one were permitted to speculate, one reason might be that the goods dispatched outside would be liable to tax in another province. Be that as it may, our plain duty is to interpret the law as we find it. If the intention were merely to exempt sales where property in the goods passes outside Bihar, irrespective of where the goods are despatched and by whom, one fails to see the necessity of Proviso 2 in the definition clause and sub-cl. (v). It would have been quite easy to say that sales, where the property in the goods passes outside Bihar, were to be excluded. If, however, the intention were that both conditions must be fulfilled—viz. (1) the property in the goods must pass outside Bihar, and (2) the goods must be dispatched to an address outside Bihar by the dealer, then the use of the word "sales" in sub-clause is inapt in that it is then being used in a sense contrary to the definition clause; for there is no sale till the property in the goods is transferred.

[15] I have not lost sight of the fact that the taxing statute provides "to impose a tax on the sale of goods in Bihar." In such a statute it would be unnecessary to refer to sales of goods outside Bihar, because they would not come under the purview of the Act and no question of granting an exemption on that ground would arise. In spite of a proviso like Proviso 2 to the definition clause, the 1947 Act avoids the kind of difficulty which has arisen, by omitting any provision like sub-cl. (v).

[16] I have already stated that the second condition, namely, despatch to an address outside Bihar has been fulfilled, on the finding of the Commissioner. The third condition, namely, whether the despatch was by the dealer or on his behalf, presents some difficulty. The word "despatch" in its ordinary dictionary sense means "to send away hastily," "to perform speedily." The despatcher need not necessarily be the owner of the goods. It is not unusual that the property in the goods is with one person, but the despatch is made by another. Mr. Das gave the ordinary example of a person who goes into a shop, buys certain things, pays the price and asks the shopkeeper to send the goods by post or rail: in such a case, the property in the goods has passed to the buyer, and if there is a loss in transit, the loss will fall on the buyer. But the despatch is being made by the seller, even though he has no more any property in the goods. If the intention of the Legislature in enacting sub-s. (v) was to exclude such transactions of dispatch, then the words they have used in sub-cl. (5) are inapt to give effect to that intention. In the Bihar Sales Tax Act, 1947, the position has been made clear in S. 4 by stating that the liability to pay tax under the Act will arise on sales which have taken place in Bihar, and there is no sub-clause like sub-cl. (v). It may be unfortunate that a loophole is provided by the way in which sub-cl. (v) has been drafted, but this Court has to interpret the terms of the sub-clause as it stands, and to give to every

word used therein its natural and accepted meaning. With regard to the third conditions, the finding of the Commissioner, as I understand it, is that the goods were actually despatched by the assessee, but the consignment note was in the name of the Company. I may usefully refer here to one of the terms of the agreement between the assessee and the Company under which the goods were manufactured and despatched. Clause 9 of the agreement reads :

> "The Manufacturing Company (the assessee) shall invoice all goods manufactured for the Imperial to the Imperial or as the Imperial may direct, and payment shall be made by the Imperial in accordance with cl. 7 hereof within fourteen days of the receipt of invoice each month."

It is not in dispute that the despatch was made in accordance with the term mentioned above. Therefore what happened was that the despatch was actually made by the assessee, though the property in the goods had passed to the company. I am unable to accept the argument that the despatch by or on behalf of the dealer necessarily means that the property in the goods is retained by the despatcher.

[17] Therefore, my answer to the first question is in the affirmative, namely, that the assessee is entitled to claim deduction of Rs. 2,93,15 373-11-4 from the gross turnover by reason of the provisions of S. 5 (2) (a) (v), Bihar Sales Tax Act, 1944.

[18] *Question No. 2.* The deduction claimed in the alternative in respect of Rs. 2,93,15,373-11-4 is under sub-cl. (ii) of S. 5 (2) (a). The sub-clause reads as follows :

> "Sales to a registered dealer of goods specified in the purchasing dealer's certificate of registration as being intended for re-sale by him, or for use by him in the manufacture of any goods for sale or in the execution of any contract, and on sales to a registered dealer of containers and other materials for the packing of such goods; "

The answer to the question turns upon whether the Company, wherever it may have its place of business, is a registered dealer within the meaning of S. 7 of the taxing statute, and whether the sale to the Company was intended for resale by it or for use by it in the manufacture of any goods etc. Learned Counsel for the assessee has given us a copy of the certificate of registration under S. 7, Bihar Sales Tax Act, 1944, which was issued to the Company by the Sales Tax Officer of Muzaffarpur. At the relevant date the Company had only one place of business in Bihar in the town of Muzaffarpur, though it had warehouses at other places. The certificate shows that the Imperial Tobacco Company of India, Limited, with only one place of business in the town of Muzaffarpur is a registered dealer for the re-sale of cigarettes and smoking tobacco. It is not in dispute that the sales in question were *not* transacted through its place of business at Muzaffarpur. The sales were made to the Imperial Tobacco Company of India, Limited, through its place of business in Calcutta.

[19] The learned Commissioner has referred to S. 7 of the taxing statute of 1944 and the rules made under the taxing statute. One of the rules R. 6, requires that a dealer having places of business in the jurisdiction of different Sales Tax Officers shall make one separate application to each such officer in respect of the place or places of business within the jurisdiction of that officer. Another relevant rule is R. 36 which relates to claims for deduction under sub-cls. (i) and (ii) of cl. (a) of sub-s. (2) of S. 5. That rule requires that a dealer who wishes to claim deduction under the aforesaid sub clauses must produce duplicate copies of the relevant cash receipts. The registered dealer in the present case was, in my opinion, the Imperial Tobacco Company of India, Limited, with its place of business at Muzaffarpur, and not the Imperial Tobacco Company of India, Limited, with its place of business in Calcutta. The fact that the Imperial Tobacco Company of India, Limited, is one business or *one* Company is of no consequence. The expression "registered dealer" in the taxing statute has an artificial, statutory meaning, a meaning which must be consistent with the schemes and purpose of the taxing statute. Section 7 enacts that no dealer shall, while being liable under S. 4 to pay tax under this Act, carrying on business as a dealer unless he has been registered under this Act and possesses a registration certificate. Sub-section (2) of S. 7 states that very dealer required by sub-s. (1) to be registered shall make application in such behalf in the prescribed manner to the prescribed authority. Therefore, the provisions of S. 7 should be read with the rules made under the taxing statute, the word "prescribed" meaning prescribed by rules under the Act. If the provisions of S. 7 are read with the rules made under the taxing statute, then it is clear that the only registered dealer within the meaning of the taxing statute of 1944 is the Imperial Tobacco Company of India, Limited, with its place of business at Muzaffarpur. One can easily realise the anomaly or difficulty which will arise if one were to take the Imperial Tobacco Company of India, Limited, as one entity for the purposes of the taxing statute, though the Company with its place of business in Calcutta or other places outside Bihar was not registered at all. A registered dealer has to submit returns of its transactions. The Company with its place of business in Calcutta did not submit any return to the taxing officers under the taxing statute.

and the sales in respect of Rs. 2,93,15,373-11-4, were not shown by the Company with its place of business at Muzaffarpur. I am unable to accept the contention that for the purposes of the taxing statute the Company should be deemed to be one unit, and the registration certificate issued to the Company with its place of business at Muzaffarpur, should be taken as a registration certificate to the Company with all its place of business inside and outside Bihar. That would render nugatory the provisions of S. 7 and the rules made under the taxing statute.

[19a] I would, therefore, answer the second question against the assessee.

[20] *Question No. 3.* The answer to the third question must follow the answer to the second question, and the learned Commissioner was right in directing that an enquiry should be made whether the sales to the extent of Rs. 46,90,246-0-10 were made to a registered dealer within the meaning of S. 5 (2) (a) (ii) of the taxing statute of 1944, namely, the Imperial Tobacco Company of India, Limited, with its place of business at Muzaffarpur.

[21] **Sarjoo Prasad J.** — The facts giving rise to this reference have been very lucidly stated in the judgment of my learned brother Das as I find from the draft prepared by him and sent for my perusal. It is, therefore, unnecessary to reiterate those facts. I am in complete agreement with him in regard to his answers to questions 2 and 3 on which a statement of case was called for from the Board of Revenue. I also agree that the questions which do not arise out of the orders passed by the Commissioner and the Board of Revenue and on which no statement of case was called for by this Court should not be answered at this stage. Mr. P. R. Das who appeared for the assessee did urge two important points for our consideration in addition to those formulated by this Court; (1) that the assessee was not a "dealer" and that the transactions of the assessee did not in fact amount to "sale" within the meaning of the Bihar Sales Tax Act. This argument, in my opinion, assumed considerable force on the interpretation of the deed of agreement itself between the assessee and the Imperial Tobacco Company. But Mr. P. R. Das very rightly abandoned the point for the purpose of this reference and reserved it for consideration on some future suitable occasion. He was also justified in not pressing his second point, viz. (2) that the duty levied on the sale of goods immediately after their manufacture was necessarily in the nature of an "excise duty". Such an assumption, as Mr. P. R. Das himself pointed out, was against the Privy Council view in *Governor-General in Council* v. *Province of Madras*, 72 I. A. 91 : (A.I.R. (32) 1945 P. C. 98). These grounds, therefore, need no further consideration.

[22] I find myself, however, in the unhappy position of not being able to agree with my learned brother in his answer to question No. 1 arising out of the reference. The difference relates to the interpretation of S. 5 (2) (a) (v), Bihar Sales Tax Act (Bihar Act VI [6] of 1944) under which reduction is claimed by the assessee. For the sake of convenience I shall also refer to this Act as the "Taxing Statute". As the amount involved affects almost the bulk of the "taxable turnover" to the tune of Rs. 2,93,15,373-11-4, and the difference is in any case one of vital importance, it is necessary for me to record my own views.

[23] The Commissioner and the Board of Revenue took the view that the sales having been completed in Bihar and the property in the goods having passed to the Imperial Tobacco Company from the assessee before the despatch of the goods, a deduction under S. 5 (2) (a) (v) was not permissible and the sale proceeds in respect of those goods, their sales having been effected in Bihar, could not be excluded from the "taxable turnover" of the assessee. Mr. P. R. Das appearing for the assessee, however, contends that on the strength of this very finding, if the goods in question were found to the satisfaction of the Commissioner to have been despatched outside Bihar, by or on behalf of the dealer, the assessee should be held entitled to a deduction of the sale prices in respect of those goods. According to his contention, the sale-price of such goods, even though the goods were sold in Bihar should be exempted from taxation. This contention, as I shall presently show, runs counter to the fundamental purpose of the "Taxing Statute" which is an Act "to impose a tax on the sale of goods in Bihar". I have come to this conclusion both on an examination of the scheme of the Act as also of the language of S. 5 (2) (a) (v) itself on which reliance is placed by the assessee.

[24] The scheme of the Act shows that it was brought into existence for the purpose of levying sales tax in respect of goods sold in Bihar, and the acid test, therefore, in interpreting the provisions of the Act is to see where the sale has taken place. If the sale has taken place in Bihar, then to fulfil the purpose of the statute a tax has to be imposed upon such a sale unless by express terms of the statute the sale has been so exempted. The statute is not concerned as to what happens to the goods after the sale is effected. Whether the goods after the sale, in other words, after title in the goods has passed on to the vendee, are despatched by the vendor himself or by the vendee to any place outside

Bihar is hardly of any moment. The despatch of the goods after their sale has nothing to do with the imposition of sales tax under the statute which is to be levied on the sale of goods in Bihar. These basic considerations have to be kept in view in ascertaining the meaning of S. 5 (2) (a) (v) which, as I shall show hereafter, is intended to exempt from taxation the sale price of such goods as have been sent by the dealer to a place outside the province of Bihar and have been sold at such a place.

[25] I may refer to some of the provisions of the taxing statute in order to clarify the position. The term "dealer" under the statute means any person who carries on the business of selling or supplying goods in Bihar. I am adopting this definition after discarding some of the expressions which are irrelevant for the present. This dealer may be a "wholesaler" or a "retailer" and his business in ordinary course of events may relate to transactions both outside and inside the province. The sale and supply of goods may be also in pursuance of contracts for sale entered into by the dealer who has his place of business in Bihar, and in pursuance of such contracts he may have to supply and despatch the goods outside the province.

[26] The word "sale", again speaking broadly, has been defined in the Act as: (i) transfer of property in goods for cash paid or promised or other valuable consideration; (ii) supply of goods on hire-purchase system where the vendor retains his lien over the goods for unpaid purchase money; and (iii) supply of goods in pursuance of any contract of sale when at the date of such contract the goods were in Bihar. In all these three class of cases the transactions of the dealer would be regarded as "sale" for the purpose of assessment. It is not necessary for me to go into any elaborate discussion as to the import and meaning of a proviso. My learned brother in his judgment has fully discussed the matter, and I agree that though ordinarily a proviso does not enlarge the meaning of the section, yet in many cases the effect thereof may be to add to the terms of the section and enlarge its connotation. The construction to be put on the words of a proviso would depend upon the context in which it is used; and so far as the definition of "sale" is concerned, it seems quite obvious to me that it was intended to include transactions of all the three characters which I have indicated above. Now, these sales, as I said, may take place in Bihar or may take place outside the province because the dealer in the ramification of his business is at liberty to sell his goods either in this province or outside it. Cases of such a dealer are not uncommon. His "turnover," therefore, means "the aggregate of the amounts of sale-prices received and receivable by a dealer in respect of sale or supply of goods during the period of assessment." I have, of course, again broadly referred to this definition only in so far as the words are material. The above definitions are embodied in S. 2 cls. (c), (g) and (i) of the taxing statute. The definition of "turnover" is material because it relates to the aggregate of sale prices obtained by the dealer and may include not only sale-prices in respect of goods sold by the dealer in Bihar in course of his transactions, but also in respect of the goods sold by the dealer at any place outside the province. In short his "turnover" would relate to all transactions irrespective of the place where the sales are held, and if his books are kept in regular course of business, as presumably they would be, they must show all the sale-prices received by him in his day to day transactions.

[27] It is again important to consider the bearing of S. 4 of the statute upon the point which I am seeking to illustrate. Section 4 of the taxing statute refers to incidents of taxation. It provides in substance that every dealer whose "gross turnover" during the year immediately preceding the commencement of the Act exceeded a certain sum of money, would be liable to pay the tax under the Act on sales that took place after the relevant date notified under the provision. This gross "turnover," as I have shown refers to all sales effected by the dealer. Therefore, the incidents of taxation would depend upon the aggregate of sale prices received by the dealer which might as well include not only sale prices of goods sold by the dealer in the province of Bihar but also despatched for sale in prosecution of his business outside the province and sold there. The Legislature must be taken to have been cognisant of these factors when providing for the deductions in ascertaining the "taxable turnover" of the dealer. In such cases when goods are sold outside the province the "despatch of the goods by and on behalf of the dealer" for the purpose of selling them outside the province would be only in normal process of transaction. Therefore, nothing much turns upon the meaning of the term "despatch" and it is safer to adopt the natural meaning of the expression.

[28] I next come to S. 5 of the taxing statute which is the taxing provision under the Act. It is significant that in this provision it is not the "gross turnover" on which the assessment is to be made but on the "taxable turnover," though the incidents of taxation depend upon the former. This "taxable turnover" is to be ascertained by the taxing authority after making certain deductions from the gross turnover of the

dealer. These deductions are enumerated in the various sub-clauses of S. 5 (2) (a) as also in cl. (b) of the statute. Some of the deductions contemplated are where the sale price relates to (i) sale of goods which are tax-free and have been declared to be so under S. 6 of the Act by the Provincial Government; (ii) sale of goods to a registered dealer of the goods specified in the purchasing dealer's certificate of registration (iii) sale of goods to the Indian Stores Department, the Supply Department of the Government of India etc.; and (iv) where the sale price relates to sale of goods which have been shown to the satisfaction of the Commissioner to have been despatched for sale to an address outside Bihar. It is this deduction which is in question here and which I have advisedly put in that form. I need not refer to the other deductions contemplated by the provision. From what I have discussed above, the conclusion appears to follow that under S. 5 (2) (a) (v) the deduction contemplated was in respect of that part of the dealer's turnover which related to sales of goods despatched for sale outside the province of Bihar. In respect of such sales the dealer had to be exempted under the Act and the receipt of such sale-prices had to be deducted from his "gross turnover" during the period of assessment in determining his "taxable turnover".

[29] My conclusion in this respect is further strengthened by another provision in the taxing statute. Under S. 9 of the Act a dealer is required to furnish to the Commissioner a return in the prescribed manner. Under S. 26 of the Act the Provincial Government is empowered to frame rules for carrying out the purposes of the Act. Amongst others the Government is entitled to frame rules for submission of returns under S. 9 of the Act. Accordingly rules have been framed by Government, and R, 21 provides for submission of all returns by a dealer in form VI. The form indicates that the dealer must mention his gross turnover and then claim the permissible deductions. Serial No. 7 in the form which under the heading "Deductions under S. 5 (2) (a) on account of sales effected during the return period" refers to cl. (v) and shows that deductions can be claimed on account of sales "to addresses outside Bihar." These rules are statutory rules and are an integral part of the taxing statute. The deduction permissible under S. 5 (2) (a) (v) is on the footing that it relates to sales to an address outside Bihar; in other words, the sales effected outside the province. The emphasis is upon "sale" and not upon "despatch" and the word "despatch" does not even occur in the form. The dealer in submitting his return must therefore mention the aggregate of sale-prices received by him in respect of all sales effected by him both inside and outside the province during the period of assessment; but the taxing authority in ascertaining his taxable turnover will permit him a deduction in respect of the sale-prices of those goods which were despatched by him for sale to an address outside Bihar and sold there.

[30] I cannot, therefore, see how it can be successfully argued that although the sale of the goods had taken place in Bihar and title to the goods had passed on to the vendee, yet the dealer could claim an exemption from taxation in respect of the sale price of those goods merely because after the completion of the sale the goods were despatched outside the province. If this were so, a wholesale dealer, although carrying on business in Bihar and completing all his transactions here, could avoid taxation by sending away the goods outside the province. Such an interpretation of the relevant provisions of the statute would, as I have said, defeat the very purpose and object of the legislation, the essential purpose of which was to tax all sales of goods in the province.

[31] I quite agree that a taxing statute has got to be strictly construed. It also cannot be doubted that if there is a lacuna or loophole in the statute allowing the assessee to escape taxation, the advantage thereof must be conceded to the assessee. At the same time, however, it cannot be denied that a statute has got to be construed in such a manner as to give effect to the purpose for which it has been enacted and not so as to defeat its purpose. I am afraid if the argument advanced by Mr. P. R. Das is to be accepted, it would plainly be against the very purpose of the legislation, and in violation of its taxing provisions.

[32] Nor is the interpretation, which I have given inconsistent with the language of the provision itself. It is true that in the new Act of 1947 the position has been absolutely clarified; but even in the Act of 1944, though there may be some amount of circumlocution, the meaning is quite clear. As I have pointed out, the test is where has the sale taken place. If the sale has taken place in Bihar, then the legislature never intended in enacting this statute to exempt the sale prices of such sales from taxation. There is no meaning in providing that it should be shown to the satisfaction of the Commissioner that the goods have been despatched "by or on behalf of the dealer" unless it was to emphasise that the property in the goods remained in the dealer before the despatch of the goods. Why should the statute require that the Commissioner should have proof to be satisfied that the despatch was "by or on behalf of the dealer" if there was no intention to tax

the sales which had been already effected? It would be a futile enquiry by the Commissioner because mere proof of despatch of the goods outside the province ought to have served the purpose. It should have been enough for the assessee to show that the goods were despatched outside the province either by the assessee himself or by the vendee. But why must needs the dealer show that the despatch was by him and on his behalf? On the interpretation of Mr. P. R. Das, the sale having been completed in Bihar and the title to the goods having already passed, such an insistence by the legislature would be utterly meaningless. What does it matter to the Commissioner whether the dealer himself despatched the goods or the vendee to whom title to the goods had passed already, as contended for by Mr. P. R. Das, despatched on his own behalf? The natural meaning, therefore, seems to be that this enquiry was necessary in order to ascertain whether title to the goods was still in the dealer before the despatch of the goods. It, therefore, contemplated sale of goods after the despatch was so made by the dealer to an address outside Bihar. That seems to be the inevitable inference. Sale-prices so received by the dealer in respect of such goods sent for sale outside the province of Bihar will be exempted from taxation and will have to be deducted from the dealer's turnover in finding out the "taxable turnover" on which the assessment is to be levied.

[33] I would here refer to the context in which sub-cl. (v) of S. 5 (2) (a) occurs. My learned brother has, if I may respectfully say so, rightly pointed out that sub-cl. (v) requires three conditions : (i) Sale of the goods; (ii) that it must be shown to the satisfaction of the Commissioner that the goods were despatched to an address outside Bihar; and (iii) that the despatch must be by and on behalf as the dealer. But the mere fact that the expression "sales of goods" occurs in the very beginning of the sub-clause does not necessarily signify that the sales must have taken place before the goods were despatched to "an address outside Bihar". Let us reproduce sub-s. (2) (a) of S. 5 of the Act along with sub-cl. (v) only eliminating the other sub-clauses and see how it reads. It reads thus:

> "(2) In this Act the expression 'taxable turnover' means that part of a dealer's gross turnover during any period which remains after deducting therefrom,—
>
> (a) his turnover during that period on—
>
> (v) sales of goods *which* are shown to the satisfaction of the Commissioner to have been despatched by, or on behalf of, the dealer to an address outside Bihar."

The words which follow the conjunction "which" in sub-cl. (v) of the section qualify not only the term "goods" but the term "sales of goods" or rather "the turnover during that period on sales of goods". We know the meaning of the expression "turnover" which means the aggregate of sale prices received by the dealer. Therefore the natural rendering of the provision would be: sale prices of such goods as "are shown to the satisfaction of the Commissioner to have been despatched" for sale "by and on behalf of the dealer to an address outside Bihar" should be deducted from the aggregate of sale prices received by him during the relevant period in determining the "taxable turnover" of the dealer. This rendering would be quite consistent with the other provisions of the statute and the purpose of the statute itself.

[34] I am not much impressed with one of the arguments of the learned Advocate-General which was to the effect that the words "sales of goods" in the sub-clause in question refer only to contract of sale as contemplated by S. 23, Sale of Goods Act. I have already said that the definition of the term "sale" for the purposes of taxing statute includes all the three kinds of transactions, namely, (i) sale for consideration paid or promised; (ii) sale or supply of goods on hire-purchase system; and (iii) sale in pursuance of a contract of sale where at *the time of the contract the* goods were in province of Bihar. Even under sub-cl. (v) of S. 5 (2) (a) Act the terms "sales" might well be intended to refer to all the three kinds of transactions stated above; and there is no reason why it should be confined merely to contract of sale under which the property in the goods passes at a later stage to the vendee. In my opinion, there is no anomaly whatsoever in importing the above concepts of sale even in the application of S. 5 (2) (a) (v) of the taxing statute.

[35] In forming my conclusions, as aforesaid, I have endeavoured to give full effect to all the relevant provisions of the statute and the language of the sub-clause itself under which the assessee claims deduction. I cannot in spite of my most anxious consideration of the matter come to a conclusion different from the one at which I have arrived, and this conclusion, as I have shown, is not prompted by any supposed intention of the legislature but by a plain reading of the language of its various provisions.

[36] It is also significant to note that neither before the Commissioner nor before the Board of Revenue the present argument which is now advanced by Mr. P. R. Das was ever advanced. Before the Commissioner the argument was that the deduction should be allowed *because the sales "had not" taken place in Bihar*, whereas before this Court the argument now is

that deduction should be allowed *because the sales "have" taken place in Bihar* but the goods were despatched outside. Before the Commissioner the argument proceeded on the assumption that if the sales did take place in Bihar, the assessee could not be entitled to the deduction as contemplated by S. 5 (2) (a) (v). A similar attitude was taken also before the Board of Revenue. I will refer to the relevant passages in the order of the Commissioner and the Board of Revenue. The learned Commissioner after an elaborate examination of the terms of an agreement between the assessee Company and the Imperial Tobacco Company Ltd. came to the conclusion as follows:

> " In my opinion, S. 5 (2) (a) (v) of the Act only exempts from the operation of the Sales Tax Act those transactions in which, property in the goods exported passes to the vendee. outside Bihar, by the very act of despath on the part of the despatching dealer. If property has already passed at a point of time antecedent to the of time of despatch this clause will not be operative. In this case at that time of despatch, the property is no longer that of the appellant; it became the property of the Imperial Tobacco Company Ltd., in accordance with the terms of the agreement the moment it was manufactured and put in a deliverable State. It is not open to the appellant thereto claim exemtion under S. 5 (2) (a)(v) of the Act on the ground of export outside Bihar, of goods which are not his property."

There was no argument before him that even if the sales are completed in Bihar and the title to the goods passed to the vendee by the mere fact of the goods having been despatched outside Bihar, the assessee was entitled to an exemption in respect of the sale price of such goods. Before the Board of Revenue the argument was on the same footing. So far as the alternative argument in respect of this item is concerned, my learned brother has elaborately dealt with it, and I respectfully agree with that part of the judgment. I will, therefore refer only to the argument advanced in regard to the application of the exemption claimed under S. 5 (2) (a) (v) of the Act:

> "The learned advocate who appeared for the petitioner argued with considerable force, that according to the provisions of S. 23 (2), Sales of Goods Act, the sale by the petitioners to the Imperial Tobacco Co. of India Ltd. was *not completed before the despatch of the goods* to the branches of the Imperial Tobacco Co. of India Ltd. in Calcutta and other places in India. The learned Commissioner has examined this point, in great detail, with reference to the contents of the agreement between the two parties and the provisions of law contained in the Bihar Sales Tax Act and the Sales of Goods Act and has given overwhelming reasons for his finding, with which I see no reason to disagree, that the sale was completed as soon as the petitioners completed the manufacture of goods in their Factory at Monghyr and put them in a deliverable condition and that the legal position remained unalterad whether or not the goods were sent elsewhere according to the directions of the purchaser restored in the petitioners' godowns for disposal according to such directions as the purchasing company might have issued in future."

[37] From the above findings and examination of the judgments of the Commissioner and the Board of Revenue on the point, it is apparent that the argument was focussed only on the question that the sales of goods had not been completed in Bihar, and, therefore, the benefit of S. (2) (a) (v) was available to the assessee. This argument was consistent with the natural meaning of the provision and the general tenor of the taxing statute. If it had been found by the Commissioner and the Board of Revenue on the evidence on record that the title to the goods had not passed to the Imperial Tobacco Company and the title remained in the vendor before the goods were despatched outside the province, then, in my opinion, the assessee would have been entitled to a deduction in respect of the sale proceeds of those goods within the meaning of the provision. But on that point there is a definite finding of fact against him, and, in my opinion, the finding is a perfectly correct finding. This finding has not been questioned before us and could not be questioned. That being so, strictly speaking, the point now argued before us did not arise on the orders of the Commissioner or the Board of Revenue. What Mr. P. R. Das now argues is something just contrary to the argument advanced before them. I need hardly point out that under S. 21 (3) read with S. 21 (1) of the Act the Board may require to make a reference to the High Court in respect of any questions of law arising out of such order, which means the order of the Commissioner or the Board of Revenue as contemplated by the preceding section, namely, S. 20 (3) of the Act.

[38] For all these reasons, I am inclined to think that the answer to the first question also should be that the assessee is not entitled to claim deduction from the gross turnover in respect of the sum of Rs. 2,93,15,373-11-4 under S. 5 (2) (a) (v), Bihar Sales Tax Act (Bihar Act VI [6] of 1944) and that the order of the revenue authorities on the point is substantially correct.

[39] **Sinha J.**—This case comes before me on a difference between my learned brothers Das and Sarjoo Prosad, JJ. on the construction of the provisions of S. 5 (2) (a) (v), Bihar Sales Tax Act (Bihar Act VI [6] of 1944). This Act has now been replaced by Bihar Act XIX [19] of 1947; but the case depends upon the true construction of the provisions of the repealed Act. The Board of Revenue, which is the highest authority under the Act, refused to make a reference under S. 21 (1) of the Act. Thereupon, the assessee moved this Court, and, under the provisions of sub-s.

(3) of S. 21 of the Act, this Court called upon the Board of Revenue to state a case. This reference was thus made under the directions of this Court. Three questions were formulated by this Court for reference. My learned brothers Das and Sarjoo Prosad, JJ. agreed on the answer to be given to the second and the third questions; but they did not agree as to the answer to be given to the first question, which is in these terms:

> "Whether the assessee is entitled to claim deduction of Rs. 2,93,15,373-11-4 from the gross turnover by reason of the provisions of S. 5 (2) (a) (v), Bihar Sales Tax Act, 1944."

[40] It is not necessary for me at this stage to state in detail all the facts of the case, which have been set out in the judgment of my learned brother Das, J. It is only necessary to state that, in pursuance of an agreement between the petitioner Company (Messrs. Tobacco Manufacturers (India). Ltd.) and the Imperial Tobacco Company of India, Ltd., the assessee manufactures Tobacco and cigarettes in the District of Monghyr, exclusively for the Imperial Tobacco Company of India, Ltd., the latter Company having its registered office in Calcutta. The assessee also agreed to despatch all the manufactured goods on behalf of the Imperial Tobacco Company, Ltd., and in their name, to destination inside Bihar, or out of it, according to the directions of the latter Company which agreed to pay, by way of remuneration, to the assessee full cost of manufacture *plus* 20 per cent. of such cost. Accordingly, the assessee has been manufacturing tobacco and cigarettes for, and on behalf of, the Imperial Tobacco Company, Ltd., and despatching the same in their name to destinations outside Bihar. Such despatches during the relevant period, namely, October 1944 to March 1945, were of the value of Rs. 2,93,15,373-11-4. In short, it was an agreement between the two companies aforesaid for the manufacture and supply of tobacco and and cigarettes in Bihar for a remuneration. When the matter came before the learned Commissioner, he recorded the following findings :

> "That the property is not his (that is, the assessee's) at the time of despatch is abundantly proved by the other circumstantial evidence, such as the certificate in document (h) filed by the appellant with his petition dated 16th October 1947 (filed on 31st October 1947), where the despatch is mentioned as being made by the appellant on behalf of the Imperial ; and by the fact that consignments are always made in the name of the Imperial Tobacco Company, Ltd., as consignor. This shows clearly that the parties had intended that property in the goods should pass to the Imperial before the despatch."

[41] It is thus clear that the petitioner is a "dealer" within the meaning of S. 2 (c) of the Act, as, by its contract with the Imperial Tobacco Company, it has agreed, for a remuneration, to supply goods to the latter. The remuneration agreed to be paid to the assessee is "sale price," according to cl. (h) of S. 2. The transaction between the parties to the agreement is, therefore, a "sale" within the meaning of cl. (g) of S. 2, being "a transfer of property in goods involved in the execution of contract" (omitting the unnecessary words of that clause for our present purposes). Moreover, it is not necessary to enter into an elaborate discussion of this point, as, in this Court at least, the arguments on behalf of the assessee proceeded on the assumption that the transaction was one of sale.

[42] The real difference between the parties centres round the true meaning of the expression "taxable turnover" in sub-s. (2) of S. 5 of the Act. On this question, the position of the assessee has not been consistent throughout. In the Revenue Courts, the contention raised on behalf of the assessee was that the sales in question did not take place in Bihar at all, and that, as a matter of law and fact, these sales took place outside Bihar, and were, therefore, not taxable. In this Court, the position taken by the learned Counsel on behalf of the assessee was that the transactions of sale were completed in Bihar but that the goods were despatched to addresses outside Bihar on behalf of the assessee, and that, therefore, the conditions laid down in sub-cl. (v) of cl. (a) of sub-s. (2) of S. 5 of the Act were satisfied. The position taken up on behalf of the Revenue has been that the sales took place in Bihar; that the delivery by the assessee also took place in Bihar ; and that, as a consequence, the goods were despatched outside Bihar not on behalf of the assessee but on behalf of the purchaser, namely, the Imperial Tobacco Company of India, Ltd. My learned brother Das J., in effect, accepted the contentions raised on behalf of the assessee, and answered the first question in the affirmative, that is to say, he took the view that the assessee was entitled to claim deduction of the said sum of Rs. 2,93,15,373-11-4 from the gross turnover by reason of the provisions of S. 5 (2) (a) (v), Bihar Sales Tax Act, 1944. On the other hand, my learned brother Sarjoo Prasad J., answered the question in the negative, in agreement with the Revenue authorities.

[43] It is manifest that the answer to the first question, which is the only question before me, must depend upon the true construction of the provisions of sub-cl. (v) aforesaid. In terms of sub-s. (2) of S. 5 :

> "taxable turnover" means that part of a dealer's gross turnover during any period which remains after deducting therefrom
>
> (a) his turnover during that period on
>
> (v) sales of goods which are shown to the satisfaction of the Commissioner to have been despatched by, or on behalf of, the dealer to an address outside Bihar."

[44] I have omitted those portions of sub-s. (2) which do not enter into the controversy before me. They are the other items of deduction which an assessee may claim under the provisions of sub-s. (2) of S. 5. The two learned Judges constituting the Division Bench have agreed that, in order to attract the operation of sub-cl. (v), quoted above, the following three conditions must be fulfilled :

> "(1) there must be sales of goods; (2) it must be shown to the satisfaction of the Commissioner that the goods have been despatched to an address outside Bihar; and (3) the despatch must be by the dealer or on behalf of the dealer."

I would modify the second and the third conditions as under : (2) it must be shown to the satisfaction of the Commissioner that the goods have been despatched by, or on behalf of, the dealer; and (3) the Commissioner must also be satisfied that the goods had been despatched to an address outside Bihar. The legislature, in its wisdom, has constituted the Commissioner the sole authority who has to be satisfied as to the two matters stated in conditions (2) and (3). If the Commissioner, on the evidence before him, is not satisfied as to any or both of them, the assessee will not be entitled to the benefit of the deduction provided therein. In the present case, as I read the findings of the learned Commissioner, though he was satisfied that the goods had been despatched to an address outside Bihar (condition 3), he was not satisfied that the goods had been despatched by, or on behalf of, the dealer ; on the other hand, he came to the conclusion that the goods had been despatched by, or on behalf of, the purchaser, the Imperial Tobacco Company of India, Ltd.

[45] The legislature has made the question of despatch by or on behalf of, the dealer one of crucial conditions for the application of sub-cl. (v) aforesaid, advisedly because, in my opinion, delivery of the goods within the Province of Bihar has been taken to be the essential condition of liability for the tax. If the goods had not been delivered by the dealer to the purchaser within the Province of Bihar, the dealer would not be liable for the tax, though the sale may have taken place in Bihar. In the supposed case, the goods would be despatched by the dealer or on his behalf; whereas only where the goods had been delivered by the dealer to the purchaser within the Province of Bihar could the purchaser have been able to despatch the goods on his own behalf to himself as consignee to any destinations as he directed, in pursuance of the contract between the dealer and the purchaser. Hence, on a plain reading of the relevant provisions of the Act, and giving effect to every word of those provisions, it must be held, in my opinion, that on the findings of the Commissioner, the assessee has failed to satisfy him that the goods had been despatched by him or on his behalf, and that, therefore he has failed to satisfy one of the essential conditions to attract those provisions, in order to get the deduction in respect of the amount in question. For these reasons, I do not agree with the following observations of my learned brother Sarjoo Prosad, J :

> "The statute is not concerned as to what happens to the goods after the sale is effected. Whether the goods after the sale, in other words, after title in the goods has passed on to the vendee, are despatched by the vendor himself or by the vendee to any place outside Bihar is hardly of any moment. The despatch of the goods after their sale has nothing to do with the imposition of sales tax under the statute which is to be levied on the sale of goods in Bihar."

These observations of my learned brother are, in my opinion, in teeth of the express words of the very sub-cl. (v) which has to be construed. One of the cardinal principles of construction of a statute is that each and every word used in a particular provision of the statute must be given its full effect and meaning. If my learned brother Sarjoo Prosad, J. is right in his observations quoted above, then the words "despatched by, or on behalf of, the dealer" in the sub-clause aforesaid are redundant. With all respect to his views, in my opinion, those words are not only not redundant but provide the key to the construction of the whole sub-clause. If the dealer as in the present case, has entered into an agreement with the vendee that, on manufacture of the goods and their being packed into a deliverable state, the goods become the property of the vendee, and are delivered to him in Bihar, the transaction of sale has become complete and effective in all respects. If, after all that has happened, the goods are despatched to places outside Bihar, those despatches must, in fact and law, be on behalf of the vendee, and in accordance with the scheme of the taxing statute, those transactions become part of the "taxable turnover". If, on the other hand, the agreement between the parties were that the goods, after their manufacture and being packed in a deliverable state, were still at the disposal of the dealer, and that the responsibility for the goods would attach to the vendee upon their delivery either inside Bihar or outside it, then, in accordance with the terms of this sub-clause, the dealer shall not be liable for taxes on those transactions in which the delivery took place outside the limits of Bihar. The crucial test, therefore, in my opinion, laid down by the sub-clause is where the goods have been delivered to the vendee. If they have been delivered within the Province, the dealer is liable to pay taxes thereon: if they have been delivered outside the Province, then the dealer is entitled to the deduction provided for in the sub-clause in question. That is the criterion which has been laid down by the legislature for determining the question of whether or not the transactions were liable to be taxed. Hence, to ignore those crucial words would be wholly unjustified.

[46] The question of who despatched the goods, or on whose behalf the goods were despatched, is not a question of form but very much a question of substance, to determine which the legislature has constituted the Commissioner the sole authority. In all the circumstances of the case, the Commissioner has to determine the all-important question by whom, or on whose behalf, the goods had been despatched outside Bihar. Naturally the Commissioner has to take into his consideration the circumstances of each particular case in order to arrive at his conclusion. In the present case, the Commissioner has recorded the finding that the goods had been despatched not on behalf of the dealer but on behalf of the Imperial Tobacco Company who, in terms of the contract between the parties, must be deemed to have taken delivery of the goods as soon as they were manufactured and packed.

[47] I do not also agree with my learned brother Sarjoo Prosad J. when he makes the following observations on the grammatical construction of sub-cl. (v) of cl. (a) of sub-s. (2) of S. 5:

> "The words which follow the conjunction 'which' in sub-cl. (v) of the section qualify not only the term 'goods' but the term 'sales of goods' or rather 'the turnover during that period on sales of goods."

My learned brother Das J. has pointed out very elaborately the pitfalls in such a construction. As I entirely agree with the observations of my learned brother Das J. on the grammatical construction of the sub-clause in question, I need not repeat those reasons. It is clear that the word 'which' following the expression 'sales of goods' clearly refers to the 'goods'. I also entirely agree with my learned brother Das J. that, under sub-cl. (v) in question, the test is where the goods were despatched and by whom? and that, in order to give relief to a dealer under sub-cl. (v), the question must be answered—where the goods were despatched and by whom? I am absolutely clear in my mind that my learned brother Das J. is right in holding that the sub-clause in question has reference to sales and not to contract for sales in Bihar. I also agree with both my learned brothers that the conditions (1) and (3), as I have analysed them, are satisfied in this case; but, in disagreement with my learned brother Das J., I must hold that condition (2) in my analysis, which is condition (3) with a little difference in my learned brother Das's analysis has not been fulfilled in this case. My learned brother Das J., has felt the difficulty in the penultimate paragraph of his judgment dealing with the first question. He has in my opinion, with all due respect to his views, lost sight of the fundamental finding recorded by the learned Commissioner that he was not satisfied that the goods had been despatched by or on behalf of, the dealer. It is true that the learned Commissioner came to the conclusion that the goods were despatched by the assessee; but he has also come to the conclusion that that despatch was made on behalf of the vendee, the assessee acting as the agent of the Imperial Tobacco Company. At this stage, it is not open to this Court to whittle down the findings of the Commissioner, or to go behind them. The Legislature, in its wisdom, has not vested this Court with appellate jurisdiction, so as to enable this Court to re-open the findings of fact recorded by the Commissioner. The finding of the learned Commissioner is entirely in consonance with the agreement between the assessee and the Imperial Tobacco Company, and has got to be accepted at its face value. Hence, I disagree with my learned brother Das J. in his conclusion on the question whether the essential condition for attracting the provisions of sub-cl. (v) has been fulfilled. In my opinion, the learned Commissioner has not found that the goods had been despatched by, or on behalf of, the dealer, and, therefore, he is not entitled to the deduction claimed. Hence, in the result, though I agree with most of the reasons given in the judgment of my learned brother Das J., I disagree with his conclusion as to the answer to be given to the first question. I also do not agree with all the reasons given by my learned brother Sarjoo Prasad J., as already indicated; but, all the same, I agree with him in his conclusion that the first question should be answered in the negative.

V.B.B. *Answer accordingly.*

A. I. R. (37) 1950 Patna 465 *[C. N. 116.]*

RAMASWAMI AND SARJOO PRASAD JJ.

Sham Sundar Singh — Judgment-debtor — Appellant v Dhirendra Nath Chandra and others — Respondents.

A. F. O. O. No. 143 of 1948, D/- 12-5-1950, from order of Sub-J., Dhanbad, D/- 29-5-1948.

(a) Civil P. C. (1908), S. 11 — Execution proceedings.

The doctrine of constructive *res judicata* is applicable to execution proceedings and where a judgment-debtor fails to raise all his objections to execution which he might and ought to have raised and the execution is ordered to proceed, all such objections will be deemed to have been impliedly decided against him and he will be precluded from raising the same objections at a later stage of the same execution proceeding, or in a subsequent execution of the same decree [Para 6]

Annotation : ('50 Com) Civil P. C., S. 11, N. 23.

(b) Civil P. C (1908), S 11 — Estoppel against statute – Evidence Act (1872), S. 115.

Where the property is admittedly non-saleable, the executing Court cannot sell the property, and the failure to raise the objection in time does not create any estoppel and *res judicata* because there is no estoppel against the statute. Where, however, the facts themselves have to be determined which may lead to the inference that the property is not saleable, those facts must be pleaded and proved like any other question for determination by the Court itself, and if those questions are not raised at a proper stage, the bar of *res judicata* must be applicable. [Para 9]

Annotation : ('50-Com.) Civil P. C., S. 11, N 11;
('46-Mad.) Evidence Act, S. 115, N. 50.

L. M. Ghose, J. M. Ghose and S. S. Rakshit — for Appellant.

S. C. Mazumdar — for Respondents.

Sarjoo Prasad J. — This appeal is by the judgment-debtor arising out of an objection under S. 47, Civil P. C.

[2] This appeal was analogous to several other appeals but we directed that as the execution case which gave rise to the present appeal was being held up this appeal should be heard and disposed of. It was accordingly placed for hearing before us It relates to Execution Case No. 547 of 194[illegible], and our observations will have to be confined to that execution case alone.

[3] It appears that the plaintiffs decree-holders obtained on 25th February 1932, a decree in the Court of the Subordinate Judge at Dhanbad in Money Suit No. 261 of 1930 which was later confirmed on appeal by this Court on 25th August 1936. The decree-holders proceeded to execute this decree by sale of certain properties belonging to the judgment-debtor. The case appears to have a long and chequered history, and it is one of those cases which demonstrate how a decree obtained in 1932 has yet remained unexecuted for all these 18 years on account of the various obstructions successfully raised by the judgment-debtor under cover of legal procedure. The execution case was started and registered on 18th November 1935 and a writ of attachment was issued The claim under execution was for a sum of over one lakh of rupees. It appears from the order sheet that several times writs of attachment and sale proclamations were issued and on several occasions on one pretext or another the judgment-debtor succeeded in having the sale postponed. The present objection which was filed not until 3rd February 1948, was registered as Miscellaneous Case No. 9 of 1948. In this objection for the first time it was alleged that the properties under execution were not saleable as being part of a Government ghatwali. The petition alleges that the estate of the judgment-debtor is known as the Pandra Estate and consists of tauzi Nos. 2 and 23 of the Manbhum Collectorate, that parts of Tauzi No. 21 had been attached and advertised for sale on 17th February 1948, and that the said tauzi being Government ghatwali was inalienable and could not be sold in execution The petition further states that Tauzi No. 23 of the petitioner's estate was sold in execution of a decree in Execution Case No. 385 of 1931. The judgment-debtor then filed a title suit in the Court of the Subordinate Judge at Dhanbad being Title Suit No. 4[illegible] of 1939 in which he claimed that the Pandra Estate was a Government ghatwali. The suit was however, dismissed by the learned Subordinate Judge, and against the said decree an appeal has been preferred to this Court which is First Appeal No. 87 of 1947. The judgment-debtor accordingly prayed that his objection should be allowed and the property should be released from attachment and sale. As I have said this objection was filed for the first time in February 1948 Though the execution case had been pending since 1935 and the judgment-debtor had appeared and had taken various steps in the execution proceedings and filed objections to the execution, in none of it he ever raised the contention which he seeks to advance in the present objection.

[4] Mr. Ghosh who appears for the appellant contends that this appeal should at any rate be postponed until the disposal of First Appeal No. 87 of 1947 wherein the question of ghatwali has been raised in connexion with another tauzi, Tauzi No. 23, belonging to the judgment-debtor. It may be at once pointed out that the present decree-holder is not a party to the said first appeal. The first appeal in question, although pending since 1947, has not yet been disposed of and there is hardly any chance of its being heard in the very near future It would be, therefore, unjust that the present decree holder should be made to stay his hands until the disposal of the said appeal which for ought we know may yet take a meandering course even after its disposal by this Court until the remedy of the judgment-debtor of an appeal to the Supreme Court is also exhausted. Mr Ghosh contends that if it is found in the appeal that the properties in question were Government ghatwali then the executing Court will have no jurisdiction to sell those properties. He relies upon a decision of the Judicial Committee in *Satya Narain Singh* v. *Satya Niranjan*, 3 Pat. 183 : (A. I. R. (11) 1924 P. C. 5). The present decree-holder being not a party to the first appeal in question the decision given in that appeal will not be *res judicata* as against him. The judgment in the case may at best be used

only as evidence to show that the question of inalienability was asserted in that litigation In my opinion, therefore, it would be unfair and unnecessary to postpone the hearing of this appeal until the disposal of the said First Appeal No. 87 of 1947.

[5] The learned Subordinate Judge in this case has held that in view of the decision in Title Suit No. 41 of 1938 the objection that the properties were part of Government ghatwalis, and, as such, inalienable was not maintainable. He also held that the doctrine of constructive *res judicata* was applicable to the case. He found that the judgment debtor filed a number of objections and go the sales stayed more than once. He got instalments in some cases and on many occasions got the sales postponed by making small payments. There were a number of petitions in which the judgment-debtor agreed that the sale would take place if he did not pay the amount the next day. By this means he repeatedly took adjournments. That being so, both on the ground of estoppel and constructive *res judicata* he was debarred from raising the question that the properties were Government ghatwalis, and, as such, not liable to be sold.

[6] If the rule of *res judicata* can be applied to execution cases, in my opinion, it would preeminently apply to this case. It is well settled that the doctrine of constructive *res judicata* is applicable to execution proceedings and where a judgment-debtor fails to raise all his objections to the execution which he might and ought to have raised and the execution is ordered to proceed, all such objections will be deemed to have been impliedly decided against him and he will be precluded from raising the same objections at a later stage of the same execution proceeding, or in a subsequent execution of the same decree. In this context reference may be made to *Dula Bibi v. Parmananda Das*, A.I.R. (27) 1940 Pat. 251 : (188 I C 672) and *Sitla Sahai* v. *Gouri Nath*, A.I R (29) 1942 Pat 477 : (202 I. C. 264). In the latter case Agarwala J relied upon an earlier decision of this Court in *Mahadeo Prasad* v. *Bhagwat Narain Singh*, A.I R (25) 1938 Pat. 427 : (177 I. C 810). It is interesting to say a few words in regard to the point which arose for consideration in this earlier decision. The judgment debtor there objected to an execution proceeding in which it was sought to sell a property which the judgment-debtor alleged could not be sold under S. 12A Chota Nagpur Encumbered Estates Act without obtaining the sanction of the Commissioner The objection was not decided and the execution was allowed to proceed and the property sold. In a subsequent suit the judgment-debtor sought to recover possession of the property on the ground that the sale was void by reason of the Commissioner not having sanctioned the sale as required by S 12A, Chota Nagpur Encumbered Estates Act. Wort J. who delivered the judgment in that case held that the matter was *res judicata* although the question whether the sale was valid for want of sanction from the Commissioner had not been expressly decided at the earlier stage when it was raised. The learned Judge pointed out that if objections to execution proceedings could be taken piecemeal one after the other, there will be no end to execution proceedings, and he observed that when a plea in bar is not taken, or is overruled, the judgment-debtor is not at a later stage entitled to challenge the validity of the proceedings on that ground. These observations apply with equal force even to a later stage in the same execution case In this connection a reference may be made to a Full Bench decision of the Lahore High Court in *Gouri* v *Ude*, I. L. R. (1942) Lah 559 : (A.I.R (29) 1942 Lah 153 (F B.)). I must guard myself against any assumption that I endorse all that has been said in the said decision. But I endorse with great respect what the learned Judges have there observed in connection with the application of the principles of *res judicata* to execution proceedings. It was held in that case that where the judgment-debtor is duly served with notice of the execution proceedings but fails to raise any objection to the proposed sale such as on the ground of exemption of property from attachment and sale under S 60, Civil P. C., at the time when the issue as to sale of the property is raised by the decree-holder and the Court then proceeds with the execution, the matter must be considered to be *res judicata* so as to debar the judgment-debtor from raising that objection later on the principle of constructive *res judicata* Their Lordships in that case further pointed out that the question of the Court's jurisdiction to sell the property does not arise until and unless the judgment-debtor has alleged and proved the facts entitling him to claim exemption under S. 60, Civil P C When no objection is raised by the judgment-debtor as to the saleability of the property under S. 60 at the earliest opportunity the order for sale cannot be subsequently challenged and the matter cannot be raised at a subsequent stage of the same execution proceeding. It is true that in that case the objection on the ground that the property was not liable to attachment and sale under S. 60, Civil P. C., was raised after the sale but that, in my opinion, does not make any difference in principle, nor does it appear to have made any difference in the decision of their Lordships. I may here

quote a relevant passage from the judgment of Bhide J. in the decision in question :

> "The question of the Court's jurisdiction does not arise, as already pointed out until and unless the judgment-debtor has alleged and proved the facts entitling him to claim exemption under S. 60, Civil P. C. If the judgment-debtor fails to raise any objection at the time when the issue as to the sale of the property is raised by the decree-holder and the Court then proceeds to order the sale of the property, I do not see why the matter should not be considered to be *res judicata*."

[7] Mr. Ghosh for the appellant relies upon a decision of this Court in *Kusum Kumari* v. *Firm Harnath Rai Birijraj*, A. I. R. (28) 1941 Pat 240 : (191 I.C. 138), and he contends that it was open to him to raise the objection at any stage of the execution case, and the Court was bound to enquire into that objection. In that case Chatterji J. who delivered the judgment of the Bench pointed out that an objection by the judgment-debtor to the sale of his land on the ground that it was a Government Ghatwali tenure and therefore not saleable goes to the root of the Court's jurisdiction to hold the sale, and therefore cannot be summarily rejected; and the mere fact that the objection was filed late e. g., on the date of sale is no ground for rejecting it. It was further pointed out that the holder of a ghatwali tenure holds the property not as a trustee but in his own right and is entitled to enjoy the usufruct thereof. Consequently an objection by the holder that the tenure is not saleable by reason of S. 60 Civil P C., can certainly be raised under S. 47 of the Code. There is no doubt that this authority very greatly supports the contention of Mr. Ghosh, but I am afraid the question of constructive *res judicata* was never raised or considered in the case in question, and we do not know what the facts in that case were. It may be that the judgment-debtor in that case was not precluded from raising the question on the ground of constructive *res judicata*, for, if it were so, the point might well have been urged on behalf of the respondent to the appeal. The decision, therefore, in its ultimate analysis does not help the contention advanced by the appellant.

[8] Mr. Ghosh also relies upon two other decisions of this Court to show that whether the property is or is not saleable can and must be gone into by the executing Court, and he argues that if a property is prohibited from sale, either by virtue of a prohibition under some particular statute or on account of the fact that it is alienable (inalienable ?) in its very nature, it affects the very jurisdiction of the Court to sell the property and there being no estoppel against the statute, estoppel or *res judicata* should not be applied to such a case. The first is a decision in *Rup Nath* v. *Jagannath*, 7 Pat. 178 : (A.I.R. (15) 1928 Pat. 227) In that case it was held that under S. 47, Chota Nagpur Tenancy Act, a raiyati holding could not be sold even in execution of a mortgage decree, and it is the duty of the executing Court to guard against evasion of this statutory provision. It may be here observed that S 47, Chota Nagpur Tenancy Act provides in terms that

> "no decree or order shall be passed by any Court for the sale of right of a raiyat in his holding, nor shall any such right be sold in execution of any decree or order."

In that case the Munsif found that the status of the judgment-debtor was that of a raiyat. That finding was never contested by the decree-holder and was accepted by all the Courts. Therefore, on the face of it what was sought to be sold was a raiyati holding and the sale of such a holding was expressly prohibited by S 47 of the statute. Under those circumstances it was held that there was no estoppel against the statute, and that once it was found as it had been found in that case and accepted by the parties that the lands sought to be sold formed a raiyati holding, whether the judgment-debtor took the objection or not, the sale of such a holding could not take place under the clear provisions of the statute.

[9] The next case on which Mr. Ghosh relied was a decision in *Uchit Lal* v. *Raghu Nandan*, 14 Pat. 52 : (A I. R (21) 1934 Pat. 666 (F.B.)) which is a Full Bench decision of this Court. Here again the facts are different. The decree-holder had obtained a mortgage decree in respect of certain lands. An objection was taken by the judgment-debtor in the executing Court that by reason of S 27, Santal Parganas Settlement Regulation, 1872, the executing Court had no power to put up the land for sale. The objection was overruled by the Courts below and the matter came up before a Bench of this Court which referred it to a Full Bench. The question which the Full Bench had to consider was whether the executing Court was precluded by the said Regulation from selling the land and transferring it to an auction-purchaser. It may be observed that the mortgagors did not raise the question of the saleability of the mortgaged property before the Court which had passed the mortgage decree nor did they attack the validity of the mortgage itself, nor did they raise the question that it was not competent for the Court itself to pass a decree for sale. It was, therefore, argued, on behalf of the decree-holders that the judgment-debtors were estopped from raising that point before the executing Court, and that the matter must be treated as *res judicata*. There again it was not seriously ques-

tioned that the property came within the mischief of S. 27, Santal Parganas Settlement Regulation. Their Lordships observed that the words of sub-s. (2) of S. 27 are absolutely prohibitive and whether or not another Court has pronounced the decree and said that the property in question can be sold, the executing Court is prevented from implementing such a decree and from granting a certificate of sale or delivering possession under such a sale. As to the matter of estoppel and *res judicata*, their Lordships agreed with the decision in *Rup Nath's case*, 7 Pat 178 : (A. I. R. (15) 1928 Pat. 227). These cases therefore, do not assist the appellant inasmuch as where the property is admittedly non-saleable the executing Court cannot sell the property, and the failure to raise the objection in time does not create any estoppel and *res judicata* because there is no estoppel against the statute. Where, however, the facts themselves have to be determined which may lead to the inference that the property is not saleable, those facts must be pleaded and proved like any other question for determination by the Court itself; and if those questions are not raised at a proper stage, the bar of *res judicata* must be applicable. I have already in this connection referred to a passage from the Full Bench decision of the Lahore High Court in *Gouri* v. *Ude*, I. L. R. (1942) Lah. 559 : (A. I. R. (29) 1942 Lah. 153 (F.B.)).

[10] I may usefully refer to another Special Bench decision of this Court in *Dhanu Pathak* v. *Sona Koeri*, 17 P L T. 880 : (A.I.R. (23) 1936 Pat. 417 (S.B.)). In that case it was contended that a certain lease was void as being the lease of a raiyati interest within the meaning of S. 46, Chota Nagpur Tenancy Act, and that there could not be estoppel against the statute. The defendants however, in that case denied that the plaintiffs were raiyats and that the plaintiffs had represented themselves as tenure holders. If the position were admitted that it was the lease of a raiyati holding, there can be no doubt that S. 46, Chota Nagpur Tenancy Act, would operate thereon. But there was a denial of this raiyati interest, and their Lordships observed:

> "This raises an issue of fact and it is not until that issue of fact is concluded in favour of the plaintiffs that any question of the operation of the statute can arise. . . . The first issue, therefore, is as to whether the plaintiffs are or are not tenure-holders, and it is at this stage that the doctrine of estoppel operates. The plaintiffs having represented themselves as tenure-holders cannot be permitted to enter into a discussion of this questoin of fact but must be held bound by their own representation. No question, therefore, of the operation of the statute can arise. The plaintiffs are prevented from proving a fact which is inadmissible before the matter of the statute can be considered."

In my opinion, these observations very clearly apply to the present case and whether it is estoppel by conduct or estoppel by record that is, constructive *res judicata*; in my opinion, the judgment-debtor is now debarred from raising the question of fact, namely, whether the property sought to be sold is a Government ghatwali, and, as such inalienable.

[11] I may also refer to a decision of the Privy Council in *Sadasiva Pillai* v. *Kamalinga Pillai*, 2 I. A. 219 : (15 Beng L. R. 383 (P.C.)), wherein the Judicial Committee has in emphatic terms condemned the attitude of parties in lying by and raising a plea in bar not until at a very late stage of proceedings. In that case the proceedings began in 1864 and for several years were carried on without objection. In 1875 they were sought to be declared infructuous on the ground of irregularities. The High Court appears to have given effect to this contention but the Judicial Committee reversed the order of the High Court with these poignant remarks:

> "Their Lordships would have felt great regret in coming to the contrary conclusion. That proceedings begun in 1864, and for several years carried on without objection, should in 1875 be pronounced infructuous on the ground of irregularity, and the party relegated to a fresh suit in order to assert an indisputable right, would be a result discreditable to the administration of justice. In such a suit the plaintiff would probably find himself either successfully or unsuccessfully, opposed by a plea of limitation. If such a plea were successful, great injustice would be done to the plaintiff, if it were unsuccessful, the respondent would probably find himself in a worse position than that in which he will be placed by the allowance of this appeal . . . ."

Their Lordships held that upon the ordinary principles of estoppel the respondents could not be heard to say that mesne profits were not payable under the decree.

[12] In this case the decree under execution was passed 18 years ago in 1932. The execution itself was started in 1935, and it is now about 15 years old. The fate of the decree-holder hangs precariously upon the issue of this execution case. The order sheet of the execution case tells its own tale, and I entirely agree with the learned Subordinate Judge in his view that the judgment-debtor appeared at various stages of the execution case, he obtained time on various pretexts and got adjournments of the sale from day to day undertaking not to raise any objection on the ground of irregularity in the sale proclamation and yet he never before raised the plea that the property was non-saleable. It would be unnecessary for me to go to the earlier stages of the execution case but I will refer only to a few of the orders which relate just previous to the stage when this application came to be filed by the judgment-debtor. On 29th May 1947, the Court ordered issue of sale proclamation fixing 15th August 1947, for sale. 15th and 20th

being holidays, the case came up on 21st. It was found that the sale proclamation had been duly published, and the judgment-debtor filed a petition praying for adjourning the sale on certain grounds and the Court adjourned it to 28th August 1947, as prayed for. It appears again that the sale continued to be adjourned until we come to the order dated 8th December 1947. On that date the judgment-debtor took no steps whatsoever and the decree-holder applied for a fresh sale proclamation. The sale proclamation was issued fixing 17th February 1948, for sale. We find then that on 3rd February 1948, the present objection was filed. When this objection was taken up on 14th February 1948, the decree-holder was ready but the judgment-debtor applied for a month's time, and on his waiving the right to issue of fresh sale proclamation, the Court directed the sale to take place on 6th (*sic*) February 1948. Again, it appears that on 21st February 1948, the decree-holder was ready but the judgment-debtor applied for time, and when the matter was again put up on 6th March 1948 the judgment-debtor applied for adjournment of the sale on waiving the right to fresh sale proclamation. The order sheet both prior to the filing of this objection as also subsequent thereto shows that the judgment debtor was never serious in pressing this objection and was only trying to kill time. In my opinion, the learned Subordinate Judge was perfectly justified in holding that at various stages even after due notice the judgment-debtor did not raise any objection on the ground of non-saleability but he allowed the execution to proceed, and in fact though he raised other objections in regard to the value of the property etc, and even on several occasions brought the matter to this Court, he did not raise this objection until at this very late stage when all his other objections had failed. Mr. Ghosh submits that prior to 1943 his client had no knowledge that his estate was a Government ghatwali but the order sheet shows that even thereafter during the last five years that the execution remained pending it never dawned on the appellant to raise the objection at any earlier stage. I have already said that it is not open to a judgment debtor to raise his objections piecemeal and especially where it relates to a plea in bar to the execution case itself. I am therefore of the opinion that the judgment-debtor cannot be allowed to raise this objection now, and it will be deemed that the question of fact whether the properties in question are Government ghatwali, and, as such, non-saleable has been by implication decided against him.

[13] For the reasons stated above, I would affirm the decision of the learned Subordinate Judge on the point, and dismiss this appeal with costs. Hearing fee to be calculated at the maximum rate.

[14] **Ramaswami J.** — I agree.

D.H. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 470 [*C. N. 117.*]

RAMASWAMI AND SARJOO PRASAD JJ.

Basuki Prasad Singh — Petitioner v. *Satya Kinkar Sahani — Opposite Party*

Civil Revn. No. 798 of 1949, D/- 1-5-1950, from order of Sub-Judge, Monghyr. D/ 18-6-1948.

(a) Civil P. C. (1908), S 115 — Demand of court-fee on basis of Act coming into force after institution of suit — Court fees Act (1870), S. 1:

Where the lower Court demanded deficit court-fee on the basis of Act XXV (25) of 1948 which came into force after the institution of the suit:

Held that the Court acted illegally and with material irregularity in the exercise of its jurisdiction as the court-fee ought to be calculated on the plaint by a reference to the law as it stood on the date of the institution of the suit: [Para 3]

Held further that the Court acted irregularly in granting short but inadequate adjournments for the purpose of payment of the deficit court-fee. [Para 3]

Annotation: ('50-Com.) C. P. C., S 115 N 12, 27b;
('49-Com) Court-fees Act, S 1 N 15.

(b) Civil P. C. (1908) S. 115 — Decision on court-fee adverse to plaintiff — Court-fees Act (1870), S. 12.

A decision upon court-fee which is adverse to the plaintiff amounts to a decision of the Court refusing to exercise its jurisdiction to try the issues as between the plaintiff and the defendant; and in such a case the decision is subject to the revisional jurisdiction of the Court. [Para 4]

Annotation: ('50-Com.) C. P. C., S 115 N 27b.
('49-Com.) Court-fees Act, S 12 N 13.

(c) Civil P. C. (1908) S 115 — Delay — Costs.

The High Court will not refrain from exercising its revisional jurisdiction on the ground of delay on the part of the petitioner where the opposite party can be sufficiently compensated for in costs. [Para 6]

Annotation: ('50 Com.) C. P. C., S 115 N 17

(d) Civil P. C. (1908). S. 115; O. 7. R. 11 — Setting aside of order demanding deficit court-fee — Court-fees Act (1870), S 12.

Where the order of the lower Court demanding deficit court-fee is set aside in revision the High Court ought, of necessity as a consequence, to set aside the order of the lower Court rejecting plaint for non-payment of deficit court-fee. [Para 7]

Annotation: ('50-Com.) C. P. C., S 115 N 16, 27b;
O 7 R 11 N 12.
('49-Com.) Court-fees Act, S 12 N 13.

Kanhaiyaji and L M Ghose — for Petitioner.
R. S Chatterji — for Opposite Party.

Ramaswami J. — This rule is directed against an order of the learned Subordinate Judge of Monghyr rejecting a plaint for non-payment of deficit court-fee.

[2] The applicant brought the suit for recovery of possession of three ghatwali estates constituting the Chakai ghatwali against the opposite party. The plaint was filed on 28th January 1946 with a court fee of Rs. 150-6-0 upon a valuation of two lacs. The Stamp Reporter objected that the court-fee should be assessed

under S. 7 (iv) (c) on the market value of the properties On 22nd March 1947, the learned Subordinate Judge investigated into the matter and found that the property should be valued at 5 lacs and that the plaintiff should pay the deficit court-fee, on or before 7th May 1947. Subsequently the applicant filed a petition for suing in *forma pauperis*. After several adjournments the petition was rejected on 5th June 1948. On 18th June 1948, the learned Subordinate Judge called upon the plaintiff to pay deficit court-fee of Rs. 66 4-14-0. On 21st July 1948, the plaint was rejected as the petitioner failed to pay the deficit court-fee in spite of several adjournments having been granted.

[3] In support of this rule Mr. L. M. Ghose argued in the first place that the learned Subordinate Judge has made a serious error in calculating the amount of court-fee. Learned counsel pointed that Act XXV [25] of 1948 which imposed 6 annas surcharge only came into force in April 1948 and cannot have retrospective effect. In support of his argument learned counsel relied upon *Tara Prasanna* v. *Nrisingha Moorari*, 51 Cal. 216 : (A. I. R. (11) 1924 Cal. 731). In that case a suit had been instituted on 16th June 1920 for a declaration and consequential relief bearing a court-fee stamp of Rs. 10. Thereupon an issue was raised to the following effect, viz., whether proper court fee had been paid on the plaint. The Subordinate Judge came to the conclusion that proper court-fee had not been paid and he directed that Rs. 740 should be recovered as deficit court fee. Before this order was passed Act V [5] of 1922 came into operation by which the amount of court-fee was raised. Upon these facts the Division Bench held that the amount of court-fee leviable upon the plaint must be determined by a reference to the law as it stood on 16th June 1920 on which the suit was instituted. Upon the authority of this case it must be held therefore that in the present case too proper court fee to be levied on the plaint was Rs. 6450 which includes 25 per cent. surcharge which was leviable by an amending Act of 1939. It is clear that the deficit court-fee was Rupees 4940-10-0 and not Rs. 6616-14-0 as calculated by the learned Subordinate Judge. In demanding, therefore, the excessive court-fee and rejecting the plaint for failure to pay the deficit court fee wrongly calculated, it is manifest that the learned Subordinate Judge acted illegally and with material irregularity in exercise of his jurisdiction. From the order sheet dated 9th June 1948 and 14th June 1948 it would appear that the learned Subordinate Judge mechanically acted upon the Sarishtadar's report without applying his mind to the question whether the new Act imposing 6 annas surcharge was leviable upon the plaint in the present case. It would also seem that the learned Subordinate Judge acted irregularly in granting short but inadequate adjournments for the purpose of payment of the deficit court fee.

[4] It has been well settled by a series of cases of this Court that a decision upon court-fee which is adverse to the plaintiff amounts to a decision of the Court refusing to exercise its jurisdiction to try the issues as between the plaintiff and the defendant; and that in such a case the decision is subject to the revisional jurisdiction of the High Court (see *Ramkhelawan Sahu* v. *Bir Surendra Sahi*, 18 P. L. T. 977 : (A. I. R (25) 1938 Pat 22 FB).

[5] In this context reference should also be made to *Joy Chand* v. *Kamalaksha*, 76 I. A. 131 : (A. I. R. (36) 1949 P. C. 239) in which the Judicial Committee held that although error in a decision of a Subordinate Court did not by itself involve that the Subordinate Court had acted illegally or with material irregularity, nevertheless if the erroneous decision results in the Subordinate Court exercising a jurisdiction not vested in it by law or failing to exercise a jurisdiction so vested, a case for revision arises under sub-s. (a) or sub-s. (b) of S. 115, Civil P. C.

[6] For the opposite party it was objected that there was great delay on part of the plaintiff and High Court should refrain from exercising its revisional jurisdiction in the present case. For the applicant, however, learned counsel explained that owing to a *bona fide* mistake of law wrong remedies were pursued and there was no wilful negligence on the applicant's part. Learned counsel cited *Venkatakrishnaiah* v. *Alli Sahib* A.I R. (25) 1938 Mad. 921 : (182 I.C. 878) in which an order for payment of the deficit court-fee was passed five years before but even so the High Court interfered in revision and granted time for payment of the deficit court-fee. In my opinion there has been a certain amount of delay on the part of the petitioner for which the opposite party could be sufficiently compensated for in costs.

[7] Lastly reference should be made to the argument of the opposite party that the order rejecting the plaint having the force of a decree and having become final it cannot be interfered with at this stage. But it should be observed that by interfering with the order of the Subordinate Judge demanding the deficit court fee we ought, of necessity as a consequence, to set aside the order of the Subordinate Judge rejecting the plaint

[8] For all these reasons, therefore, the rule must be made absolute and the application must be allowed on the condition that the applicant

will pay costs of 10 gold mohars to the learned counsel for the opposite party within a fortnight from today. The order of the learned Subordinate Judge dated 18th June 1948 and also the order rejecting the plaint dated 21st July 1948 are set aside. The applicant is now granted two weeks' time to pay the deficit court-fee of Rs. 4941 from the date of the receipt of the records by the lower Court.

[9] If either the deficit court-fee or costs of 10 gold mohars is not paid within the time fixed this application will stand dismissed with costs: 5 gold mohars.

[10] **Sarjoo Prasad J.** — I agree.

D.H. *Rule made absolute.*

A. I. R. (37) 1950 Patna 472 *[C. N. 118.]*

SHEARER J.

J. W. Broucke and others — Petitioners v. *Kamleshwari Narain Singh and others — Opposite Party.*

Criminal Revn. No. 311 of 1950, D/- 25-4-1950, against order of A. S. J., Champaran, D/- 31-1-1950.

(a) Criminal P. C. (1898), S. 145 — Onus of proof.

Where in proceedings under S. 145, instituted in January 1949, it is found that one party were in possession of the land in dispute in the middle of 1947, the onus is on the other party to show conclusively that they had succeeded in dispossessing them within more than 2 months prior to the institution of the proceeding. [Para 2]

Annotation : ('49-Com.) Criminal P. C, S. 145, N 25 41, 43.

(b) Criminal P. C. (1898) S. 148 — Local enquiry by pleader commissioner—Legality—Local enquiry after first party closed their case – Failure to allow such party to show that report is erroneous — Effect.

Where in a proceeding under S. 145, local enquiry is necessary, the enquiry under S 148 ought to be held by a Subordinate Magistrate. But where it is held by a pleader commissioner, it is not a very serious error [Para 3]

Where the local enquiry is held after the first party has closed their case, the latter are entitled to adduce rebutting evidence and show that the report is erroneous or ought not to be relied on. Failure to allow the first party to adduce rebutting evidence is a very serious error. [Para 3]

Annotation : ('49-Com.) Criminal P. C., S. 148, N. 4, 5 12.

S. N. Basu and S. Mustafi — for Petitioners.

Lalnarayan Sinha and Sreenath Singh — for Opposite Party.

Order. — This application in revision is directed against an order made under S. 145, Criminal P. C., in which the petitioners were the first party. On 30th May 1947, two of the petitioners executed a sale deed conveying to the second party to the proceeding an area of 526 bighas 6 kathas 6 dhurs of land and also certain buildings situated in village Chowterwa. This land was land in which the executants of the sale deed had rights of occupancy under the landlord Chowterwa which is the Bettian Raj. It is apparently the practice of the Bettian Raj to have the holdings of occupancy *raiyats* measured from time to time in order to ascertain whether they have encroached on waste land. If it is found that waste land has been encroached on and amalgamated with an occupancy holding, the occupancy *raiyat* is required to take formal settlement of it on payment of a *salami*. During or before the negotiations between the parties to the proceeding, a measurement had been made, and it had been discovered that the petitioners had made a number of encroachments. the aggregate extent of the encroachments amounting to more or less 11 bighas. The second party in the first instance declined to take a conveyance of this 11 bighas, but agreed eventually to do so. In the meantime, however, a second measurement had been made as a result of which it appeared that further encroachments to the extent of somewhat more than 40 bighas had been made by the petitioners. The second party declined to have his area included in their sale deed, as they considered that the petitioners had then no title to it. They stipulated, however, that, if and when the petitioners were in a position to convey a good title to this land also, they should be given the option of purchasing it The subject-matter of the proceeding was this area of more or less 40 bighas The sale deed, as I have said, was executed on 30th May 1947, and on 27th June 1947 that is within four weeks of the execution of the sale deed, one of the first party wrote to the second party suggesting that, as they had not purchased this land and as it was contiguous to land which they had purchased, the boundary between this land and the land conveyed by the sale deed should be demarcated. On the following day a reply was sent to this letter by the second party stating that they had sent for an *amin* to have the demarcation made, as desired by the first party. The petitioners eventually succeeded in persuading the manager of the Bettiah Raj to settle this 40 bighas with them and paid the requisite *salami*. It is said, however, that the Board of Revenue declined to ratify what the manager had done and that the land was later formally settled with the second party who also paid *salami*. The second party apparently contend that, as a result of this, they succeeded in evicting the first party and obtained possession of the land. This, it is quite clear is the vital question for decision, and the importance of it has not been fully realised by the Court below.

[2] It is obvious that the first party were in possession of the land in dispute in the middle of 1947, and the onus was therefore, on the second party to show conclusively that they had succeeded in dispossessing them within more

than two months prior to the institution of the proceeding. which was on 4th January 1949. This is clear on general principle. If authority is needed, I may refer to the decision cited by Mr. S. N. Basu for the petitioners, in the course of his argument *S. M. Yaqub* v. *T. N. Basu*, A. I. R. (36) 1949 Pat. 146 at p. 154: (50 Cr. L. J. 299 S. B.). The trial is also vitiated by another irregularity of a serious kind.

[3] When the first party had closed their case, an application was made for a pleader commissioner to be appointed. The learned trying Magistrate appointed a pleader commissioner to make a local enquiry and directed him to report on certain specific points. The pleader Commissioner in due course, submitted his report, and objections were taken to it by the first party which asked to be allowed to adduce rebutting evidence. The learned trying Magistrate declined to accede to this request. The pleader commissioner was called to give evidence by the second party, but was not examined at any length, the reason, no doubt being that the pleader for the second party considered that his report could be read as evidence. The learned trying Magistrate was of the same opinion and the report was read as evidence, and the learned trying Magistrate greatly relied on it in his judgment. If a local enquiry was necessary, and I do not say that it was not entirely justified, the enquiry ought, under S. 148 Criminal P. C., to have been held by a Subordinate Magistrate. I do not regard it as a very serious error that it was not held by a Subordinate Magistrate but by a pleader commissioner. The really serious matter is that the first party were not allowed to adduce rebutting evidence. The local enquiry having been held after the first party had closed their case, they were, quite clearly, entitled to adduce rebutting evidence and show that the report was erroneous or ought not to be relied on. In these circumstances the order of the Court below must, in my opinion, be set aside, and the proceeding must be ordered to be retried from the point at which the irregularity occurred. A local enquiry ought to be made either by a Subordinate Magistrate or by the trying Magistrate himself, and in either case the first party ought to be given an opportunity of seeing the report or the memorandum of inspection and an opportunity, if they so desire, of adducing rebutting evidence. The second party will of course, be entitled to examine the pleader commissioner, and the pleader commissioner will be entitled to refer to his report in order to refresh his memory but the report itself cannot be read as evidence. In conclusion, I would point out that Mr. S. N. Basu, for the petitioners, conceded that a mistake had been made in drawing up the proceeding in that a number of plots comprising no very considerable area was land which had been conveyed by the sale deed. Mr. Lalnarayan Sinha, for the opposite party, similarly concedes that a small area, on which there were some buildings, was in the possession of the first party. The learned trying Magistrate will, no doubt, deal with these minor points in his final order.

V.B.B. *Order accordingly.*

*** A. I. R. (37) 1950 Patna 473** *[C. N. 119.]*

RAMASWAMI AND SARJOO PRASAD JJ.

Ram Kishun Rai and another — Appellants
v. *Ashirbad Rai and others — Respondents.*

A.F O.O. No. 217 of 1948, D/- 3-5-1950, from order of Sub-Judge, Arrab, D/- 28-7-1948.

(a) Civil P. C. (1908), S. 15 and O. 7, R. 10 — Plaint returned for re-presentation — Suit when instituted.

The combined effect of S. 15 and O. 7, R. 10 is that a suit cannot be said to be instituted so long as the plaint is not presented before the Court competent to try the suit. Hence, when the Court before which a plaint is filed returns it to be presented in a Court of competent jurisdiction, the suit is to be considered as instituted on the date of such presentation. [Para 6]

Annotation : ('50-Com.) C. P. C., S. 15, N. 3.

(b) Civil P. C. (1908), O. 7, R. 10 — Suit instituted after return of plaint — Suit whether continuation of prior suit.

After a plaint is returned for re-presentation to the proper Court, the institution of the suit commences from the date on which the plaint is re-presented to the proper Court. The suit so instituted is not a continuation of the suit before the Court which had really no jurisdiction to entertain it and therefore returned it for re-presentation to the proper Court. [Para 7]

Annotation : ('44-Com.) C. P. C., O. 7, R. 10 N. 1 and N. 9.

(c) Civil P. C. (1908), S. 15 — Jurisdiction, question of, raised and decided against plaintiff — Effect of, on Court.

Where a question of jurisdiction is not raised before a Court, then the matter cannot be collaterally re-opened in a subsequent suit and the decision of the Court challenged on the ground of jurisdiction. But once the jurisdiction of the Court is challenged and the Court decides that it has no jurisdiction to entertain the suit and directs the plaint to be presented before a Court competent to entertain it, the matter ends there. The Court thereafter is *functus officio*. [Para 12]

Annotation : ('50-Com.) C. P. C., S. 15 N. 5.

✠(d) Civil P. C. (1908), O. 23, R 3 — Compromise reached in suit before Court incompetent to try it — Plaint returned — Plaint re-presented in proper Court — Proper Court, competency of, to record such compromise.

Where in a suit filed in the Court incompetent to try it, a compromise arrived at between the parties is filed and thereafter the plaint is returned for re-presentation to proper Court, the suit instituted after such re-presentation in the proper Court is not a continuation of the prior suit and the latter Court cannot record the compromise as it is not reached in a pending suit. If the compromise is genuine then the only remedy of the party who wants the Court to have it recorded is by way of a separate suit. [Para 13]

G. P. Das and G. N. Mukherji — for Appellants.
Mr. Awadh Bihari Saran — for Respondents.

Sarjoo Prasad J. — This is an appeal by the plaintiffs against a decision of Mr. Radha Prasad Singh, Subordinate Judge of Arrah, dated 28th July 1948. This appeal raises an interesting question of law as to the recording of a compromise under O. 23 R. 3 Civil P. C.

[2] To lead up to the points for discussion, I may indicate the essential facts. On 8th November 1945, a plaint was presented before the Munsif, Third Court, Arrah which was registered as Title Suit No. 182 of 1945. In the said suit, the Court directed issue of summonses on the defendants which were duly served, and defendant 1 filed his written statement on 21st February 1946. The issues in the suit were settled in March 1946, and 22nd August 1946 was the date fixed for hearing. The case was, however, adjourned on that date for 16th January 1947. In the meantime on 28th October 1946, a petition of compromise was filed and the plaintiffs applied that the compromise should be recorded. This petition along with the compromise filed in the case was ordered to be put up in the presence of the parties on the date fixed for hearing. The petition of compromise is dated 3rd September 1946 and purports to be between the plaintiffs and the defendants to the suit. Although the heading of the compromise petition shows that it is by the plaintiffs and defendants 2 to 6 it also purports to have been signed by Ashirbad Rai defendant 1 in his own pen. The plaintiffs and defendants 2 to 6 in their petition for recording the compromise alleged that defendant 1 had affixed his signature to the compromise on getting a sum of Rs. 3000 by way of consideration for the compromise as recited in the terms thereof. The plaintiffs and the pleader for defendants 2 to 6 signed the compromise petition but it did not bear the signature of the pleader of defendant 1, and it appears from the allegation in the petition for recording the compromise that defendant 1 told the parties that he would get the compromise by his pleader signed on the re-opening of the Court which promise he did not actually carry out. On 16th January 1947, the pleader for defendant 1 intimated to the Court that he had not been served with a copy of the petition filed by the plaintiffs and defendants 2 to 6 for recording the compromise, and the Court directed the plaintiffs to serve a copy of that petition at once on the pleader of defendant 1. On the same day at a later stage defendant 1 thereafter filed a rejoinder to the plaintiff's petition for recording the compromise. In this rejoinder it is alleged. defendant 1 repudiated the aforesaid terms and his signature thereon, and the Court after a few adjournments directed that the matter should be put up for hearing regarding the compromise on 1st February 1947. In the meantime the plaintiffs were permitted to take photographs of the signature of defendant 1 on the compromise petition, the vakalatnama and the written statement filed in the case for getting them compared by an expert. They also in the meantime took out dasti summons for the witnesses as per *isimnavisi* filed by them. Defendant 1 also applied for direction on the plaintiffs and defendants 2 to 6 to supply him with copies of their petitions for obtaining photographs in order to enable him to make necessary *pairvis*. I understand from the parties that the signatures in question were examined by an expert who has submitted a report in favour of the plaintiffs and against defendant 1. While these steps were being taken when the matter was put up for consideration by the Court on 1st February 1947, defendant 1 filed a petition praying to the Court to decide the issues regarding the question of jurisdiction, and to postpone the examination and cross examination of the expert to some future date after the issue regarding the jurisdiction of the Court to entertain the suit had been decided. The Court adjourned the case on that date and eventually after various adjournments, it took up the issue as to jurisdiction for decision on 21st April 1947. It held that the value of the suit was Rs. 15 000 both for the purpose of jurisdiction and court fees and much beyond the pecuniary jurisdiction of the learned Munsif. In that view of the matter, the learned Munsif held that he had no alternative but to find that the suit was clearly beyond the pecuniary jurisdiction of that Court and hence the plaint was liable to be returned. He, therefore, ordered the plaint to be returned to the plaintiffs for being presented to the proper Court competent to entertain the suit. The plaintiffs brought up the matter in revision before this Court but their application was dismissed, and the decision of the learned Munsif on the point of jurisdiction and court-fees was affirmed. This brought to a close the first phase of the litigation between the parties. It is apparent from the above that the compromise filed on 28th October 1946 before the learned Munsif was not recorded as it could not be recorded by him, he having no jurisdiction to entertain the suit itself

[3] I now come to the second phase of the litigation which started on 10th April 1948, when the plaint was presented afresh to the learned Subordinate Judge Third Court, Arrah. The suit was then registered as Title Suit No. 26 of 1948. The deficit court-fees were duly paid and summonses were ordered to be issued to the defendants fixing 20th May 1948 for settlement of issues. In the meantime on 1st May 1948, the

plaintiffs filed a petition that the compromise petition filed in Title Suit No 182 of 1945 of the Munsif, 3rd Court Arrah, be called for and kept in a closed cover. On 20th May 1948 summonses were served on defendant 1 who appeared on that date and asked for time to file his written statement which was accordingly granted. On 24th May the plaintiffs applied for recording the compromise called for from the Court of the learned Munsif. This application for recording the compromise was opposed by defendant 1 though the other defendants do not appear to have taken any exceptions to the same. Defendant 1 denied that there was any compromise between the parties or that he signed the petition of compromise. His allegation was that the compromise petition was a forgery and the allegations contained therein were false. The question whether the Court was competent to record the compromise filed before the learned Munsif, Third Court, Arrah, was taken up for hearing on 24th July 1948 and the learned Subordinate Judge by his order under appeal passed on 28th July 1948 held that when the compromise was filed there was no suit pending between the parties, and that being so, the alleged compromise could not be recorded under O 23, R. 3 by the learned Subordinate Judge, and the remedy of the parties, if any, was to bring a suit on the basis of the alleged compromise, and for the enforcement thereof. The learned Subordinate Judge, however, did not enter into the merits of the question whether the compromise was genuine or otherwise. It is against this order of the learned Subordinate Judge that the present appeal is directed.

[4] The question in my opinion, is not free from difficulty. The specific provision of the Code of Civil Procedure under which the Court has power to record a compromise is R. 3 of O. 23 which runs as follows :

> "Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit."

If it is held that this suit was pending at the time when the compromise petition was filed, in other words, if it is found that the present suit, namely Title Suit No. 26 of 1948 before the Subordinate Judge, First Court, Arrah, is nothing but a continuation of Title Suit No 182 of 1945 filed before the Munsif Third Court Arrah, then the compromise filed in the suit cannot but be recorded under O 23 R. 3 provided it otherwise on merits satisfies the requirements of the rule. If, on the other hand, it is held that the title suit before the learned Subordinate Judge in which the prayer for recording this compromise is made is distinctly a fresh suit and not a continuation of the previous suit then evidently the compromise in question was arrived at when the present suit was not pending and the Court then will have no jurisdiction to record such a compromise under this provision. The party affected in such a case may enforce the rights by a separate suit.

[5] Mr. G P. Das for the appellants contends that the present suit should be taken to be a continuation of the suit filed before the learned Munsif, the plaint and the parties being the same and as such, the compromise should be recorded. He also contends that in any case the learned Subordinate Judge was in error in trying the matter piecemeal, and he should have also taken evidence to find whether the compromise was genuine or otherwise. Mr. Awadh Bihari Saran for the respondents presses the contrary view. According to his submission, the suit before the learned Subordinate Judge was altogether a fresh suit and could not be in any sense a continuation of the former suit. He accordingly supports the decision given by the learned Subordinate Judge.

[6] There are no decisions of this Court directly bearing upon the point, and at any rate none has been cited at the Bar. A great deal will depend upon the meaning of the term "suit" used under O. 23 R. 3 of the Code. Section 15, Civil P. C., provides that the suit shall be instituted in the Court of the lowest grade competent to try it. This shows that if the Court before whom the plaint is presented finds that it is not competent to try it, it shall at any stage return the plaint to be presented to the Court in which the suit should have been instituted. This is provided for in R. 10 of O 7. The combined effect of the two rules is that a suit cannot be said to be instituted so long as the plaint is not presented before the Court competent to try the suit. It may be that for certain purposes the Court before whom a plaint is originally filed may have jurisdiction to entertain the plaint and to pass certain orders with reference to it. But when the Court before whom the plaint was filed returns it to be presented in a Court of competent jurisdiction, the suit is to be considered as instituted on the date of such presentation. A reference may be made in this connection to a decision in *Hedlot Khasa v. Karan Khasiani*, 15 C L J. 241 : (13 I. C. 377). That case was under the old Code of Civil Procedure, and S. 57 of the old Code corresponds to O. 7 R. 10 of the present Code. Their Lordships, in dealing with the first and second contentions on behalf of the appellant which dealt with the

question of the frame of the suit and the plea of limitation, held that the combined effect of s. 57, Civil P. C., and s. 14, Limitation Act, is that when the plaint is returned to be presented in a Court of competent jurisdiction, the suit is to be considered as instituted on the date on such presentation. They also held that if a contrary view were adopted, the inference would follow that the provisions of S. 14, Limitation Act were superfluous.

> "It would have been needless," their Lordships observed, "to formulate the rule embodied in S. 14, unless the theory were adopted that the suit was instituted only when the plaint was presented in the Court of competent jurisdiction."

Another decision of the Calcutta High Court bearing upon the point is *Bimala Prasad* v. *Lal Moni Devi*, A. I. R. (13) 1926 Cal. 355: (30 C. W. N. 90). In that case it was held that when the plaint which has been returned is presented in a Court of competent jurisdiction, the suit, even for purposes of court fee, must be taken to be instituted on the date of such representation and therefore on such plaint the court-fee should be leviable under the law which was in force at the time when the plaint was represented, and if the Act is amended in the meantime increasing the amount of fee payable thereunder the plaintiff should be credited with fee originally paid. In that case their Lordships relied upon the earlier decision of the Court referred to above in the case of *Hedlot Khasia* v. *Karan Khasiani*, 15 C.L.J. 241: (13 I. C. 377).

[7] There are decisions of other Courts which accept the view taken by the Calcutta High Court. A reference may be made to the decision in *Hirachand Succaram* v. *G. I. P. Ry. Co.*, A. I. R. (15) 1928 Bom. 421: (52 Bom. 548) and also to a recent decision of the Madras High Court in *T. Chandrayya* v. *V. Seethamma*, A.I.R. (27) 1940 Mad. 689: (194 I. C. 646). In the Bombay case, their Lordships relying upon the Calcutta view held that when the plaint is returned to be presented in a Court of competent jurisdiction, the suit is to be considered as instituted on the date of such presentation, and it could not be said that "the previous suit instituted in a Court having no jurisdiction was continued in the Court which had jurisdiction to try the suit." In the Madras case the original plaint was filed within time but for want of pecuniary jurisdiction it was returned by the Court for presentation to the proper Court. The plaintiff with a view to bringing the claim within jurisdiction amended the plaint by striking out part of his claim and represented it to the same Court. It was found, however, that the claim on the date of the representation had become time-barred. The learned Munsif before whom the plaint was filed held that it was barred, but the learned Subordinate Judge on appeal took a different view which was affirmed by a single Judge of the High Court, they being of the opinion that the amended plaint filed on 6th August 1930, must be deemed to be a continuation of the suit which was filed on 30th October 1929 and as such, was within time. In Letters Patent appeal their Lordships disagreed with this view and held that a Court which had no jurisdiction could not pass orders in the suit beyond directing the plaint to be presented to the proper Court and giving a direction with regard to the costs incurred up to the time of the return of the plaint, and that the suit must be deemed to have been instituted on the date of representation of the amended plaint which the Court had jurisdiction to accept and was, therefore, barred. Their Lordships also refused to grant the benefit of S. 14, Limitation Act to the plaintiff under those circumstances. The view therefore held by all these Courts is that after the plaint has been returned for representation to the proper Court, the institution of the suit commences from the date on which the plaint is presented to the proper Court, and that the suit so instituted is not a continuation of the suit before the Court which had really no jurisdiction to entertain it and transferred it for re-presentation to the proper Court.

[8] The seal of approval appears to have been set upon this view of the law by a decision of the Privy Council in *Ramdutta Romkissendass* v. *E. D. Sassoon & Co.*, 56 Cal. 1048: (A. I. R. (16) 1929 P. C. 103). The relevant passage is at p. 1057 of the report. There the question was whether limitation applied to bar the claim of the respondents under the award which they had obtained. The Judges of the High Court held that the arbitration proceedings which resulted in the award under consideration before the Privy Council were in effect a mere continuation of the proceedings which had been instituted on 15th July 1915, but which proved abortive through want of jurisdiction of the arbitrator appointed. The Privy Council disagreed with that view of the High Court and observed as follows:

> "They think that these proceedings came to an end with the decision of the single arbitrator whose award was ultimately set aside and that the proceedings instituted at a later date, after the decision in the Privy Council had been announced, cannot be regarded as a mere continuation of the first proceedings. It is quite clear that where a suit has been instituted in a Court which is found to have no jurisdiction and it is found necessary to raise a second suit in a Court of proper jurisdiction, the second suit cannot be regarded as a continuation of the first, even though the subject-matter and the parties to the suits were identical."

Their Lordships then referred to S. 14, Limitation Act, as providing an alleviation of the hardships that might arise in such cases In view of those clear and categorical pronouncements of the Judicial Committee the matter is hardly left in the region of doubts at all.

[9] I shall however, refer to some of the decisions on which reliance has been placed by the learned Advocate for the appellants. One of them is the decision in *Khellat Chunder Ghose* v. *Nusseebunnissa Bibee*, 16 W. R. 47. In that case, a Division Bench held that the date of a suit must be taken to be that on which the plaint was originally filed and not that on which it was filed in another Court either as an amended plaint or as a plaint returned to be filed in that Court. But this observation must be read subject to the facts of the case in which the decision was given. In that case the plaint was originally filed before a Munsif but the Munsif estimated the value of the claim stated by the plaintiff as beyond the jurisdiction of his Court. He accordingly returned the plaint to the plaintiff in order to its being presented in a proper Court. The plaintiff then presented the plaint in the Court of the Subordinate Judge, and the Subordinate Judge tried the case and gave the plaintiff a decree. It was contended that when the suit was brought in the Munsif's Court, Act XXVI [26] of 1867 was replaced by another Act, Act VII [7] of 1870, under which the valuation was 15 times the net profits. That being so, the suit would be within the jurisdiction of the learned Munsif. It is quite clear, therefore that here the suit had been decided by the Subordinate Judge who although not the Court of the lowest grade competent to try the suit, was nevertheless competent to entertain the suit and to try it, and therefore it made no difference whether the plaint was presented to him under the new Act or presented to the learned Munsif. Of course, the proper course should have been to present it before the learned Munsif after the change in the law. Nevertheless if the learned Subordinate Judge proceeded to decide the matter it was quite competent for him to decide and the date of the institution of the suit, therefore, did not really matter at all.

[10] The next case on which reliance has been placed is the decision in *Ramaswami Iyar* v. *Veerarayan Raju*, A.I.R (28) 1941 Mad 711 : (196 I. C 521). There also the facts were almost parallel to the facts in the Weekly Reporter case so far as the point of jurisdiction is concerned. Indeed when their Lordships' attention was drawn to the decision in *Hirachand Succaram* v. *G. I. P. Ry. Co*., 52 Bom 48 : (A. I. R. (15) 1928 Bom. 421), they distinguished the case on the following grounds :

> "The difference between Bombay suits and the suit now before us is that in the Bombay suits the Subordinate Judge had no jurisdiction to try them, but in the case before us the Subordinate Judge had jurisdiction, although after the suit had been instituted it was found that another Court *also* had jurisdiction and that the Code of Civil Procedure required the suit to be tried by the other Court as the Court of first instance."

Therefore, that decision also is distinguishable. Where there is another Court also having jurisdiction the jurisdiction of the Court before whom the suit is tried is not affected by the mere fact that the other Court is the Court of the lowest grade competent to try it The cases of this class, therefore, stand on a different footing, and do not support the argument of the learned counsel for the appellants.

[11] Another decision cited on behalf of the appellants is the decision in *Ganga Prasad* v. *Ramanand*, A.I.R. (2) 1915 ALL. 344 : (30 I. C. 544) In that case their Lordships held that representation of a plaint in accordance with the order of the former Court before a Court of competent jurisdiction within the period of limitation amounts to a continuance of the suit, and therefore no question of limitation arises. No reasons have been assigned in the judgment for arriving at this conclusion and in any case so far as this Court is concerned, it has been held in *Firm Jiwan Ram Ramchandra* v *Jagernath Sahu*, 18 P. L T 250 : (A.I.R (24) 1937 Pat 495) that a Court returning a plaint for want of jurisdiction has got no authority to grant any time to the plaintiff for presenting it to the proper Court. The decision in *Ganga Prasad* v. *Ramanand*, A. I. R (2) 1915 ALL. 344 : (30 I. C. 544) therefore does not commend itself to me as a current decision.

[12] Another contention which has been urged in support of the view that the present suit could be taken to be a continuation of the first suit is that, it could not be said that the learned Munsif had completely no jurisdiction in the matter. The argument is that if the point of jurisdiction had not been raised, and the Court had proceeded to decide the suit, the decision would not be open to question in a collateral proceeding on the ground that the learned Munsif had no jurisdiction to decide the suit. Of course if the question of jurisdiction had not been raised, then the matter could not be collaterally re-opened in a subsequent suit and the decision of the Court challenged on the ground of jurisdiction. It is really for that Court to decide whether he has jurisdiction to entertain the suit or not, and whether having regard to the value of the subject matter of the suit it falls within his pecuniary jurisdiction. But once the jurisdiction of the Court has been challenged and the Court has decided that it has

no jurisdiction to entertain the suit and he directs the plaint to be presented before a Court competent to entertain it the matter ends there. The Court thereafter is *functus officio*. The plaint when it is returned to the plaintiff for being presented to the proper Court may or may not be so presented by him. It may be subject to limitations. It may be also subject to payment of proper court-fees. Therefore this argument of the learned counsel for the appellants does not in any manner lead to the inference that the subsequent institution of the suit in a Court of competent jurisdiction is a mere continuation of the previous proceedings.

[13] I have already dealt with the relevant cases bearing on the point and after a detailed analysis of the matter, I have no hesitation in coming to the conclusion that the suit pending before the learned Subordinate Judge at Arrah was in no sense a continuation of the suit filed before the learned Munsif. The position then is that the compromise petition which was presented to the learned Munsif was filed not during the pendency of the present suit but at some stage before the suit came to be instituted. Under those circumstances it seems difficult to hold that the provisions of O. 23, R. 3 applied and that the Court could record such a compromise under that provision. It is unfortunate that the exigencies of the case may have deprived the plaintiffs of enforcing a right to which they possibly may have been entitled if it had not been held that the suit was beyond the competence of the learned Munsif. There are also no materials before us and in fact it would be unnecessary to go into those materials in the view of the law which I have taken affirming the view of the learned Subordinate Judge to hold whether the compromise is genuine. If genuine the plaintiffs may have their remedies by way of a suit. But in my opinion for the reasons discussed above I must uphold the decision of the learned Subordinate Judge and agree with him that the compromise in question cannot be recorded in the present suit.

[14] The appeal, therefore, fails and must be dismissed. In the circumstances, however I would not order any costs to defendant 1 who is the contesting respondent here, either of this Court or of the Court below.

[15] **Ramaswami J.**—I agree.

V.S.B. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 478 *[C. N. 120.]*

SHEARER AND DAS JJ.

Sm. Gangamoni Devi —*Applicant* v. *Kumud Chandra Mazumdar and others* — *Opposite Party.*

Supreme Court Appeal No. 79 of 1948, D/- 3-5-1950, for leave to appeal to the Supreme Court.

(a) Civil P. C. (1908), S. 100 — Question of fact — Whether there was consideration for compromise.

The question whether there was good consideration for the compromise or not is a question of fact which cannot be raised for the first time in appeal. [Para 5]

Annotation : ('50 Com.) Civil P. C., Ss. 100-101, N. 38, Pt. 13; N. 52, Pt. 1.

(b) Civil P. C. (1908), S. 110 — Substantial question of law — Question newly raised.

Leave to appeal could not be given for the purpose of raising for the first time a question which was not raised at any time while the litigation was pending, that is to say, either at the trial Court or in the appellate Court. The resort to the provisions which permit a party to apply for leave to appeal for raising a point for the first time after the whole case has been disposed of, would be an abuse which should not be encouraged. [Para 6]

Annotation : ('50-Com.) Civil P. C., S. 110, N. 17, Pt. 18.

(c) Transfer of Property Act (1882), S. 100—Document creating charge failing as lease.

No particular form of words is necessary for the creation of a charge, and it is sufficient if, having regard to all the circumstances of the transaction, it shows an intention to make the property security for the payment of the money mentioned therein. Thus, where a document, in clear terms, creates a charge, even if it fails as a lease, it can still be treated as creating a charge on the leasehold property. [Para 7]

Annotation : ('50 Com.) T. P. Act, S. 100, N. 5, Pt. 1

R. S. Chatterji — **for Applicant.**

S. C. Mazumdar — **for Opposite Party.**

Das J. — **This is an application for leave to appeal to the Supreme Court, and the main question for decision is whether the appeal involves some substantial question of law within the meaning of para. 3 of S. 110 Civil P. C.**

[2] The facts look, at first sight, somewhat complicated, but when stated clearly in chronological order, do not present any serious difficulty with regard to the questions raised. One Ramdayal Mazumdar took a lease of underground rights in nine annas share of village Kusunda from the proprietor, the Raja of Katras, by a registered lease dated 1st Agrahayan 1301 B. S. corresponding to the year 1894. This Ramdayal Mazumdar was the ancestor and predecessor-in-interest of the plaintiffs to the action, out of which this application has arisen. Ramdayal Mazumdar granted a sub-lease of his interest to Raja Durga Prasad Singh of Jharia by a registered document dated 26th Chait 1311 B. S. corresponding to 1905. For the sake of convenience, this lease of 1311 B. S. in favour of Raja Durga Prasad Singh of Jharia will be called the head lease. One of the terms of this head lease was that the annual minimum royalty reserved viz., a sum of Rs. 900 would be paid in four equal instalments. Raja Durga Prasad Singh of Jharia, in his turn, assigned his interest to one C. J. Smith by a deed of assignment dated 15th Baisakh 314 B. S. which would correspond to 1907. In 1914, Ramdayal Mazumdar sued Raja Durga Prasad Singh and his assignee, C. J.

Smith, for royalty due for the period 1318 B. S. to Aswin 1321 B. S This suit was compromised, and the terms of compromise, as embodied in the decree, stated :

> "The amount of rent for the year in suit is settled out of Court and henceforward defendant 2 (that is, C J. Smith) shall continue to pay the amount of rent in conformity with the terms embodied in the *kabuliat* executed by Raja Durga Prasad Singh and the additional terms mentioned below. Defendant 2 further stipulates to execute within one month a proper *kabuliat*, creating the entire rent payable in respect of the land in suit first charge on the leasehold land. Under the terms cited above, the defendant shall pay the amount of claim and the *salami* for mutation and registration of name, i. e., in all, Rs 4500 and get his own name registered. He (the defendant) shall execute a separate *kabuliat* within one month mentioning therein that the rent shall form 'first charge' on the leasehold property."

[3] In accordance with the aforesaid compromise and in execution of the decree passed in terms of the compromise a document was executed on behalf of Mr Smith by the Court on 27th April 1918, in Execution Case No. 94 of 1917. On 4th February 1920, Mr. Smith executed an English mortgage in respect of the leasehold property in favour of a company known as the Jagadamba Loan Company, Limited (hereinafter to be referred to as the Loan Company), to secure a sum of Rs. 3 lacs advanced by the Loan Company to Mr. Smith. Thereafter, the Loan Company came in possession of the leasehold property, but under the terms of the mortgage, the mortgagor remained liable to pay all rents, royalties etc, for the leasehold property. In the year 1929, the plaintiffs, successors in-interest of Ramdayal Mazumdar, instituted a suit against the heirs and legal representatives of Mr. Smith for recovery of royalty up to 1338 B. S. by enforcing the charge on the leasehold property for the payment of the said rent. The Loan Company was not made a party to this litigation. A decree was obtained, and in execution of the decree the leasehold property was put up to sale, and purchased by one Saroj Basini Debi on 12th November 1931. This Saroj Basini Debi was defendant 1 to the action, out of which this application has arisen. On 31st March 1938, the Loan Company assigned their interest to one Smt. Umarani Debi On 25th September 1938, Smt Umarani Debi transferred her interest to Smt. Gangamoni Debi, defendant 2 to the action and appellant in the High Court (now petitioner before us). On behalf of the petitioner it is stated that Smt. Umarani Debi acquired from the Loan Company the interest as mortgagee as well as the interest which the Loan Company had acquired by paying up Saroj Basini Debi and Smt. Umarani Debi transferred her mortgage interest to Smt. Gangamoni Debi, but not the other interest. In 1945, the plaintiffs brought the action, out of which this application has arisen, against Saroj Basini Debi, defendant 1, and Gangamoni Debi, defendant 2, for recovery of minimum royalty or rent for the years 1344 B. S. to *Poos kist* of 1351 B. S. by enforcing the charge against the leasehold property. This suit was valued at Rs. 9469 and odd annas, being the amount of royalty claimed with interest thereon. It was contested by the present petitioner, Gangamoni Debi, and her principal defence was that she held the property as a mortgagee, and was not, therefore, liable for rent or royalty there being neither privity of estate nor privity of contract between herself and the plaintiffs.

[4] The learned Subordinate Judge decreed the suit. Gangamoni Debi preferred an appeal to this Court This appeal was dismissed and the decision of the learned Subordinate Judge was affirmed. Gangamoni Debi has now made the present application for leave to appeal to the Supreme Court against the decree passed by this Court on appeal.

[5] When the appeal was heard in this Court, Mr R. S. Chatterji, appearing for the appellant, raised several contentions which were stated and dealt with under four heads in the judgment of the Bench which heard the appeal. The same contentions as also some others, which were not raised at any previous stage, have again been pressed before us in support of the submission that the appeal involves some substantial question of law. The first contention is that the compromise in the suit of 1914 was void by reason of the fact that it was without consideration. This contention was dealt with by the Bench which heard the appeal in the following way It was pointed out that such a plea was not raised in the first Court, and as the plea involved a question of fact, it could not be raised for the first time in appeal. Secondly it was pointed out that by the compromise C. J. Smith was recognised as the lessee in place of the Raja of Jharia, and the liability of the Raja was deemed to have been paid up in accordance with the terms of the compromise: it was stated that this was good consideration under s. 2. sub-s (d), Contract Act. Mr. R. S. Chatterji has contended before us that the second ground mentioned above is not correct in law inasmuch as Ramdayal Mazumdar was, in law bound to recognize the transfer made in favour of C J. Smith, who was accordingly made a party defendant in the suit He has also contended that s. 2 (d) has no application. In my view, it is unnecessary to go into these questions. The first ground was itself sufficient to dispose of the contention of Mr. Chatterji. It is well settled that a question of fact cannot

be raised for the first time in appeal. I do not think that there can be any doubt that the question whether there was good consideration for the compromise or not is a question of fact. The appellant should have raised such a plea in the first Court and joined issue thereon. Having failed to do that, it was not open to the appellant to raise the question for the first time in appeal. This, I think, is well settled, and no substantial question of law is involved therein.

[6] Secondly, it has been contended that the terms of compromise, so far as they imposed an additional burden on the lessee by the creation of a charge on the leasehold property for payment of rent, were outside the scope of the suit of 1914: therefore, such terms could not be enforced by way of execution of the compromise decree, but could only be enforced by obtaining a decree in a suit for specific performance. This is an entirely new point never taken at any previous stage. Even in the application for leave to appeal, no such ground has been taken. There are several decisions which state that the question of law must definitely and clearly arise and must not be one newly raised. In *Mohamad Shadak* v. *Venkata Komaraju*, A. I. R. (27) 1940 Mad. 810 : (193 I. C. 353), it was pointed out that leave to appeal could not be given for the purpose of raising for the first time a question which was not raised at any time while the litigation was pending, that is to say, either at the trial Court or in the appellate Court. Their Lordships observed :

> "The resort to the provisions which permit a party to apply for leave to appeal for raising a point for the first time after the whole case has been disposed of, would be in our opinion, an abuse which should not be encouraged."

If I may say so with respect, I entirely agree with the above observation.

[7] The third contention of Mr. Chatterji is that the *kabuliat* of 1918 executed on behalf of C. J. Smith, purported to create a fresh lease, though in law it did not; alternatively, it purported to create a mortgage, but was not validly executed in accordance with the provisions of S. 59, T. P. Act. The contention is that if the document fails as a lease or a mortgage, it can create no right in favour of the plaintiffs-respondents. The appellate Court fully dealt with this contention of Mr. Chatterji. It pointed out that the *kabuliat* could not be treated as a lease, because it had not been signed by the lessor. It further pointed out that by the *kabuliat*, there was no transfer of any interest in the property: therefore, the document was not a mortgage. Manohar Lall J. with whom Mahabir Prasad J. agreed, stated that the parties really intended to make a lease, but not a mortgage. There was no doubt, however, that the *kabuliat* of 1918 created a charge on the leasehold property, and the appellate Court held that there could be no valid objection to treating the document as such. The document in clear terms, creates a charge, and even if it fails as a lease, I see no good reason why it cannot be treated as creating a charge on the leasehold property. No particular form of words is necessary for the creation of a charge, and it is sufficient if, having regard to all the circumstances of the transaction, it shows an intention to make the property security for the payment of the money mentioned therein. It has been contended that a document creating a charge requires to be attested in the manner laid down in S. 59, T. P. Act, and Mr. Chatterji has relied on certain observations made in *Shiva Rao* v. *Shanmughasundarswami*, A. I. R (27) 1940 Mad. 140 : (I. L. R. (1940) Mad. 306). This again, is a point which was never raised at any previous stage of the litigation, and cannot be allowed to be raised for the first time on an application for leave to appeal.

[8] The last contention of Mr. Chatterji is that the suit should have been dismissed on the ground of non-joinder of Umarani Debi. It is contended that Umarani Debi was interested in the equity of redemption inasmuch as she acquired that interest of the Loan Company which the latter got by paying up Saroj Basini Debi, and which interest Umarani Debi had not parted with in favour of the petitioner. Saroj Basini Debi had purchased the leasehold property in execution of the mortgage decree obtained by the plaintiffs in the suit of 1929. Therefore, Saroj Basini Debi became the lessee, and was rightly impleaded as defendant 1 in the action. There is no document showing that the interest of Saroj Basini Debi as lessee was transferred to the Loan Company. It was, no doubt, stated that the Loan Company had redeemed or paid up Saroj Basini Debi. Mr. Chatterji has drawn our attention to para. 11 of the plaint where it was stated that :

> "The plaintiffs have been informed and believe that defendant 2 acquired interest in the leasehold property by transfer from defendant 1, hence she is also impleaded as defendant."

I do not think that this statement in the plaint amounts to an admission, as is contended by Mr. Chatterji, that the interest of a lessee which Saraoj Basini Debi had acquired was transferred to the Loan Company, and then to Umarani Debi. The appellate Court rightly pointed out that the plea that the suit could not proceed in the absence of Umarani Debi was not taken in the Court below and no issue was framed. In these circumstances, the point could not be raised for the first time in appeal. It was further pointed out that on the materials before the Court, it was impossible to come to a satisfactory conclusion as to whether any person interested in the equity of redemption had not been made a party. In my view, both these are good and valid reasons for overruling the contention of Mr. Chatterji. Firstly, on the materials in the record it cannot be said that Umarani Debi had acquired the interest of a lesseee; secondly such a plea not having been raised in the first Court could not be raised for the first time in appeal.

[9] For the reasons given above, I am unable to hold that the appeal involves any substantial question of law. The value of the suit, as I have already stated, was Rs. 9469-6-0. Mr. Chatterji has contended that the decision affected the right of the petitioner as mortgagee, the value of which was much more than Rs. 10,000, therefore, the petitioner was entitled to get leave to appeal under para. 2 read with para. 3 of S. 110, Civil P. C. I have pointed out that no substantial question of law is involved, and para. 3 does not apply.

[10] The application accordingly fails, and is dismissed with costs. Hearing fee, three gold mohurs.

[11] **Shearer J.** — I agree.

V.R.B. *Application dismissed.*

A. I. R. (37) 1950 Patna 481 [*C. N. 121.*]

DAS AND NARAYAN JJ.

Kishun Das and another — *Appellants* v. *Ganesh Ram and others* — *Respondents.*

A. F. A. D. Nos. 2012 and 2012A of 1946, D/- 9-5-1950, from decicion of D. J., Bhagalpur, D/- 5-7-1946.

(a) Sale of Goods Act (1930), Ss. 23 (2) and 25 (2) —Property in goods sold — Seller's right to retain —Constructive delivery.

In an ordinary contract for sale, the seller may retain the property in the goods till the price is paid. Ordinarily and normally, a party buying goods is entitled to call upon the vendor to give him physical delivery of the goods, but by agreement a purchaser may say that he will be satisfied with a constructive delivery. If the goods are made over to a bailee, the bailee would ordinarily be an agent of the seller unless the buyer agrees to make the bailee his agent, and asks the bailee to hold the goods for him. [Para 6]

Annotation: ('46-Man.) Sale of Goods Act, S. 23, N. 3; S. 25, N. 2.

(b) Contract Act (1872), S. 221 — Loss of goods — Agent's lien, if lost — Loss, if falls on principal.

The lien of an agent is, as a general rule, lost by his parting with the possession. If possession is given to a bailee for safe custody or for some other purpose consistent with the continuance of the lien, and the circumstances are such as to show that the agent intends to retain his rights, his lien will not be prejudiced by his parting with the possession. But if the goods themselves are lost the agent loses his lien, and the proprietor or owner loses the goods. The loss of the goods must fall on the owner, or the person in whom the property in the goods is vested. Such a loss cannot fall on the agent. If the agent had paid for the price as a money-lender, he cannot lose his lien as also the money which he had paid for his principal. There is a well understood distinction in law between a lien on property and a title to property. The agent holds the lien, but the principal owns the title. When the goods are lost, the agent loses the lien and the principal loses the goods. [Para 6]

The plaintiffs acted as agents for the defendants in the matter of the purchase of certain goods and advanced the money for price therefor. The goods were lost in transit due to circumstances beyond the control of the parties. The railway receipt which was endorsed in favour of the plaintiffs was sent to the Bank with a demand draft. The defendants having refused to pay, the plaintiffs brought a suit against them for recovery of price paid by them:

Held, that when the goods were lost in transit, due to circumstances beyond the control of the parties, the plaintiffs lost their lien as agents which they wanted to retain till the demand draft was paid, and the defendants lost their property in the goods. The loss of the price of the goods etc., paid for by the plaintiffs must therefore fall on the defendants in whom lay the property in goods. [Paras 6, 7]

Annotation: ('46-Man.) Contract Act, S. 221, N. 1.

Mahabir Prasad and T. K. Prasad — for Appellants.

L. K. Jha, S. C. Mazumdar, Baidya Nath Pd. I and Narottam Chatterji — for Respondents.

Das J. — These two appeals are by the defendants first party. The suit out of which these two appeals have arisen was a tripartite suit, though the contest was between two parties only. The plaintiffs respondents, first party here, brought the suit for recovery of Rs. 4565 and odd annas on the following allegations. They alleged that they carried on a joint family business of commission agency and *goladari* at Naugachia in the District of Bhagalpur. The appellants had a joint family business at Jaunpur under the name and style of Mohan Lal Mata Prasad. The defendants second party, respondents second party before us, had also a business at Naugachia under the name and style of Lalchand Bhagat Ambica Ram. On 11th August 1942, the plaintiffs respondents purchased, on behalf of the appellants, 337 bags of maize weighing 627 maunds and odd at the rate of Rs. 5-9-0 per maund from the respondents second party, and paid the price thereof. The maize in question had been loaded already in wagon at Karhagola railway station, and was booked for Jaunpur in the name and in favour of the firm Lalchand Bhagat Ambica Ram under a particular invoice dated 10th August 1942. The maize did not, however, reach Jaunpur having been looted by a violent mob during the disturbances in August 1942. The railway receipt which it is stated, was endorsed in favour of the plaintiffs-respondents was sent to the Bank of Bihar at Jaunpur with a demand draft for Rs. 1200 for realisation of the money from the appellants. The appellants refused to pay. The suit was brought for the realisation of the price etc., including the price of 337 gunny bags and *paya* charges, of the aforesaid 337 bags of maize. It appears that the plaintiffs-respondents also claimed some money as a result of certain cash transactions alleged to have taken place between the plaintiffs-respondents and the appellants. In all, the claim was laid at Rs. 4565 and odd annas, as already stated above.

[2] The defence of the appellants was that they had nothing to do with the respondents second party, and they purchased 337 bags of maize on 9th August 1942 (and not 11th August 1942, as alleged by the plaintiffs-respondents) from the plaintiffs-respondents; but the title to, or the property in the goods had not passed to the appellants, because the agreement between the parties was that the property in the goods would pass on delivery of the goods and payment of the price at Jaunpur. In other words, the main defence of the appellants was that the property in the goods was still retained by the plaintiffs-respondents, and the loss in transit must, therefore, fall on the plaintiffs-respondents.

[3] The learned Subordinate Judge, who dealt with the suit in the first instance came to the following findings: (1) 337 bags of maize were purchased by the plaintiffs-respondents themselves from the respondents second party, and the title thereto had passed to the plaintiffs-respondents as soon as they paid the price and got the railway receipt endorsed in their favour; and (2) title to the said bags of maize never passed to the appellants, and the plaintiffs-respondents still retained their property in the goods. On these two main findings, the learned Subordinate Judge dismissed the claim for the price of the maize. With regard to the claim arising out of certain other transactions, the learned Subordinate Judge held that the appellants owed a sum of Rs. 246 and odd annas to the plaintiffs-respondents, and passed a decree accordingly.

[4] Two appeals were preferred to the learned District Judge, one by the plaintiffs-respondents, and the other by the present appellants. The learned District Judge came to the following findings. He held that the plaintiffs-respondents merely acted as agents, and the purchase of 337 bags of maize on 11th August 1942, was really made by the present appellants, who thereupon acquired good title to the goods, though the price was paid by the plaintiffs-respondents on behalf of the appellants. He further found that the railway receipt was sent through the Jaunpur branch of the Bihar Bank with a demand draft for Rs. 1200 for the purpose of enforcing the lien which the plaintiffs-respondents held as agents. On these findings, the learned District Judge held that the property in the goods had passed to the present appellants; therefore, they had to bear the loss, due to unforeseen causes, which took place in transit. With regard to the claim arising out of other transactions, the learned District Judge found against the present appellants. In the result, he dismissed the appeal of the present appellants, and allowed that of the plaintiffs-respondents.

[5] In the two appeals before us, learned counsel for the appellants has advanced his arguments mainly on the question as to the party in whom the property in the goods of 337 bags of maize lay. We have not been addressed with regard to the claim arising out of other transactions.

[6] The point urged before us on behalf of the appellants may be put in the following way. It is contended that as between the appellants and the plaintiffs-respondents the property in the goods could not have passed, in law, to the appellants, in view of the findings that the railway receipt was not endorsed in favour of the appellants, and the railway receipt along with a demand draft for Rs. 1200 was sent to the Jaunpur branch of the Bihar Bank for realisation of the price from the appellants. Learned counsel for the appellants contends that it is clear from the aforesaid findings, which were accepted by the Court of appeal below, that the intention of the parties was that the property in the goods would not pass till the demand draft was honoured by the appellants. Our attention has been drawn to Ss. 23 (2) and 25 (2), Sale of Goods Act, and to the decisions in *Mehta & Co.* v. *Joseph Heureux*, 48 Bom. 531: (A. I. R. (11) 1924 Bom. 422) and *Rameshwardas* v. *Paper Sales, Ltd.*, A.I.R. (31) 1944 Bom. 21: (211 I.C. 93). I do not think that there is any doubt that in an ordinary contract for sale, the seller may retain the property in the goods till the price is paid. Ordinarily and normally, a party buying goods is entitled to call upon the vendor to give him physical delivery of the goods, but by agreement a purchaser may say that he will be satisfied with a constructive delivery. If the goods are made over to a bailee, the bailee would ordinarily be an agent of the seller unless the buyer agrees to make the bailee his agent, and asks the bailee to hold the goods for him. In the case before us, the railway receipt was not endorsed in favour of the appellants. On the contrary, it was sent to the Jaunpur branch of the Bihar Bank with a demand draft for Rs. 1200, and unless the demand draft was honoured, the appellants could not get the goods. Normally, I think, these circumstances would give rise to the inference in law that the seller retained the property in the goods till the money was paid. The

present case cannot, however, be decided on such a simple issue. The final Court of fact, on a consideration of the entire evidence in the case, came to the clear finding that the plaintiffs-respondents were merely acting as agents for the appellants, and the purchase made on 11th August 1942, of 337 bags of maize, which had already been loaded in wagons at Karahgola railway station, was a purchase really made by the appellants, though the money for the price was advanced by the plaintiffs-respondents. Learned counsel for the appellants has subjected this finding to a good deal of criticism, and has drawn our attention to that part of the judgment of the learned District Judge where he said that

> "the difference between the parties as regards whether the purchase of this quantity of maize was from plaintiffs, as stated by defendants first party, or from defendants second party through plaintiffs, as stated by plaintiffs, is not of much importance."

It is contended that after having expressed himself that the matter was not of much importance, the learned District Judge could not have come to a finding that the plaintiffs-respondents were acting as agents of the appellants. The finding of the learned District Judge has to be taken from his judgment as a whole and not from a stray observation occurring in the judgment. I have very carefully considered the judgment of the learned District Judge, and it seems clear to me that he found in unambiguous terms that the plaintiffs-respondents acted as agents for the appellants in the matter of the purchase of 337 bags of maize, though the plaintiffs-respondents advanced the money for the price therefor. There is evidence in support of that finding which evidence the final Court of fact has rightly or wrongly, accepted. No doubt, the learned Subordinate Judge came to a contrary finding. He thought that the transaction was of a different character, namely, first a purchase by the plaintiffs respondents from the respondent second party and then a contract for sale by the plaintiffs-respondents to the appellants. The learned District Judge did not, however, accept that finding. He found that there was really *one sale or purchase*—337 bags of maize purchased on 11th August 1942, by the appellants through their commission agents namely, the plaintiffs-respondents. The plaintiffs respondents acted in a dual capacity: they acted as commission agents for the purchaser; and as money-lenders, they advanced the money for the price of the goods purchased. If this be the real character of the transaction as found by the final Court of fact, and I have no doubt that he has correctly found so, then the legal position would be different from the simple issue propounded by learned counsel for the appellants. Under S. 221, Contract Act, the plaintiffs-respondents would be entitled to retain the goods until the amount due to them for commission, etc., has been paid or accounted for. There has been some argument before us if 'disbursements' in S. 221, Contract Act, include 'loans'. That would depend on whether the loans have been specially assigned to the property. In the case before us, the plaintiffs-respondents were entitled to their commission as also to the money which they had paid for the price of the goods. In other words, they had an agent's lien on the principal's property. Learned counsel for the appellants has contended that if an agent retains possession of the goods in enforcement of the agent's lien, the entire loss, if the goods are lost during the retention of possession by the agent, must fall on the agent himself and not on the principal. I do not think that this contention is correct. What the agent loses is his lien which is extinguished. It is, I think, well settled that the lien of an agent being a mere right to retain possession of the property subject thereto is, as a general rule, lost by his parting with the possession. If possession is given to a bailee for safe custody or for some other purpose consistent with the continuance of the lien, and the circumstances are such as to show that the agent intends to retain his rights, his lien will not be prejudiced by his parting with the possession. But if the goods themselves are lost, the agent loses his lien, and the proprietor or owner loses the goods. The loss of the goods must fall on the owner, or the person in whom the property in the goods is vested. Such a loss cannot fall on the agent. If the agent had paid for the price as a money-lender, he cannot lose his lien as also the money which he had paid for his principal. There is a well understood distinction in law between a lien on property and a title to property. The agent holds the lien, but the principal owns the title. When the goods are lost, the agent loses the lien and the principal loses the goods. That, in my opinion, is the correct position in law. Therefore, when the goods in this case were lost in transit, due to circumstances beyond the control of the parties, the plaintiffs respondents lost their lien as agents which they wanted to retain till the demand draft was paid, and the appellants lost their property in the goods. The loss of the price of the goods etc., paid for by the plaintiffs-respondents, must fall on the appellants. The position of an agent *vis-a-vis* the principal in very similar circumstance has been well-explained in *Dhanpat Singh* v. *Haricharan*, 29 C. W. N. 121: (A. I. R. (12) 1925 Cal. 284).

[7] In my view, the learned District Judge rightly held that ownership or the property in the goods was with the present appellants in

spite of the fact that the railway receipt was not endorsed in their favour and was sent with a demand draft for Rs. 1200 to the Jaunpur branch of the Bihar Bank. The learned District Judge also rightly held that the loss of the goods must fall on the party in whom lay the property in the goods.

[8] For these reasons, the appeals fail, and are dismissed with costs.

[9] **Narayan J.** — I agree.

V.R.B. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 484 [*C. N. 122.*]

RAMASWAMI AND SARJOO PRASAD JJ.

M. A. Rauf—Appellant v. *Bodhi Singh and others — Respondents.*

A. F. A. D. No. 2438 of 1946, D/- 5th May 1950, from decision of A. D. J., Gaya, D/- 26th July 1946.

(a) Limitation Act (1908), Arts. 142 and 144 — Applicability — Suit for possession based on title —Onus of proof—Evidence of both parties unsatisfactory — Presumption arising from title can be taken into consideration.

In a suit for ejectment, where the evidence adduced by both parties, although unsatisfactory, is not altogether valueless, the Court is entitled to take into consideration the presumption arising from title and probabilities of the case. [Para 10]

A suit was brought for declaration that the land was bakasht and for recovery of possession by eviction of defendants on the allegation that the plaintiff had purchased the land and was in possession thereof until 1937, when defendants had set up a false claim to the land and an order under S. 145, Criminal P. C., declaring defendants to be in possession was passed on 7th June 1939. The evidence as to possession adduced by both the parties was found to be unsatisfactory. The question was whether the suit was governed by Art. 142 or Art. 144, Limitation Act, and on whom the onus of proof lay:

Held, that the plaintiff would succeed, even if Art. 142 was applicable, but that upon the pleadings of the case the appropriate provision would be Art. 144 and the suit would not fail until the defendants established adverse possession for the statutory period either of the entire or limited interest of the landlord: 25 Cal. L. J. 69 (P.C.) and A. I. R. (9) 1922 Pat. 432, *Rel. on*; *Case law referred.* [Para 11]

Annotation: ('42-Com) Limitation Act, Art. 142 and 144, N. 87.

(b) Precedent — Obiter dictum — Test to decide whether dictum is obiter.

The test for determining whether a proposition is *obiter* is whether the decision would have been the same if a word has been inserted in the proposition reversing its meaning. [Paras 9 and 11]

Annotation: ('50-Com.) Civil P. C., Pre, N. 15.

P. R. Das and R. S. Chatterji — for Appellant.

Mahabir Pd., R. P. Katriar, Baidyanath Pd. II and R. Prasad—for Respondents.

Ramaswami J. — This appeal involves the important question whether the Subordinate Judge was right to hold that the suit was barred under Art. 142, Limitation Act.

[2] The dispute relates to 14.68 acres of bakasht land in village Chak Dharampur. The Mouza belonged to Ramadhin Singh and Shyamadhin Singh who on 1st August 1917 executed a sale deed in favour of Safdar Ali who in his turn made a registered *wakf* deed appointing the plaintiff as mutawalli. The plaintiff brought the suit alleging that in the year 1912 Ramadhin Singh and Shayamadhin Singh had in execution of rent decrees purchased the land and obtained dakhaldehani thereof; that in the survey proceeding the land was recorded as bakhasht; that Safdar Ali continued to be in khas possession after his purchase; that in the year 1937 the defendants set up a false claim to the land on account of the Kisan movement. A proceeding under S. 145 was instituted in the Court of the Subdivisional Magistrate who by his order dated 7th June 1939 held that the defendants were in possession of the land. The plaintiff, therefore, brought the suit for a declaration that the land was bakasht and for recovery of possession by evicting the defendants.

[3] The main ground of defence was that the rent decree obtained by Ramadhin Singh and Shayamadhin Singh were 'fraudulent and collusive, that the plaintiff never obtained khas possession of the land, that the defendants continued to be in possession and on account of a subsequent compromise the landlord settled the land with the defendants at nakdi rent after taking salami. After Safdar Ali purchased the mouza the defendants obtained renewal of settlement on payment of further salami.

[4] Upon these contentions the lower appellate Court found that the case of settlement with the defendants was not true and defendants could not claim to be tenants by virtue of the alleged settlement. But on the question of possession, the lower appellate Court held that both the parties had adduced unsatisfactory evidence and since the onus of proof under Art. 142 was upon the plaintiff the suit was barred by limitation.

[5] On behalf of the appellant, Mr. P. R. Das contended that the lower appellate Court has misplaced the onus of proof and it was erroneous to hold that the suit was barred. Learned counsel maintained that the suit was in substance for a declaration of title and confirmation of possession, the cause of action starting from 7th June 1939 the date of the order of the Special Magistrate under S. 145, Criminal P. C., declaring that the defendants were in possession of the land in dispute. Learned counsel made reference to paras 31 and 33 of the plaint and contended that the suit was governed by Art. 144, Limitation Act, and that the burden was upon the defendants to establish the nature and extent of the right asserted. In support of his argument learned counsel referred to *Midna*

pore Zamindary Co. Ltd. v. *Panday Sardar*, 2 Pat. L. J. 506: (A. I. R. (4) 1917 Pat. 471), in which the proprietor of land sued a tenure-holder for recovey of possession of land on which the latter had encroached. The plaintiff claimed that the area in dispute should be declared to be the mal land of the mouza and that he should be awarded khas possession of the same. In the alternative there was a plea that if defendants were found not liable to be ejected it should be declared that the plaintiff was entitled to fair and equitable rent for the land occupied. Defendant 1 contested the suit claiming that the disputed area was ghatwali land and denied that the plaintiffs or their predecessors had any right to or possession of the land in suit. The trial Court gave a decree in favour of the plaintiff but the lower appellate Court set aside the decree of the trial Court on the ground that the plaintiff had failed to prove possession of the land within 12 years of the institution of the suit. On appeal, the High Court held that the suit was not barred and that plaintiffs were entitled to a decree. If Art. 142 applied the plaintiff must succeed because the plaintiff having proved his proprietary title was entitled to claim the presumption that he had possession and that his possession continued till within 12 years of the suit. It was for the defendants to rebut the presumption and this they have failed to do. But the learned Judges held that Art. 144 really applied to the case and that since the defendant had failed to prove adverse possession the plaintiff was entitled to a decree for khas possession of the land.

[6] The same principle has been expounded in *Sir Rameshwar Singh* v. *Rit Lal Singh*, 6 P. L. T. 514: (A. I. R. (12) 1925 Pat. 739) and *Kameshwar Singh* v. *Faturi Missra*, A. I. R. (21) 1934 Pat. 339: (149 I. C. 453). In the latter case Wort J. referred to the circumstances that it was admitted position that the plaintiff had title and it was also the case of the defendants that had they a title, it was not of the proprietary interest but a limited tenancy interest only as against the admitted proprietor the zamindar. The learned Judge therefore held that the defendant must either show title to tenancy right by contract or by the fact that he has been in possession for the necessary period and the onus was equally upon him to show the date upon which he came in possession and his title began. Such a case was governed by Art. 144, not Art. 142, and it was impossible for the Judge in trying such a suit to raise any presumption against the plaintiff by reason of the absence of any evidence on the part of the plaintiff.

[7] For the respondent learned counsel placed reliance upon *Dino Monee Debia* v. *Doorga Pershad*, 21 W. R. 70: (12 Beng. L. R. 274). But this case is not of much assistance for the Full Bench merely laid down that in a suit for possession of land against a tenant who was really a trespasser the defendant merely by alleging tenancy in his written statement did not preclude himself from setting up the defence of the law of limitation. In that case the defendants in their written statement pleaded a *mourusi* holding with respect to some of the plots in dispute; and with respect to other plots they set up an independent title claiming them to belong to another taluk than that of the plaintiff. The present case must be distinguished for the defendants have *not raised* the alternative plea of limitation in their written statement.

[8] For the respondent reference was made to *Ishan Chandra Mitter* v. *Raja Ramranjan Chakarbutty*, 2 C. L. J. 125, in which the landlord sued the defendant for khas possession of land which lay outside the boundaries of the leases granted by the plaintiff. The learned Judges held that when a tenant took possession of the land outside his tenancy and professed to do so in his character as tenant the landlord was dispossessed in a limited sense, in other words he was deprived of actual or khas possession of the land but not of proprietary possession or possession by receipt of rent. In such a case Art. 142, Limitation Act, would apply and the landlord who wishes to eject the defendant must bring a suit within 12 years of his dispossession; if he does not do so, his title to recover actual possession would be barred, although his title to receive fair rent would not be barred, the possession of the tenant, so far as the latter right is concerned having never been adverse. The learned Judges however thought that where the tenant intends the encroachment for his own benefit and sets up a title adverse to the entire interest of the landlord Art. 144, Limitation Act might be applicable. The distinction appears somewhat illogical for on principle there is no difference between a case where the person sets up a title adverse to the entire landlord's interest and a case where he prescribes for the limited interest of a tenant. In any event the authority of this case appears doubtful for in a subsequent case, *Gopal Krishna* v *Lakhiram*, 16 C. W. N. 634 : (14 I. C. 212), upon almost similar facts a Division Bench held that Art. 144 would apply. It was observed that though a tenant was bound to treat that which was an encroachment on his landlord's land as held by him under his landlord the landlord was not bound to treat the land on which his tenant encroached as held under a tenancy. But the landlord's right to recover possession of the land

encorached upon may be lost by the tenant having adversely to the landlord asserted his title as tenant to the land for more than 12 years. Under Art. 144, Limitation Act, there may be adverse possession not only of immovable property but of any interest therein, and a tenant may claim to have been in adverse possession for 12 years of a limited interest in encroached land, viz., a tenancy commensurate with that in the admitted lease between the parties.

[9] On behalf of the respondent learned counsel referred to *Raja Mohan Bikram Shah* v. *Deonarain Mahto*, A. I. R. (32) 1945 Pat. 453 : (24 Pat. 379) in which the plaintiff sued for khas possession of certain land on the ground that it was his bakasht and that the defendants had no raiyati right. The defendants on the contrary alleged that they possessed the land as raiyati on manhunda rent. The lower appellate Court found that the plaintiff had not proved khas possession within 12 years of the suit and the defendants had been in possession thereof as raiyats on manhunda rent. On appeal to the High Court, Sinha J. observed that in a suit for ejectment the onus was on the plaintiff to make out his title and his possession within 12 years of the suit. Where his title as proprietor is admitted by the defendants the plaintiff must prove his title in the limited sense of title to khas possession. But with great respect this dictum seems to be obiter since the lower appellate Court had found that the defendant had proved that they were raiyats on manhunda rent and this finding was accepted by the High Court. The test for determining whether a proposition is obiter is whether the decision would have been the same if a word has been inserted in the proposition reversing its meaning, (Wambaugh—Study of Cases, p. 17). Applying this test the question of limitation was not material for the decision of *Mohan Bikram Shah* v. *Deonarain Mahto*, A. I. R. (32) 1945 Pat. 453 at p. 456 : (24 Pat. 379) the report states :

> "Certainly, it lay on the defendants to prove their tenancy, and the finding recorded by the learned Judge on appeal is to the effect that the defendants had proved their tenancy, and that the plaintiff had failed to prove that the lands were in his direct possession since after 1921, when the alleged settlements were made by him in favour of the defendants. If the defendants had failed to prove their tenancy, their position on the findings of the learned Additional District Judge, would be that of trespassers, and in that case they would have indefeasible title not by virtue of the settlements but by adverse possession."

[10] Upon the pleadings in the present case I am of opinion that the suit is not barred. After examining the record, the lower appellate Court has found that both parties have adduced unsatisfactory evidence as regards possession of the land. But the Court has failed to take into consideration the presumption arising from the title of the plaintiff. For the respondents, it was contended that no such presumption can be called in aid in appraisement of the evidence and reference was made to the Full Bench decision in *Shiva Pd. Singh* v. *Hira Singh*, 6 Pat. L. J. 478 : (A. I. R. (8) 1921 Pat. 237 F. B.). But in *Matuk Singh* v. *Tian Sahu*, 2 Pat. 1 : (A.I.R. (9) 1922 Pat. 432), Sir Dawson-Miller explained the limits to which the principle of the Full Bench decision can be extended and observed that, in a suit for ejectment, where the evidence adduced by both parties, although unsatisfactory is not altogether valueless, the Court is entitled to take into consideration the presumption arising from title and the probabilities of the case.

[11] In this context reference should be made to the *Secretary of State* v. *Sri Rajah Chelikani Ramarao*, 25 C. L. J. 69 : (A.I.R. (3) 1916 P. C. 21) in which the Crown claimed an island in the sea but the High Court of Madras dismissed the suit on the ground that the Crown had failed to prove possession i. e., a subsisting title within the period of limitation. The Judicial Committee disagreed with this view and observed as follows :

> "Their Lordships are of opinion that the view thus taken of the law is erroneous. Nothing is better settled than that the onus of establishing property by reason of possession for a certain requisite period lies upon the person asserting such possession. It is too late in the day to suggest the contrary of this proposition. If it were not correct it would be open to the possessor for a year or a day to say 'I am here; be your title to the property ever so good you cannot turn me out until you have demonstrated that the possession of myself and my predecessor was not long enough to fulfil all legal conditions'."

And later the Judicial Committee goes on to say :

> "It would be contrary to all legal principle thus to permit the squatter to put the owner to the fundamental right to a negative proof upon the point of possession."

In the present case, the plaintiff would succeed, even if Art. 142 is applicable. But the authorities establish that upon the pleadings of the case the appropriate provision would be Art. 144 and the suit will not fail until the defendants establish adverse possession for the statutory period either of the entire or limited interest.

[12] Upon these grounds I should set aside the decrees of the lower Courts and order that the plaintiff should be granted a decree. I should accordingly allow the appeal with costs.

[13] **Sarjoo Prasad J.**—I agree.

D.R.R. *Appeal allowed.*

A. I. R. (37) 1950 Patna 487 *[C. N. 123.]*

AGARWALA J.

Ramnath Singh and others — Appellants v. *Dawas Singh and others — Respondents.*

A. F. A. D. No. 2003 of 1948, D/- 10-5-1950, from decision of 1st Addl. Sub-J., Chapra, D/- 14-8-1948.

(a) Tenancy Laws — Bihar Tenancy Act (VIII [8] of 1885), S. 103B — Homestead land — Suit for rent on — Record of rights — Entry in, as to rent-free — Presumption as to correctness of, when is not rebutted — Record of rights — Evidence Act (1872), S. 35.

In a suit for assessment of rent on plots of homestead land the statutory presumption of correctness attaching to an entry in the record of rights to the effect that homestead land within the ambit of zamindari is held free of rent is not rebutted by showing that the land lies in the landlord's zamindari. Such a statutory presumption is not rebutted by another presumption under the general law : A. I. R. (9) 1922 P. C. 272, *Expl.*; A. I. R. (10) 1923 Pat. 340 ; A. I. R. (16) 1929 Pat. 748 and A.I.R. (24) 1937 Pat. 165, *Rel. on.* [Para 1]

Annotation : ('46-Man.) Evidence Act, S. 35, N. 12.

(b) Words and Phrases — "Belagan," meaning of — Record of rights.

In the district of Saran, "belagan" in respect of homestead lands means "rent-free" and not merely land in respect of which no rent has been assessed. [Para 2]

P. B. Gupta — for Appellants.

H. P. Sinha, P. Jha and R. P. Srivastava — for Respondents.

Judgment.—This is an appeal by the plaintiffs against concurrent decisions of the Courts below. The appeal arises out of a suit for assessment of rent on two plots of homestead land which the defendants hold under the plaintiffs otherwise than as part of an agricultural holding which the defendants also hold under the plaintiffs. In the record of rights in the column describing the incidents of the tenancy of these homestead lands the entry is *belagan*. Both Courts have agreed in holding that the plaintiffs are not entitled to have rent assessed on these two plots, because they are held free of rent. In appeal the learned advocate for the plaintiff appellants challenges this decision basing his contention on the well-known decision of the Privy Council in *Jagdeo Narain Singh* v. *Baldeo Singh*, 2 Pat. 38 : (A. I. R. (9) 1922 P. C. 272). The learned advocate contends that the Privy Council have laid it down as a general rule that whenever a land within the ambit of a zamindari is assessed to revenue any one claiming to hold the land free of rent has the onus of doing so upon him, and he does not discharge this onus merely by showing that there is an entry in the record of rights describing the land as held *belagan*. It is true that at one time it was conceded that this was the meaning of the decision of the Privy Council in *Jagdeo Narain Singh's case*, 2 Pat. 38 : (A.I.R. (9) 1922 P. C. 272) and that decision was applied without question in *Kameshwar Singh* v. *Sakhawat Ali*, 17 P.L.T. 819 : (A. I. R. (24) 1937 Pat. 96). There were two other Division Bench cases, however, in which the view held was that the Privy Council did not intend to go as far as it was thought that they had gone. These two cases are *Stonewigg* v. *Kameshwar Narayan Singh*, 11 P.L.T. 444 : (A.I.R. (10) 1923 Pat. 340) and *Jodha Sahu* v. *Tirbena Sahu*, 11 P. L. T. 468 : (A.I.R. (16) 1929 Pat. 748). Then again in *Surpat Singh* v. *Bhupendra Narayan Singh*, 16 Pat. 105 : (A. I. R. (24) 1937 Pat. 165) it was pointed out that the statutory presumption of correctness attaching to an entry in the record of rights cannot be rebutted by another presumption under the general law, and that the decision of the Privy Council in *Jagdeo Narain Singh's case*, 2 Pat. 38 :(A.I.R. (9) 1922 P.C. 272) applied with reference to a claim by a person who had been entered in the record of rights as a malikanadar that he was entitled to hold his land free of rent. It appears that there are three Division Benches of this Court which have taken the view that the decision in *Jagdeo Narain Singh's case*, 2 Pat. 38 : (A.I.R. (9) 1922 P.C. 272) does not mean that the presumption of correctness attaching to record of rights is rebutted by showing that the land in respect of which rent is claimed or in respect of which assessment is claimed lies in the plaintiffs' zamindari.

[2] As the present case comes from the district of Saran, I have looked up the Settlement Report of the last settlement, 1893 to 1901, to ascertain in what sense the Settlement Officer used the word "*belagan*" in respect of homestead land. In para. 133 at p. 44 of the Report the Settlement Officer says :

> "Another important point, which was raised during the first season's operations in Saran, was regarding the entry of homestead lands. The Hathwa Raj claimed that, according to the custom of the district, the homestead lands of a raiyat did not form part of his agricultural holding, and it brought a test case under S. 106 to have the point decided. This was tried by Mr. Colvin, who found that, while it was a fact that homestead lands do not form part of the raiyat's agricultural holding, the landlord has no power to charge rent for the homestead lands or to eject the raiyats from their houses so long as they remain in the village."

In the column of incidents of the tenancy a note was added that the raiyats were entitled to hold the land rent-free, and he could not be ejected so long as he continued to cultivate the land in the village. The note referred to took the form of the word "*belagan*." At the end of the next paragraph of the Report is the following :

> "However, though Mr. Colvin's orders applied originally only to the Hathwa Raj villages, they were accepted by the landlords and raiyats of all other

estates in Saran and were applied to the district generally. The raiyat's interests appear to be sufficiently protected by the note in 'Incidents' column."

These observations in the Settlement Report of Saran leave no doubt at all so far as the present case is concerned. The officer responsible for the settlement used the word "*belagan*" in respect of homestead lands to mean "rent-free" and not merely land in respect of which no rent has been assessed, which is the literal meaning of the word. That being so, I have no doubt that the decision of the Courts below is correct. The appeal is dismissed with costs.

V.S.B. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 488 [*C. N. 124.*]

DAS AND NARAYAN JJ.

Baikunth Singh—Appellant v. *Jhulan Singh and others—Respondents.*

A. F. A. D. No. 928 of 1947, D/- 21st April 1950, from decision of Sub-J., Gaya, D/- 22nd March 1947.

Transfer of Property Act (1882), S. 6 (a) — Deed of *ekrarnama* executed by reversioners — Deed, if family arrangement or hit by S. 6 (a) — Estoppel — Hindu law — Reversioners — Evidence Act (1872), S. 115 — Family arrangement.

A family arrangement is founded on the assumption that there was an antecedent title of some kind in the parties and the agreement acknowledges and defines what that title was, and cannot be deemed to be a transfer of property because by such an arrangement no right, either vested or contingent, is conveyed by one party to another. [Para 5]

Three reversioners *A*, *B* and *C* instituted a suit against a widow for a declaration that the two girls set up by the widow as her daughters were not really her daughters. While the suit was pending *A* died and *D*, his son, was substituted in his place. A deed of *ekrarnama* was executed by *D*, *B* and *C* one of the terms of which was that in the event of the suit succeeding *D* would be entitled to the same share in the property left by the widow's husband to which his father would have been entitled. The suit ended in a decree in favour of the plaintiffs. *B* and *C* were members of one family and *A* and *D* were the members of another family and the former family had no concern whatever with the latter family:

Held, that the arrangement embodied in the *ekrarnama* could not be regarded as a family arrangement, but was a transfer of property which could have come in the hands of the reversioners only after the death of the widow who was alive on the date of the agreement. The agreement, therefore, merely dealt with a mere *spes successionis* and as such was unenforceable. [Paras 5 & 6]

Held further that, as the agreement came within the mischief of S. 6 (a), the principle of estoppel could not be invoked by *D* in a suit by him instituted against *B* and *C* for a declaration of his title to the share transferred to him under the *ekrarnama*. [Para 6]

Annotation : ('50-Com.) T. P. Act, S 6 N 4 Pts 7 to 13;
('46-Man.) Evidence Act, S 115 N 18 and 13.

B. C. De and Shambhu Barmeshwar Prasad —for Appellant.

Lakshman Saran Sinha and Lalnarayan Sinha — for Respondents.

Narayan J. — This is a plaintiff's second appeal arising out of a suit in which the plaintiffs sought to recover possession of half share in certain lands described in Schs. I and II of the plaint on declaration of his title thereto. The property in suit belonged to one Molan Singh who died leaving a widow Mt. Manmati Kuer. Manmati Kuer came into possession of the property as a limited owner, but as she alleged that she had two daughters, Rudar Singh the father of the plaintiff-appellant, and Jhulan Singh and Janardan Singh, defendants 1 and 2 respectively of this suit, had to institute a suit for a declaration that Mt. Urehan Kuer and Alodhan Kuer who had been set up by Mt. Manmati Kuer as her daughters were really not her daughters. This suit was Title Suit No. 60 of 1929 and while it was pending Rudar Singh died and the present appellant was substituted in his place. A deed of *ekrarnama* was executed on 20th December 1930 by the plaintiff Baikunth Singh and defendants 1 and 2 and one of the terms of this *ekrarnama* was that in the event of the suit succeeding the plaintiff would be entitled to the same share in the property in dispute to which his father Rudar Singh would have been entitled. This suit ended in a decree in favour of the plaintiffs, and after the termination of that suit defendants 1 and 2 obtained from Mt. Manmati a deed of surrender with regard to the property which was the subject-matter of the suit and after the surrender they settled some lands out of the said property with Damodar Singh, defendant 4 by a deed of settlement. The execution of the deed of surrender and the settlement with defendant 4 have been mentioned in the plaint as the cause of action for the present suit which was commenced on 27th June 1942. The plaintiff has prayed for a declaration that the deed of surrender in favour of defendants 1 and 2 and the *patta* executed by them in favour of defendant 4 are fraudulent and inoperative documents and that by virtue of the *ekrarnama* which had been executed on 20th December 1930 the plaintiff is entitled to half share in the property which was the subject matter of Title Suit No. 60 of 1929 and which is also the subject-matter of this present suit. Mt. Manmati died during the pendency of this suit, and after her death the plaintiff amended the plaint and added a prayer for recovery of *khas* possession of one-half share in the disputed land.

[2] The principal defendants, namely, defendants 1 and 2, contested the plaintiff's claim and their main defence was that by virtue of the agreement embodied in the *ekrarnama* dated 20th December 1930 no title to the property in suit had passed to the plaintiff, inasmuch as,

the agreement is hit by S. 6 (a), T. P. Act, which forbids the transfer of expectancies or a mere *spes successionis*.

[3] The contention of the defendants has found favour with the Courts below and the suit has accordingly been dismissed.

[4] The only point for determination in this appeal, therefore, is whether the agreement embodied in the deed of *ekrarnama* dated 20th December 1930 is illegal and void. Of course, one of the contentions raised by the defendants was that the deed of *ekrarnama* was fraudulent, collusive and inoperative, but this contention has not been accepted by the Court below. The only ground on which the learned Court below has dismissed the plaintiff's suit is that in view of the provisions of S. 6 (a), T. P. Act, the agreement that the plaintiff would be entitled to the share which would have gone to his father Rudar Singh is illegal and unenforceable. As has already been pointed out, the previous suit, namely, Title Suit No. 60 of 1929, had been instituted by Rudar Singh, the father of this appellant, and by defendants 1 and 2 and the cause of action for that suit was that Mt. Manmati had set up two ladies as her daughters. Rudar Singh and defendants 1 and 2 were certainly the presumptive reversioners to the estate of Molan Singh, but Rudar Singh having died during the pendency of the suit, his son could not claim to be a presumptive reversioner, though he was substituted in place of his father and though he might have contributed towards the expenses of the litigation. It, however, appears from the *ekrarnama* that defendants 1 and 2 agreed to relinquish that share in the property in favour of this plaintiff which Rudar Singh would have been entitled to as a reversioner. The following clauses in the deed of *ekrarnama* are important and contain the stipulation on the basis of which the plaintiff is claiming one-half share in the property in suit:

> "6. Whatever amount of decree and profits will be awarded by the judgment of the Court or the compromise in the said suit, will be taken by us according to the extent of our respective share and right.
>
> 7. After the death of the said Babu Rudar Singh if we, the Executants Nos. 2 and 3, would be deemed to have got any interest according to law, *shashtras* and fact in place of the said Babu Rudar Singh according to the extent of his right, and share in the property left by the said Babu Molan Singh, we, the executants gave up and relinquished that share of Babu Rudar Singh deceased, and the absolute title of executant 3 is declared and confirmed in place of Babu Rudar Singh deceased."

[5] The contention on behalf of the defendants-respondents is that the stipulation contained in para. 7 amounts to an agreement to transfer a mere right to succeed to the estate or a mere *spes successionis* and so comes within the mischief of S. 6 (a), T. P. Act. But Mr. B. C. De on behalf of the plaintiff-appellant has strenuously urged the contention that this was merely a family arrangement and that because it was a family arrangement, it is not hit by the provision contained in S. 6 (a), T. P. Act. In my opinion, the contention put forward by Mr. De is without any substance. A family arrangement cannot certainly be deemed to be a transfer of property because by such an arrangement no right, either vested or contingent, is conveyed by one party to another. As was pointed out by the Allahabad High Court in *Raghubir Datt* v. *Narain Datt*, A.I.R. (17) 1930 ALL. 498: (126 I. C. 24), a decision which has been cited by Mr. De, a family arrangement is founded "on the assumption that there was an antecedent title of some kind in the parties and the agreement acknowledges and defines what that title was." This language has been borrowed from the decision of the Judicial Committee in *Rani Mewa Kunwar* v. *Rani Hulas Kunwar*, 1 I. A. 157: (13 Beng. L. R. 312). It was further pointed out in the Allahabad case that the entire scheme of family arrangement rests not upon the transfer of a right but upon the recognition of a claim. In the said Allahabad case the compromise which was the subject-matter of consideration did not intend to make any transfer and did not at all "imply any definite change of legal relation to any property *in præsenti* or in future." What their Lordships held in this case was that where a reversioner *for good consideration* agrees not to lay claim to a property when the succession opens out, he must in equity be held bound by that agreement. Their Lordships relied on a decision of the Judicial Committee in *Kanhai Lal* v. *Brij Lal*, 40 ALL. 487: (A.I.R. (5) 1918 P. C. 70) in which case as observed by their Lordships of the Judicial Committee there was no question of a conveyance of, or of an agreement to convey, any future right or expectancy, or of an agreement to relinquish any future right or expectancy. About the claim of Lala Kanhai Lal who had claimed as a reversioner and who was confronted by a compromise which he had entered into, their Lordships had to observe as follows:

> "Lala Kanhai Lal's case was that, according to an Agarwal custom (the family was of the Agarwal caste) which governed the family, a man could lawfully adopt his sister's son, and he alleged that Badri Prasad had given Mt. Parbati authority to make the adoption, and that he, Lala Kanhai Lal had been validly adopted to Badri Prasad. That Lala Kanhai Lal might have found it difficult or impossible to prove that he had been validly adopted is immaterial. He made the claim; it was a serious one, and it was supported by Mt. Parbati and it must have influenced Mt. Ram Dei, who was induced, doubtless mainly by that claim, to consen to

> a division of the family property, in which she obtained for herself merely a one-fourth share. The claims which were set up by Mt. Parbati and Mt. Kausilla, that the three sons of Balak Ram had separated, must also have influenced Mt. Ram Dei to agree to the compromise of 1892. Lala Kanahi Lal was a party to that compromise. He was one of those whose claims to the family property, or to shares in it, induced Mt Ram Dei, against her own interests and those of her daughter, Mt. Kirpa, and greatly to her own detriment, to alter her position by agreeing to the compromise, *and under that compromise he obtained a substantial benefit, which he has hitherto enjoyed.* In their Lordships' opinion he is bound by it, and cannot now claim as a reversioner."

These facts make that case entirely distinguishable from this present case, and their Lordships distinctly pointed out that in that case there was no question of an agreement to relinquish any future right or expectancy. These two authorities can, therefore, be of little use to the appellant in this case. The other two decisions relied on by the learned counsel are the decisions of this Court in *Jagdam Sahay* v. *Rupnarain Mahton*, 5 P. L. T. 375: (A.I.R. (11) 1924 Pat. 736) and in *Rai Kumar Singh* v. *Abhai Kumar Singh*, A.I.R. (35) 1948 Pat. 362. In the former case Jwala Prasad J. with whom Foster J. agreed did not construe the agreement in question as a transfer of any reversionary right or relinquishment of their chance of succession. As was pointed out by Jwala Prasad J. the plaintiffs who were the reversioners did not transfer any interest but simply agreed not to raise any objection to the transaction and for so doing they obtained good consideration in the shape of properties having been given to them *which under no circumstance they would have got at that time.* It is, therefore, that their Lordships thought that the arrangement was a family arrangement which had been confirmed and consented to by the reversioners. The arrangement was of the nature of a *takshimnama* (partition) on account of a dispute having arisen between the nephews, the daughter and the daughter's sons of one Girwar Narain. There was an amicable division of the properties between them and a share was taken by each of the aforesaid three parties. Each cosharer took possession of the properties allotted to him or her and dealt with it on that footing, but on the death of the daughter the two grandsons born of a predeceased daughter brought suits for possession in respect of the properties which had been allotted to the surviving daughter and to the two nephews. On these facts their Lordships found that the partition was in the nature of a *bona fide* settlement of the family dispute and was binding on all the parties including the two grandsons by the predeceased daughter. In the second case a certain compromise was the subject of consideration and it was found that that compromise was not hit by any rule of Hindu law or by the provisions of S. 6 (a), T. P. Act. The compromise was arrived at in a partition suit, and by virtue of the compromise the shares of all the parties had been defined and they had taken immediate possession of the properties. There was an agreement that they would not claim any share which would otherwise have accrued to them on the death of either of the parties. As pointed out by Manohar Lall J. the agreement in question had been entered into in *bona fide* settlement of several disputes that had cropped up between the members of the family. In my opinion, none of these two Patna cases can be cited as authority in this case in support of the proposition that the agreement in question should be regarded as a family arrangement. Mr. De seems to have overlooked para. 2 of the *ekrarnama* wherein it is distinctly stated that the executants 1 and 2 who are defendants 1 and 2 respectively in this present suit were members of one family and Rudar Singh the father of executant 3 who is the plaintiff in the present suit, and executant 3 were the members of another family and that the family of these defendants had no concern whatsoever with the family of this plaintiff. In face of this clear statement in the deed of *eknarnama* on the basis of which the plaintiff seeks to recover half share in the property in suit it would be idle to contend that the arrangement embodied in the *ekrarnama* should be regarded as a family arrangement.

[6] Mr. De also put forward the plea of estoppel and contended that because defendants 1 and 2 had agreed to relinquish one-half share in the property in favour of the plaintiff and because on that understanding the plaintiff had met half the expenses of the litigation they were now estopped from contending that the plaintiff was not entitled to recover half share. But the principle of estoppel cannot be invoked by the plaintiff in this case if under the law the agreement in question is one which comes within the mischief of S. 6 (a), T. P. Act. On the authority of certain Privy Council decisions, I have no doubt that the agreement in question offends against the provision contained in S 6 (a), T. P. Act. Their Lordships of the Judicial Committee have held in *Amrit Narayan* v. *Gaya Singh*, 45 I. A. 35: (A. I. R. (4) 1917 P. C. 95) that a Hindu reversioner has no right or interest *in præsenti* in the property which the female owner holds for her life and that until it vests in him on her death, should he survive her, he has nothing to assign or to relinquish, or even to transmit to his heirs. His right, as pointed out by their Lordships, becomes concrete only on her demise; and until then it remains *spes suc-*

cessionis. In *Harnath Kuar* v. *Indar Bahadur Singh*, 50 I. A. 69 : (A. I. R. (9) 1922 P. C. 403), a Hindu had obtained a declaration that he was entitled to succeed to certain estates on the death of the last surviving widow of one Naipal Singh to whom the estates had belonged. The plaintiff's case was that the said Hindu had transferred half the estate to the plaintiff's husband and the question was whether on the date of the sale the said Hindu possessed an interest in the property which was capable of being transferred. Their Lordships held that there was no effectual transfer of the property because on the date of the transfer the vendor had only an expectancy. In *Ananda Mohan* v. *Gour Mohan*, 50 I. A. 239 : (A. I. R. (10) 1923 P. C. 189) there was a contract by a Hindu to sell immovable property of which he was the nearest reversionary heir entitled to succeed to it upon the death of the widow in possession. He had entered into an agreement to transfer the property after possession had accrued to him, and this agreement was held to be void according to the provisions of S. 6 (a), T. P. Act. The agreement with which we are concerned in this appeal does not stand on any better footing, and it must be regarded as an agreement for transfer of property which could have come in the hands of the reversioners only after the death of the widow Mt. Manmati Kuer who was alive on the date of this agreement. Nobody could anticipate at that time as to what would be the position of this plaintiff and these defendants 1 and 2 at the time when the lady would die and whether any of them would be alive at the time of the lady's death. The subject-matter of this agreement was certainly a mere expectancy and s. 6 (a), T. P. Act, which forbids the transfer of expectancies would be rendered nugatory if a contract of this nature is enforced. The question of estoppel does not to my mind arise at all, because it was quite within the knowledge of this plaintiff at the time when he entered into this agreement that he was not the presumptive reversioner. At that time only defendants 1 and 2 were in the position of presumptive reversioners and the fact that the plaintiff had been substituted in place of Rudar Singh who had died during the pendency of the litigation did not clothe him with the right which was possessed by Rudar Singh. The plaintiff must be deemed to be aware of the provisions contained in S. 6 (a), T. P. Act, and he could not enter into any such agreement which if enforced would offend against that provision of law. It cannot be said that the defendants by their declarations, acts or omission intentionally caused or permitted the plaintiff to believe a thing to be true and to act upon such belief. The legal position was perfectly clear and understandable, and apart from the principle that ignorance of law is no excuse, the agreement which has been entered into shows that the plaintiff very well realised that he was not even in the position of a presumptive reversioner at the time when the *ekrarnama* was executed. It is an agreement dealing with a mere *spes successionis* and therefore unenforceable. The decision of a Division Bench of this Court in *Joti Lal* v. *Beni Madho*, A. I. R. (24) 1937 Pat. 280 : (168 I. C. 512) is a decision on this point, and it is decisive of this case and decisive of it against the appellant.

[7] In the result, this appeal fails and is dismissed with costs.

[8] **Das J.**—I entirely agree.

V.R.B. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 491 [*C. N. 125.*]

RAMASWAMI AND NARAYAN JJ.

Nagendra Pratap Singh Deo—Appellant v. *Joharmal Padia and others—Respondents.*

A. F. O. O. No. 89 of 1948, D/- 10-5-1950, from order of Special Sub-J., Chaibassa, D/- 5-1-1948.

Civil P. C. (1908), S. 48 and O. 34, R. 6 — Personal decree for balance under O. 34, R. 6 after sale of mortgaged property—Execution—Computation of period under S. 48.

Where after the mortgaged property has been sold under O. 34, R. 5, there is a decree passed according to the terms of O. 34, R. 6, directing that for the realisation of the balance the decree-holder can proceed against the person and other properties of the defendants, the decree-holder will have 12 years under S. 48 for execution of the personal decree from the date on which the personal decree under O. 34, R. 6 was passed. The decree-holder is not bound to execute this decree within 12 years of the date of the final decree in the mortgage suit. [Para 3]

Annotation : ('50-Com.) Civil P. C., S. 48, N. 10 Pt. (6).

J. C. Sanyal — for Appellant.
G. C. Mukherjee, A. N. Mitter and S. S. Rakshit — for Respondents.

Narayan J. — This appeal arises out of an execution proceeding. The judgment-debtor is the appellant, and his contention is that the execution is time barred. The facts are these : A preliminary mortgage decree had been passed against this appellant and others, and this decree was made absolute on 18th June 1932. The decree was for a sum of Rs. 16,000 and odd and in execution of this decree the mortgaged property was put up to sale and sold for Rs 12,000. After the sale of the mortgaged property a balance of Rs. 4571-5-3 was left, and for this amount the decree holder obtained a personal decree against the judgment-debtors on 19th December 1934, according to the provisions of O. 34, R. 6, Civil P. C. This personal decree was also executed, and in three execution cases which were filed before this present execution case some amounts were realised. For the balance that was left the application for execution giving rise to this appeal was filed. This application for execution was filed on 18th December 1946, and it was within three years from the date on which the last execution case had been dismissed but beyond 12 years from the date of the final decree that is, 18th June 1932. The judgment-debtors objected to this execution on the ground that it was barred under S. 48, Civil P. C. But their objection was overruled by the learned Subordinate Judge, and hence they have come up in appeal to this Court.

[2] The execution case giving rise to this appeal having been filed more than 12 years after the date of the final decree which was passed in the mortgage suit cannot be deemed to be in time if the period of 12 years has to be reckoned from the date on which the decree was made absolute. But this execution case would be deemed to be in time if 12 years have to be reckoned from the time when the personal decree under the provisions of O. 34, R. 6, was passed for the recovery of that portion of the decree money which could not be realised by the sale of the mortgaged property. The sole question for determination in this appeal, therefore, is whether 12 years should be reckoned from the date of the personal decree, that is from 19th December 1934, or from the date of the final decree of the mortgage suit, that is, 18th June 1932. Mr. Sanyal, appearing for the appellant, had submitted that a composite decree had been passed in this suit, and that, therefore, this appeal should not be decided without calling for preliminary and the final mortgage decrees of the mortgage suit. As this prayer had been made at a very late stage we directed that the appeal should be put up for further hearing after ten days if a sum of three gold mohurs was paid as costs to the learned Advocate for the respondents who had pressed for costs in case we passed an order calling for the decrees of the mortgage suit. The costs, however, were not paid by Mr. Sanyal and we were asked to dispose of the appeal on the materials which have been placed before us. We cannot, therefore, proceed on the assumption that in this case there was a combined decree against the property and the person of the mortgagor. And if there was no composite decree, then it must be taken that the final decree that was passed on 18th June 1932, was only for the sale of the mortgaged property. And if the decree that had been passed on 18th June 1932, was a decree only for the sale of the mortgaged property, then under R. 6 of O 34, Civil P. C., the decree-holders could apply to the Court for passing a personal decree for the unrealised balance of the decree money, that is, for the amount of Rs. 4571-5-3 which was the balance left after the sale of the mortgaged property. Section 90 of Act IV [4] of 1882 has now been substituted by R. 6 of O. 34, Civil P. C., and this rule runs as follows:

> "Where the net proceeds of any sale held under the last preceding rule are found insufficient to pay the amount due to the plaintiff, the Court, on application by him may, if the balance is legally recoverable from the defendant otherwise than out of the property sold, pass a decree for such balance."

[3] The rule thus lays down that when there is a balance left after the sale of the mortgaged property and that balance is legally recoverable by the mortgagee from the mortgagor the mortgagee may apply for and obtain a decree against the mortgagor personally. Such a decree can undoubtedly be executed by the mortgagee against the person of the mortgagor or by attachment or sale of his other properties. The object of such a rule is undoubtedly to obviate the necessity of a fresh suit to recover the balance. And because the language is "pass a decree for such balance," there is no reason why the decree-holder should not be allowed a period of 12 years from the date of the decree for the purpose of execution. A Full Bench of the Madras High Court held in *Aiyasamier* v. *Venkatachela Mudali*, 40 Mad. 989: (A. I. R. (5) 1918 Mad. 1187 (F. B.)) that where a mortgage decree provides for recovery of any balance from the other properties of the mortgagor in case the sale proceeds of the mortgaged properties are found insufficient to satisfy the entire decree amount, the decree-holder has under S. 48, Civil P. C., 12 years for the recovery of such balance reckoned from the time when it is ascertained to be due. The decree in that case was a composite decree in asmuch as besides directing the sale of the mortgaged property it further directed that if there was any balance left after the sale of the mortgaged property, it could be realised from some of the defendants personally and from the attachment and sale of the family properties other than the mortgaged properties. This decree was interpreted as a personal decree contingent on the mortgaged properties not fetching the whole of the decretal amount, and their Lordships of the Madras High Court held that the decree-holders would have 12 years from the date of the personal decree on the footing that the decree could not be interpreted to be a decree executable at once against the person or the other properties of the defendants. The authority of this case is, however, now shaken because of the decision by the Judicial Committee in *Khulna Loan Co. Ltd.* v. *Jnanendra Nath*, 22 C. W. N. 145: (A. I. R.

(4) 1917 P. C. 85) in which case their Lordships held that where a mortgage decree provides that if the proceeds of the sale of the mortgaged properties were insufficient to satisfy the entire decretal debt, the balance would be realised from other properties and the persons of the defendants, limitation for execution of the latter part of the decree would run not from the date of the sale of the mortgaged property but from the date of the decree as fixed by O. 20, R. 6, Civil P. C. If, therefore, the decree with which we are concerned in this appeal would have been a composite decree or a combined decree, we would not have been able to follow the Full Bench decision of the Madras High Court, but there is no reason why the principle laid down in that case should not be followed by us when it has not been shown that the decree under execution is a composite or a combined decree. In a later Madras case *Swaminatha Odayar* v. *Thiagarajaswami Odayar*, 50 Mad. 5 : (A. I. R. (13) 1926 Mad. 954) the decision of the Judicial Committee in *Khulna Loan Co. Ltd.* v. *Jnanendra Nath Bose*, 22 C. W. N. 145 : (A. I. R. (4) 1917 P. C. 85) was followed, and the following observation was made:

> "If an order was passed after the property had been sold that, for the balance, other properties of the mortgagors should be proceeded against, the present application would be in time, but no such order was passed and therefore the application is barred by S. 48, Civil P. C."

In other words, if after the mortgaged property has been sold, there is a decree passed according to the terms of O. 34, R. 6, directing that for the realisation of the balance the decree-holder can proceed against the person and other properties of the defendants, there is no reason why the decree-holder should not have 12 years, from the date on which the personal decree under O. 34, R. 6 was passed. In *Bunyad Hussain* v. *Ballabh Das*, 15 Luck. 95 : (A. I. R. (27) 1940 Oudh 90) in which case also the Privy Council decision referred to above was considered, the learned Judges of the Lucknow Chief Court held that time for execution of the personal decree under S. 48, Civil P. C., would run from the date of the personal decree.

[4] The appellant's learned counsel drew our attention to the following passage in the judgment of the Judicial Committee in *Banku Behari* v. *Naraindas Dutt*, 54 I. A. 129: (A. I. R. (14) 1927 P. C. 73):

> "Then it is suggested on his behalf that he could not have a personal decree till all the mortgaged properties had been exhausted by sale. This is true, but it does not mean that he could first wait till just short of twelve years before selling and then take another period just short of twelve years for a personal decree."

[5] But in that case the decree that was being executed was a decree passed by the High Court of Calcutta on its Original Side and the Article of the Limitation Act which was found applicable was Art. 183. This Article gives 12 years for enforcing a judgment, decree or order of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction, or an order of His Majesty in Council from the date when 'a present right to enforce the judgment, decree or order accrues to some person capable of releasing the right." Their Lordships held after quoting Art. 183 that the rights of the appellant to enforce the decree had all to be exercised within 12 years from its date—that is, 12 years from 4th February 1905—and their Lordships found that the appellant had taken no steps from 1905 till 1919. In that case steps for obtaining personal decree could not be taken before 1919 though the final decree in the mortgage suit had been passed on 4th February 1905, and on an interpretation of Art. 183 their Lordships held that it was not open to the decree-holder to wait for 12 years after the sale of the mortgaged property. It was in this context that they observed that the decree-holder "could not first wait till just short of 12 years before selling and then take another period just short of 12 years for a personal decree." In order to understand this observation we have to look to the context and the facts of the case. In my opinion, this Privy Council case is no authority to support the proposition that the decree-holder in this case was bound to execute even the personal decree within 12 years from the date of the final decree of the mortgage suit. This appeal, therefore, appears to me to be without any merit.

[6] The appeal fails and is dismissed with costs.

[7] **Ramaswami J.** — I agree.

V.B.B. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 493 *[C. N. 126.]*

RAMASWAMI AND SARJOO PRASAD JJ.

Sarajoo Pd. and another — Appellants v. *Smt. Rampayari Debi and others — Respondents.*

A. F. A. D. No. 455 of 1948, D/- 19-4-1950, from decision of A. D. J., Gaya, D/- 17-12-1947.

(a) Negotiable Instruments Act (1881), Ss. 8, 32, 78—Promissory note—Discharge of debt under — Suit for recovery by non-holder on ground that holder is benamidar for him—Whether lies.

Upon a proper construction of Ss. 8, 32 and 78, it is manifest that the maker of a promissory note can obtain the discharge of a debt by payment to the holder alone and to none else. It makes no difference whether the holder is a benamidar or is a true owner. To say that payment to any one except the holder of the handnote will not discharge the debt is tantamount to saying that no one can recover the debt from the maker of the promissory note except the person in whose favour it is made or who is a holder thereof. A person, therefore, who is not the holder of the promissory note cannot maintain a suit for the recovery of the amount due thereon even though the holder is admittedly the benamidar and is impleaded in the suit : A. I. R. (5) 1918 P. C. 146, *Rel. on*; A. I. R. (19) 1932 Pat. 346 and A. I. R. (21) 1934 Pat. 85, *Disting.*; *Case law discussed.* [Paras 1, 5 & 13]

Annotation : ('46-Man.) Neg. Instru. Act, S. 78, N. 1, Pt. 2.

(b) Promissory note — Nature of — Collateral security or conditional payment—Suit on original consideration when lies.

When a promissory note is given by the borrower to the lender in connection with the loan either at the time when the loan is contracted or afterwards, the promissory note may be regarded as given either as collateral security or as conditional payment. The fact that the execution of the promissory note is contemporaneous with the borrowing cannot exclude the possibility of the instrument having been given as collateral security or by way of conditional payment. The question depends in each case, on the intention of the parties. In the former case the lender is entitled to sue upon the original consideration independently of the security and without regard to any rights he may possess under the negotiable instrument. Where, therefore, it is clearly shown that a promissory note was intended to be merely a collateral security for the loan, the person advancing the loan can sue on the original consideration of loan itself instead of the note : *Case law referred.* [Paras 14, 20]

Ramchander Singh and L. S. Sinha — for Appellants.

Lalnarain Singh, I. B. Singh, Bhuneshwardhari Singh and Rajeshwar Pd. Singh — for Respondents.

Ramaswami J. — In the suit out of which this appeal arises the plaintiffs claimed a sum of Rs. 2459 and odd from defendant 1 being the amount proportionate to his liability under a handnote. It was alleged that plaintiff 2, defendant 1 and Chandrika Prasad father of defendant 3 executed the handnote in favour of defendant 4, benamidar for plaintiff 1 who actually advanced the amount for which the handnote was executed. The handnote was executed on 30th Magh 1342, after which there was separation in the joint family. Plaintiff 2 and the *pro forma* defendant 3 paid off their respective share of the debt and the present suit is brought for the share due from defendant 1 on the handnote. The main ground of defence was that the handnote was not genuine, that no consideration passed and that the suit was not maintainable. The learned Subordinate Judge accepted the plaintiffs' case and decreed the suit. This decree has been affirmed by the learned District Judge.

[2] The first question to be determined in this appeal is whether the plaintiff who is not the holder of the promissory note can maintain a suit for the recovery of the amount due thereon even though the holder is admittedly the benamidar and is impleaded in the suit.

[3] The answer to the question depends upon the construction of Ss. 8 and 78, Negotiable Instruments Act.

[4] Section 78 enacts that subject to the provisions of S. 82 (c), which do not apply in the present case,

> "payment of the amount due on a promissory note, must in order to discharge the maker be made to the holder."

The section is imperative and in my opinion precludes the maker when sued upon the instrument from pleading discharge by payment to anyone but "the holder". Section 8 defines the "holder" as

> "any person entitled in his own name to the possession of the handnote and to receive or recover the amount due thereon from the parties thereto."

The use of the phrase "entitled in his name" is significant, and it is obvious that no one can claim the rights of a holder under the Act on the ground that the ostensible holder is a mere name lender. In this contest reference should be made to S. 27 which provides that

> "Every person capable of binding himself or of being bound, as mentioned in S. 26, may so bind himself or be bound by a duly authorised agent acting in his name. A general authority to transact business and to receive and discharge debts does not confer upon an agent the power of accepting or indorsing bills of exchange so as to bind his principal. An authority to draw bills of exchange does not of itself import an authority to indorse."

[5] Section 32 is also important.

> "In the absence of a contract to the contrary, the maker of a promissory note as the acceptor before maturity of a bill of exchange are bound to pay the amount thereof at maturity according to the apparent tenor of the note or acceptance respectively, and the acceptor of a bill of exchange at or after maturity is bound to pay the amount thereof to the holder on demand. In default of such payment as aforesaid, such maker or acceptor is bound to compensate any party to the note or bill for any loss or damage sustained by him and caused by such default."

Upon a proper construction of these sections it is manifest that the maker of a promissory note can obtain the discharge of a debt by payment to the holder alone and to none else. It makes no difference whether the holder is a benamidar or is a true owner. To say that payment to any one except the holder of the handnote will (not?) discharge the debt is tantamount to saying that no one can recover the debt from the maker of the promissory note except the person in whose favour it is made or who is a holder thereof. By the use of the words "apparent tenor" S. 32 makes it clear that payment in order to be a valid payment must be made to the person whose name appears on the face of the bill or note as entitled to demand payment.

[6] In this context it is important to state that according to the Law Merchant no person

could be sued unless he appeared as party by name or designation on the face of the instrument; nor could any person sue unless he was named therein as payee-promisee or unless he had become entitled as indorsee or bearer. In *Pease* v. *Hirst*, (1829) 10 B. & C. 122 at p. 126 : (8 L. J (O. S.) K. B. 94), Bayley J. made the following observation :

> "It is said that the note was considered by all parties to be for the benefit of the new house; and, therefore, that the persons who are now partners in the banking house must sue. It seems to me that the action has been rightly brought in the names of the members of the firm to whom the note was given. If the note had been endorsed to the new firms, then the action must have been brought in the names of the indorsees; but not having been so endorsed, the action is properly brought in the names of the original payees for the benefit of the parties interested."

[7] This opinion is supported by *Subba Narayan* v. *Ramaswami Aiyar*, 30 Mad. 88 : (16 M. L. J. 508 F. B.) in which the question was whether it was open to the defendant in a suit on a negotiable instrument to plead that the payee named in the instrument or the indorsee as the case may be was a mere benamidar and not entitled to sue upon the instrument. The Full Bench held that no person could sue on a negotiable instrument unless he were named therein as payee or unless he had become entitled as endorsee or bearer; that in a suit on a negotiable instrument by the payee named therein or the indorsee, it was not open to the defendant to plead that such payee or indorsee was a mere benamidar.

[8] This case was followed in *Reoti Lal* v. *Manna Kunwar*, 44 ALL. 290 : (A. I. R. (9) 1922 ALL. 70) in which it was observed that the provisions of the Negotiable Instruments Act do not admit of a suit being brought on a promissory note by a benamidar whose name did not appear upon the document.

[9] In *Harkishore* v. *Gura Mia* 58 Cal. 752 : (A. I. R. (18) 1931 Cal. 387) also a Division Bench held that the holder of a promissory note alone was entitled to maintain a suit for the recovery of the amount due thereon, that a true owner who is not a holder cannot maintain a suit on the promissory note. In that case, the note was purported to have been executed by the principal defendant in favour of pro forma defendant 2 but the plaintiff claimed to have advanced the money and to be the real or beneficial owner of the note. The plaintiff further alleged that pro forma defendant was merely his benamidar and the pro forma defendant himself deposed to that effect. Even so, the lower appellate Court held that plaintiff had no cause of action; and dismissed the suit. The decision was affirmed by the High Court. Patterson J. observed that the property in a promissory note including the right to recover the amount due thereon is vested by statute in the holder of the note. The Negotiable Instruments Act was enacted for the benefit of trade and commerce and the principle underlying it is that promissory notes, bills of exchange and cheques should be negotiable as apparent on their face without reference to secret title to them.

[10] In *Sadasuk Janki Das* v. *Kishan Pershad*, 46 I. A. 33 : (A. I R. (5) 1918 P. C. 146), the Judicial Committee had enunciated the same principle. The question was whether upon the form of the hundi respondent 1, viz., the Maharaja was properly included as a defendant in the suit or whether as against him the claim was demurrable. The Judicial Committee held that no person was liable upon a hundi or bill of exchange unless his name appeared upon the instrument in a manner which, upon a fair interpretation of its terms showed that the name is the name of the person really liable, and that in an action of bill of exchange or promissory note against a person whose name properly appears as a party to the instrument it was not open *either by way of claim or defence* to show that the signatory was in reality acting for an undisclosed principal. At page 36 Lord Buckmaster states :

> "It is of the utmost importance that the name of a person or firm to be charged upon a negotiable document should be clearly stated on the face or on the back of the document, so that the responsibility is made plain and can be instantly recognised as the document passes from hand to hand. In this case the preliminary words mention no more than that Mohan Lal has been directed to execute the hundis, and they do not necessarily imply that he has been clothed with authority to execute them in any other form than that in which they were actually prepared—a form which it has already been shown constituted nothing more than a personal liability on behalf of Mohan Lal."

[11] On behalf of the respondents reliance was placed upon *Sarjug Singh* v. *Deosaran Singh* 11 P L T. 255 : (A.I.R. (17) 1930 Pat. 313) in which Kulwant Sahay J. held that s. 78 did not debar the real beneficiary under the promissory note from suing on the basis of the note if he can give a discharge to the maker of the promissory note. The learned Judge expressly based the decision upon *Broja Lal* v. *Budhnath*, 55 Cal. 551 : (A. I. R. (15) 1928 Cal. 148) which has been dissented from in the subsequent Calcutta case *Harkishore Barna* v. *Gura Mia*, 58 Cal 752 : (A. I. R. (18) 1931 Cal. 387) wherein it was held that a true owner who was not a holder cannot maintain a suit on a promissory note even though the holder was admittedly his benamidar and was made a party to the suit. In a later Patna case also *Hriday Singh* v. *Kailash Singh*, 19 Pat. 404 : (A.I.R. (27) 1940 Pat. 377), a Division Bench held that in a suit based

on a negotiable instrument it was not open to the defendant to plead that the holder of the note, viz., the payee was not the person entitled to recover on it, that is to say, the defendant cannot plead that the person to whom the money was due was not the plaintiff, who was the specified payee, but someone else. The decision of Kulwant Sahay J. in *Sarjug Singh* v. *Deosaran Singh*, 11 P. L. T. 255 : (A. I. R. (17) 1930 Pat. 313) was disapproved.

[12] On behalf of the respondents reference was also made to *Surajman Pd.* v. *Sadanand*, A.I.R (19) 1932 Pat. 346 : (11 Pat. 616) in which a Division Bench held that in a suit on a promissory note in which the holder, though not a plaintiff was party and the plaintiff real ŏwner was in a position to give to the drawer through the holder a discharge, the plaintiff could maintain a suit. Learned counsel also referred to another Division Bench case *Ramnagina Pd.* v. *Bishwanath Pd.*, 15 P. L. T. 102 : (A. I. R. (21) 1934 Pat 85) in which it was held that S. 78 did not debar the real beneficiary under the handnote from suing on the basis of the note if he can give a discharge to the maker of the handnote and if the person in whose name the document stands is a party to the litigation and does not dispute the plaintfff's right to recover the loan and give a valid discharge. But I think that the authority of the two cases is doubtful in view of the decision of the Judicial Committee in *Sadasuk Jankidas* v. *Kishen Pershad*, 46 I. A. 33 : (A. I. R. (5) 1918 P. C. 146) wherein the rule is clearly laid down that in an action on a bill of exchange or promissory note against a person whose name properly appears as party to the instrument it was not open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal. In any event the present case may be distinguished from *Surajman Pd.* v. *Sadanand*, A.I.R. (19) 1932 Pat. 346 : (11 Pat 616) and *Ramnagina Pd.* v. *Bishwanath Pd.*, 15 P. L. T. 102: (A.I.R (21) 1934 Pat. 85) because defendant 4 in whose name the handnote stands did not appear in the trial Court though summoned nor did she offer to give a discharge to defendant 1 if the latter should make payment to the plaintiff. In the High Court when the appeal was heard Mr. Rajeshwar Prasad Singh, advocate, filed a vakalatnama on behalf of defendant 4 and offered to give a discharge. Even so the facts would not be strictly parallel to *Sarajman Pd.* v. *Sadanand*, A.I.R. (19) 1932 Pat. 346 : (11 Pat. 616) and *Ramnagina Pd.* v. *Sudanand*, 15 P. L. T. 102 : (A.I.R (21) 1934 Pat. 85) the authority of which is highly doubtful for reasons I have already stated.

[13] On the first question therefore I hold that the contention on behalf of the appellants is correct and that the suit cannot be maintained in view of S. 78, Negotiable Instruments Act.

[14] For the respondents it was nevertheless maintained that every loan carried with it a contract to repay and that it was open to the respondents to bring a suit on the original consideration of the handnote. It is necessary that the question should be subjected to a closer legal analysis. When a promissory note is given by the borrower to the lender in connection with the loan either at the time when the loan is contracted or afterwards the promissory note may be regarded as given either as collateral security or as conditional payment. The fact that the execution of the promissory note is contemporaneous with the borrowing cannot exclude the possibility of the instrument having been given as collateral security or by way of conditional payment. The question depends in each case on the intention of the parties. In the former case the lender is entitled to sue upon the original consideration independently of the security and without regard to any rights he may possess under the negotiable instrument. But if the promissory note or other negotiable instrument is treated as a conditional payment of the loan the cause of the action on the original consideration is suspended during the currency of the negotiable instrument. But the cause of action to recover the amount of the debt revives if the negotiable instrument is dishonoured or the rights thereunder are not enforceable. On the contrary the cause of action on the original consideration is extinguished when the amount due under the negotiable instrument is paid or if the lender by negotiating the instrument or by laches or otherwise has made the bill his own and thus accepted the negotiable instrument in accord and satisfaction of the borrower's liability on the original consideration. In *In re Romer and Haslam*, (1893) 2 Q. B. 286 at p. 296: (62 L. J. Q. B. 610) Esher M. R. states :

> "It is perfectly well-known law, which is acted upon in every form of mercantile business, that the giving of a negotiable security by a debtor to his creditor operates as a conditional payment only, and not as a satisfaction of the debt, unless the parties agree so to treat it. Such a conditional payment is liable to be defeated on non-payment of the negotiable instrument at maturity, and it is surprising that there can be at the present day any doubt as to the business result of such a transaction."

In the same case Bowen L. J. states at p. 300 :

> "It has been established by a series of authorities, which it would be ridiculous to go through seriatim, that a bill of exchange given for a debt amounts to conditional payment of that debt, and is only conditional payment so long as it is running; the payment is liable to be defeated when the bill is dishonoured."

[15] The principle has been recognised in a catena of authorities.

[16] In *Golab Chand* v. *Mohokoom Kooaree*, 3 Cal. 314 : (2 C. L. R. 412*n*), Kennedy J. observed that the plaintiff in a suit of promissory note written on unstamped paper was not debarred from giving independent evidence of consideration and that the principle was well-settled that the existence of an unstamped promissory note did not prevent the lender of money from recovering on the original consideration if the pleadings are properly framed for that purpose.

[17] In *Sheikh Akbar* v. *Sheikh Khan*, 7 Cal. 256 : (8 C. L. R. 528), the plaintiff had sued to recover a sum of money on a handnote which was insufficiently stamped. The question before the High Court was whether the evidence for the consideration of the note was admissible. Garth C. J. observed that if a cause of action for money was complete in itself, whether for goods sold, or for money lent, or for any other claim, and the debtor then gave a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note was not paid at maturity, might always, as a rule, sue for the original consideration, provided that he had not endorsed or lost or parted with the bill or note, under such circumstances as to make the debtor liable upon it to some third person. But when the original cause of action was the bill or note itself, and did not exist independently of it, as for instance, when, in consideration of A depositing money with B, B contracted by a promissory note to repay it with interest at six months' date, there was no cause of action for money lent, or otherwise than upon the note itself, because the deposit was made upon the terms contained in the note, and no other. In such a case the note was the only contract between the parties and if for want of a proper stamp or some other reason the note was not admissible in evidence the creditor must lose his money.

[18] The law has been similarly expounded in *Krishnaji Narayan* v. *Rajmal Manikchand*, 24 Bom. 360 : (2 Bom. L. R. 25) in which Jenkins C. J. held that the holder of a hundi which was defective and inadmissible in evidence for want of stamp may still sue on the consideration the person to whom he gave it though he cannot use the bill in support of his suit.

[19] In *Payana Reena Saminathan* v. *Pana Lana Palaniappa*, 41 I. A. 142 (P. C.), the respondent commenced an action in the District Court of Colombo on two promissory notes. At the trial it appeared that material alteration had been made in the promissory notes by one of the arbitrators at the request of the respondent. The action was accordingly dismissed. The respondent then commenced a second action against the appellants claiming payment of the sums due on the promissory notes. The Supreme Court held that the appellants had failed to discharge the onus of rebutting the presumption that the promissory notes were given in conditional payment and further that the respondent was not precluded by the judgment in the previous action from bringing the present action. In appeal the Judicial Committee also held that the second action was maintainable. At p. 147 Lord Molton states :

> "Through an innocent act the promissory notes have become incapable of being enforced, and the appellants have availed themselves of this and have refused to pay the notes, so that payment in the form contemplated has failed. But this does not affect the substance of the award or the basis of the arrangement, which was liability, and thefore it was open to the respondent to bring an action for the unpaid balance of the sum found due i. e., for the amount of the promissory notes."

[20] In the present case the circumstances indicate that the handnote was taken as collateral security for the debt. In para. 6 of the plaint it is alleged that plaintiff 1 advanced Rs. 600 on 15th January 1935 to the joint Hindu family consisting of plaintiff 2, defendants 1 and 2 and father of defendant 3 and that a further sum of Rs. 4400 was paid on 18th February 1935 to the same persons in order to pay mokkari rent due to Raj Darbhanga. It is alleged in the plaint that as collateral security for the two loans plaintiff 2, defendants 1 and 2 and father of defendant 3 executed the handnote on 30th Magh 1342 in favour of the persons already named. In para. 15 of the plaint it is said that the cause of action arose on 15th January 1935 and on 18th February 1935, the date of the loans and the date of the handnote. The evidence of the witnesses examined for the plaintiff would also suggest that the handnote was taken as collateral security for the loans which have been made to the defendants. In view of the principles already enunciated it must be held that the plaintiffs are entitled to maintain the suit not upon the handnote but upon the original consideration of the loan.

[21] For these reasons I should affirm the decree of the lower appellate Court and dismiss this appeal with costs.

[22] **Sarjoo Prasad J.** — I agree.

D.R.R. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 497 *[C. N. 127.]*

RAMASWAMI AND NARAYAN JJ.

Mt. Balmati Kuari — Petitioner v. *Jagbandhan Nath Tewary and others — Opposite Party.*

Civil Revn. No. 810 of 1949, D/- 11-5-1950, from order of Sub-J., Ranchi, D/- 15-7-1949.

Civil P. C. (1908), S. 151 and O. 9, R. 13 — Compromise decree in partition suit — Direction by Court to ascertain net income — Commissioner ascertaining mesne profits — Gross mistake — Power of Court to set aside ex parte final decree beyond limitation.

In an appeal from a decree of dismissal passed in a suit asking for partition the parties arrived at a compromise. According to the compromise the High Court passed a decree on 1-3-1946 and remitted the case for ascertaining the net income of the family properties regarding which the suit was brought. After the remand the lower Court issued a writ to a Commissioner and on receiving a report from him on 28th January 1948 it passed an *ex parte* final decree. On 30th July 1948 one of the defendants applied to the Court for setting aside the final decree on the ground that the Commissioner calculated mesne profits for six years in direct contravention of the consent order passed by the High Court and that there had been an abuse of the process of the Court. The lower Court set aside the final decree under S. 151. In the revision before the High Court from this order it was contended that the lower Court had no jurisdiction to set aside the *ex parte* final decree in exercise of its inherent powers beyond the period of limitation prescribed by the statute:

Held, that the Commissioner made a gross mistake in not ascertaining the total net income according to the terms of the compromise decree which the High Court recorded. It was a clear case for exercising inherent jurisdiction and the lower Court properly exercised it in setting aside the final decree passed. [Para 5]

Annotation: ('50-Com.) Civil P. C., S. 151, N. 2 and 6; O. 9, R. 13, N. 28.

L. K. Chowdhury — for Petitioner.

Baldeva Sahay, Rai Parasnath and S. N. Banerjee — for Opposite Party.

Ramaswami J. — This rule is directed against an order of the Subordinate Judge of Ranchi dated 15th July 1949 setting aside a final decree passed *ex parte* in exercise of his inherent jurisdiction.

[2] On 18th August 1942 applicant Mt. Balmati Kuari brought the suit asking for partition of 1/5th share of certain immovable properties. The suit was dismissed by the trial Judge and an appeal was preferred before the High Court. On 1st March 1946 the parties agreed to a compromise and the High Court disposed of the appeal in terms thereof. According to the compromise (1) the case was to be remitted to the learned Subordinate Judge for ascertaining the net income of the family properties regarding which the suit was brought, (2) Mt. Balmati Kuer shall be entitled to 1/8th of the total net income of the family properties as ascertained by the learned Subordinate Judge in satisfaction of her claim in the suit and in lieu of maintenance, (3) the above share of the income shall be paid by the respondent annually to the appellant and shall be a charge on the properties.

[3] After the remand the learned Subordinate Judge issued a writ to a pleader-commissioner who submitted his report on 28th January 1948. As no objections were filed the Subordinate Judge accepted the report and ordered that a final decree should be prepared. On 30th July 1948 Rameshwar Pandey, curator of defendant 4, applied to the Court asking that the final decree should be set aside on the ground that defendant 4 was not properly represented before the commissioner, that the latter calculated mesne profits for six years in direct contravention of the consent order passed by the High Court and that there had been an abuse of the process of the Court. After hearing the parties the learned Subordinate Judge allowed the application and set aside the final decree under S. 151, Civil P. C. on the ground that there had been a gross mistake on the part of the pleader-commissioner and there had occurred miscarriage of justice.

[4] In support of this rule Mr. L. K. Choudhuri contended that the learned Subordinate Judge had no jurisdiction to set aside the *ex parte* final decree in exercise of his inherent powers beyond the period of limitation prescribed by the statute. In support of his argument learned counsel cited *Ajodhya Mahton* v. *Mt. Phul Kuer*, 1 Pat. 277: (A. I. R. (9) 1922 Pat. 479) in which a Bench of this Court held that an *ex parte* final decree could not be set aside under O. 9, R. 13, on the ground that the application for the final decree was barred by time; that if a definite period of limitation has been provided by law within which action must be taken a Court is not entitled to extend such period by purporting to act under S. 151. But the facts of this case must be distinguished for there was no allegation that there has been any mistake or abuse of the process of the Court. Learned counsel also referred to *Surendra Kumar Singh* v. *Mukund Lal Sahu*, A. I. R. (36) 1949 Pat. 68, in which Ray J. observed that the inherent power of Court is intended to be exercised only for granting relief against abuse of process of Court and not for spinning out a new procedure for a particular suit or proceeding, that such a power cannot be exercised for setting aside an *ex parte* final decree for foreclosure as it would necessarily involve loss of a vested right in plaintiff. It should again be noticed that in this case Ray J. clearly found that there was no abuse of process of Court and it was only for granting relief against such abuse that inherent power is given.

[5] In the present case it is manifest that the pleader-commissioner made a gross mistake in not ascertaining the total net income according to the terms of the compromise decree which the High Court recorded. The pleader-commissioner commenced his report by stating that he had been appointed "to ascertain mesne profits of the suit properties for the period directed in the decree." At p. 5 of his report the pleader-

commissioner states that he had been ordered to ascertain mesne profits for the year directed in the decree but

> "as there is no period mentioned in the decree he calculated mesne profits of the properties for six years, i. e. from the year 1942 when the property was released from the management of the Encumbered Estates and up to the year 1947."

It is not disputed that the compromise decree was passed in the High Court on 1st March 1946 and it is not clear upon what basis the pleader-commissioner calculated the mesne profits for six years from the date of the institution of the suit. On behalf of the applicant learned counsel contended that there was no difference between the calculation of net income and mesne profits. In my opinion it is not possible to accept this argument. The term "mesne profits" is used to denote compensation that is to say damages recoverable from a person who has been in wrongful possession, and in such circumstances means that which the plaintiff has lost by reason of the wrongful act of the defendant; and it is not the profit actually made by the defendant but that which the plaintiff might reasonably be expected to have made, had his possession not been wrongfully disturbed. When the wrongful possession is of a very aggravated character the Court may in computing mesne profits refuse to take into account even the collection expenses incurred by the wrong-doer during the period of his possession. In *Girish Chander* v. *Soshi Shikhareswar*, 27 I. A. 110 : (27 Cal. 951 P. C.), the Judicial Committee observed that mesne profits were in the nature of damages which the Court may mould according to the justice of the case. In *Abdul Ghafur* v. *Raja Ram*, 23 ALL. 252 : (1901 A. W. N. 80), the High Court held that when the trespass is of an aggravated character the Court had full discretion to refuse collection expenses incurred by a trespasser for the period he was in possession. It is manifest, therefore, that there is a great difference in principle between calculating "mesne profits" recoverable from a person who is in tortious possession and "a share of net income" due from the defendant who is in possession of the joint family properties which sum is given in lieu of maintenance and which is to be charged on the family properties. Instead of determining the total net income of the properties it would seem that the Court had issued a writ to the Commissioner for "ascertainment of mesne profits for the period directed in the decree" which decree is silent about mesne profits or about the period for which it should be computed. After the commissioner had submitted his final report the learned Subordinate Judge again committed a mistake in mechanically accepting it without applying his mind to the question whether the commissioner's report was in accordance with the terms of the compromise decree which the High Court recorded. In my opinion there is no clearer case for exercising inherent jurisdiction than the present one and the learned Subordinate Judge properly exercised it for setting aside the final decree passed.

[6] It is manifest that the present case falls within the principle of *Debi Bakhsh Singh* v. *Habib Shah*, 35 ALL. 331 : (40 I. A. 151 P. C.) in which for non-appearance of the plaintiff an order was made dismissing the suit for default. The plaintiff was in fact dead at the time the order was made and his son, the appellant, was engaged in performing his father's funeral ceremonies and was unable to attend the Court. These facts were brought to the notice of the Deputy Commissioner and an application was made under O. 22, Rr. 3 and 9 by the son as the heir and legal representative of the plaintiff. The application was accepted by the Deputy Commissioner within the time allowed by law and an order was made setting aside the dismissal of the suit and substituting the name of the son on the record in place of the deceased plaintiff. On an application for revision of the Deputy Commissioner's order under S. 115 of the Code the Court of the Judicial Commissioner reversed it holding that the order of dismissal of the suit was a proper order under O. 9, R. 8 and the application to set aside the order was not within time and was barred and O. 22, R. 3 applied only to a still pending suit and not to one that had been dismissed. On appeal the Judicial Committee held that there was an abuse of the process of the Court within the meaning of S. 151 of the Code, that the order of the Deputy Commissioner setting aside the dismissal was manifestly sensible and correct and ought to be restored. In pronouncing the opinion of the Judicial Committee Lord Shaw observed :

> "Quite apart from S. 151, any Court might have rightly considered itself to possess an inherent power to rectify the mistake which had been inadvertently made. But S. 151 could never be invoked in a case clearer than the present, and their Lordships are at a loss to understand why, apart from points of procedure and otherwise, it was not taken advantage of."

[7] The principle was followed in *Balgobind* v. *Sheo Kumar*, A. I. R. (11) 1924 ALL. 818 : (46 ALL. 861) in which there was a gross mistake on the part of the Court. A preliminary decree for foreclosure had been passed in a mortgage suit instead of a preliminary decree for sale. The High Court observed that even if the parties had not shown a prompt sense of their obligation or a right appreciation of the appropriate procedure it was nonetheless the object of Courts to decide the rights of

parties and not to punish them for mistake they had made in the conduct of their case, that S. 151 could not be invoked more appropriately than for the purpose of correcting a miscarriage of justice appearing on the face of the proceedings and to prevent an abuse of the process of the Court. The High Court added that it would be absolutely shocking, if the Court were to enforce against a mortgagor or any one interested in the equity of redemption a foreclosure decree when he had been misled by its duly accredited agent owing to the issue of a notice for a decree for sale. Accordingly High Court set aside the decree absolute for foreclosure made in the case.

[8] In this context reference should be made to *Rodger* v. *Comptoir d'Escompte de Paris*, (1871) L. R. 3 P. C. 465 at p. 475 : (40 L J. P. C. 1), in which Lord Cairns L. C. laid down the principle that it is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved. At page 475, Lord Cairns states :

> "One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors, and when the expression 'the act of the Court' is used, it does not mean merely the act of the primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. It is the duty of the aggregate of those Tribunals, if I may use the expression, to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court."

[9] In this connection, the language of Lord Eldon in *Pulteney* v. *Warran*, (1801) 6 Ves. 73 at p. 92 : (31 E. R 914) has application :

> "If there be a principle, upon which Courts of justice ought to act without scruple, it is this ; to relieve parties against that injustice occasioned by its own acts or oversights at the instance of the party, against whom the relief is sought. That proposition is broadly laid down in some of the cases."

[10] Upon these grounds I think that the learned Subordinate Judge rightly acted under his inherent jurisdiction in setting aside the *ex parte* final decree made in this case. I should accordingly discharge the rule. The application is dismissed but there will be no order as to costs.

[11] **Narayan J.**—I agree.

V.S.B. *Application dismissed.*

A. I. R. (37) 1950 Patna 500 *[C. N. 128.]*

JAMUAR J.

Manik Lal Martia—Petitioner v. *The State of Bihar — Opposite Party.*

Criminal Revn. No. 321 of 1950, D/- 3-5-1950, against order of Munsif-Magistrate, Patna, D/- 21-2-1950.

Criminal P. C. (1898), Ss. 254, 190 (1)—Magistrate taking cognizance of case — Transfer to another Magistrate — Latter's power to frame charges for offence disclosed by evidence—Such act, if amounts to taking cognizance—Essential Supplies (Temporary Powers) Act (1946), S. 11.

Where a Magistrate takes cognizance of a case and transfers it to another Magistrate for trial the latter can frame such charge or charges against the accused before him for any offence or offences as disclosed by the evidence. [Para 13]

Where, therefore, the Magistrate framed a charge in respect of an offence under Cl. 3, Bihar Cotton Cloth and Yarn (Control) Order, 1948, which was not disclosed in the complaint which was in respect of Cls 9 and 10 of the Order read with the Essential Supplies Act, 1946, but which came within the purview of S. 254 of the Code :

Held, that it was within the jurisdiction of the Magistrate so to do provided such an offence was disclosed by the evidence. This act on the part of the Magistrate did not mean his taking cognizance within the meaning of S. 11, Essential Supplies Act. [Para 13]

Annotation: ('49-Com.) Criminal P. C., S. 190, N. 9; S. 254, N. 7.

Khaleel Ahmad and Ramanand Sinha — for Petitioner.

Harinandan Singh — for Opposite Party.

Order. — In this application it is sought to delete a charge framed against the petitioner, and in order to appreciate the argument the following facts relevant to the point may be stated.

[2] The petitioner is a dealer in cloth and has a shop in Patna City. On 13th April 1949, a complaint was filed before the Sub-divisional Officer of Patna City by Diva Kanta Jha, a Supply Inspector of Patna, against the petitioner and three others. It was alleged in the complaint that on 11th April 1949, at about 6 P. M., one Rameshwar Prasad had made a report that *saris* in the shop of the petitioner were being sold at a price higher than the controlled price. On this report, D. K. Jha informed the District Supply Inspector who signed five Government currency notes of Rs. 10 each and gave them to Rameshwar Prasad who was asked to make some test purchases from the petitioner's shop. Rameshwar Prasad went there and returned with the information that he had purchased three pairs of *saris* at a price higher than the controlled price and further that he had not been granted any cash memo. Thereafter, D. K. Jha, together with some others, entered into the shop of the petitioner and made enquiries and he was informed that no such sale had taken place. It is further alleged that when he demanded the production of the cash memo book, registers and other *Bahis*, his demand was refused. So, he put four seals on the locks of the shop in the presence of certain witnesses and the petitioner was given an order in writing to take care of the seals. On the next morning, however, i.e., on 12th April 1949, he was informed that the

seals had been broken. He then went to the shop and found that the seals had actually been broken. He reported the matter to the District Magistrate who deputed a Deputy Magistrate to make an enquiry and ordered D. K. Jha to file a complaint before the Sub-divisional Officer, Patna City.

[3] In the complaint the accused named therein, including the petitioner, were alleged to have committed these offences, namely, (1) under Cl. 9 (1), Bihar Cotton Cloth and Yarn (Control) Order, 1948, for having sold cloth at a price higher than that fixed by the Controller, (2) under Cl. 10 (b) of the same Order for the refusal to produce the *Bahis* and other papers which were required to be produced; and they were also alleged to have committed offences under Ss. 175 and 188, Penal Code.

[4] On receipt of this complaint, the learned Sub-divisional Magistrate of Patna City took cognizance of the case and issued summonses under Cls. 9 (1) and 10 (b), Bihar Cotton Cloth and Yarn (Control) Order, 1948 read with the Essential Supplies Act of 1946, as amended in the year 1949, as also under Ss. 175 and 188, Penal Code.

[5] Eventually the case was transferred to the Court of Mr. R. P. Lakhaiyyar, Magistrate, First Class, Patna City, for disposal. But then later, the case was transferred to the Court of Mr. A. P. Sinha, Munsif-Magistrate, Patna, on 30th August 1949, for disposal and is now pending in that Court.

[6] A number of witnesses were examined by Mr. A. P. Sinha by 3rd February 1950. On 4th February 1950, D. K. Jha, the Supply Inspector, filed an application in the Court which he stated to be "in continuation of my report filed on 13th April 1949, in this connexion." His report dated 13th April 1949, was the complaint upon which the Sub-divisional Magistrate of Patna City had taken cognizance of the case. In his further report, dated 4th February 1950, D. K. Jha stated that on 23rd July 1949, on the opening of a certain bag in which some articles as well as some papers belonging to the petitioner had been kept, it was found that the stock registers of *dhoties, saris* and other cloths had not been maintained up to date and that certain cloths received by the accused under a number of *Bijaks* mentioned therein had not been entered in the stock register. This report concluded with a prayer in the following words:

> "As the account books were not maintained up to date this may also be enquired into and tried as this is an offence under the Bihar Cotton Cloth and Yarn (Control) Order, 1948, under which the present trial is going on."

[7] This report having been received by Mr. A. P. Sinha, Munsif-Magistrate, he recalled D. K. Jha into the witness-box on the same date and this witness was further examined by the prosecution. The witness proved his report of that date, the relevant contents of which have just been mentioned, and the report was exhibited as Ex. 13. The witness stated:

> "As the record of this case was in the High Court, I could not file this report (Ex. 13) at the earliest stage. The fact that the account was not up to date was detected on 23rd July 1949, and thereafter as the record was all along with the Hon'ble High Court, I could not get any opportunity to file the same. After the perusal of the record of this case, the A. P. P. and the D. S. I. instructed me to file this petition."

It appears from the record that even on 23rd July 1949, a petition had been filed to the effect that the accused had not kept their registers up-to-date and this had been discovered on examining the registers and other papers which had been seized from the shop of the accused. This petition was filed when the case was in the Court of Mr. Lakhaiyyar and it was prayed that the registers mentioned in that petition may be detained and a report be submitted of the facts to the S. D. O. for necessary action. The petition is Ex. 20 and it was kept on the record.

[8] After D. K. Jha had been recalled on 4th February 1950, and his further evidence taken, charges were framed against the petitioner. The charges were under Cls. 9 and 10, Bihar Cotton Cloth and Yarn (Contor) Order, 1946, read with the Essential Supplies Act of 1947, as also under Cl. 3, Bihar Cotton Cloth and Yarn (Control) Order, 1948. Clause 3 reads as follows:

> "Save as provided in sub-cl. 3 of cl. 5, no person shall after the commencement of this order, carry on business as a dealer except under and in accordance with the terms and conditions of a licence granted by the licensing authority in form B."

Condition (2) of the licence granted to the petitioner is in these words:

> "A register of daily transactions in the form below shall be correctly maintained by wholesale and retail dealers separately for (a) *dhoties* and *saris* by Nos. (b) cloth normally sold by yardage in yards and that by weight in lbs. (c) other materials sold . . . . (d) yarns by counts in weights"

and condition (3) is as follows:

> "All licensees (except such licensees as have been licensed as hawkers) shall issue to every customer a correct receipt, cash or credit memo, or invoice as the case may be. . . ."

[9] It will be noticed that no contravention of Cl. 3, Bihar Cotton Cloth and Yarn (Control) Order, 1948, read with condition 2 of the licence granted to the petitioner had been alleged in the original complaint filed by D. K. Jha before the Sub-divisional Officer of Patna City on 13th April 1949, upon which the Sub-divisional Officer had taken cognizance of the case. A breach of condition No. 2 of the licence, namely, the failure to maintain a proper register of daily transactions in the form prescribed was alleged in the

petition (Ex. 20) dated 23rd July 1949, filed before Mr. Lakhaiyyar and then in the further report of D. K. Jha filed on 4th February 1950, before Mr. A. P. Sinha, Munsif-Magistrate. It was after this report dated 4th February 1950, that the Munsif-Magistrate included the charge under Cl. 3, Bihar Cotton Cloth and Yarn (Control) Order, 1948, for a breach of condition No. 2 of the licence.

[10] The argument of Mr. Khaleel Ahmad, who appeared for the petitioner, is that this charge must be deleted on the ground that Mr. A. P. Sinha, Munsif-Magistrate, had no jurisdiction to frame a new charge under Cl. 3, Bihar Cotton Cloth and Yarn (Control) Order, 1948.

[11] His argument was that under S. 11, Essential Supplies Act of 1946, no Court can take cognizance of any offence punishable under this Act, except on a report in writing of the facts constituting such offence made by a person who is a public servant as defined in S. 21, Penal Code. In the present case, the report filed by D. K. Jha on 4th February 1950, before Mr. A. P. Sinha, Munsif-Magistrate was, according to Mr. Khaleel Ahmad, a "further complaint" by that public servant and Mr. A. P. Sinha, Munsif-Magistrate, was not empowered to entertain that complaint and to take cognizance of that offence. The proper Court to take cognizance of it was the Court of the Sub-divisional Officer and not the Court of the Munsif-Magistrate. In these circumstances, Mr. Khaleel Ahmad argued that the charge under Cl. 3, Bihar Cotton Cloth and Yarn (Control) Order, 1948, in respect of not maintaining registers properly should be deleted, as having been framed by a Court which was not competent to frame that charge. This present application is accordingly in respect of this grievance only.

[12] I am not inclined to accept this argument. Taking cognizance of an offence is one thing and framing a charge upon evidence adduced at a later stage is another thing. The Sub-divisional Magistrate, having taken cognizance of this case upon a complaint before him, transferred this case to another Court for trial, and this Court under S. 254, Criminal P. C. had to proceed to frame the charge or charges. This section is in the following terms :

> "If, when such evidence and examination have been taken and made, or at any previous stage of the case, the Magistrate is of opinion that there is good ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try, and which, in his opinion could be adequately punished by him, he shall frame in writing a charge against the accused."

[13] Once, therefore, the Sub-divisional Magistrate took cognizance of the case and transferred it to another Court for trial, this Magistrate can frame such charge or charges against the accused before him for any offence or offences as disclosed by the evidence. If, therefore, the Magistrate framed a charge in respect of an offence, which was not disclosed in the complaint but which does come within the purview of S. 254, Criminal P. C., it was within his jurisdiction so to do provided such an offence is disclosed by the evidence. This act on the part of the Magistrate does not mean his taking cognizance within the meaning of S. 11, Essential Supplies Act of 1946, referred to above. This view finds support from the case of *Baldeo Prasad* v. *Emperor*, A.I.R. (20) 1933 Pat. 297 : (34 Cr. L. J. 942), from which the following passage may be quoted :

> "It seems to me that the reason for this is that the power of framing charges comes into operation well after the initial requisite of taking cognizance under S. 190 (1) (that being a case of cognizance having been taken under the Criminal Procedure Code), and that this power is not restricted to the offender or the specific sections, if any, mentioned by the prosecutor. A complaint, as defined in S. 4 (h) need not in fact specify any offender, or even the section of the law which makes an act or omission punishable; and cognizance is taken under S. 190 (1) (a) upon receiving an offence, while charges are framed on the evidence before the trial Court. The evidence may, and not infrequently does disclose offences other than those originally mentioned or implied, but it cannot be said that cognizance is taken of such new offences under cl. (c), sub-s. (1), S. 190, for the double reason that the stage for the application of the sub-section itself is long past and the clause can have no application to the evidence produced in the case. Similar observations apply to cases in which cognizance has been initially taken under cl. (b), upon a police officer's written report of facts constituting an offence. It has in fact been repeatedly held that when a Magistrate has taken cognizance of an offence upon a complaint or upon a police report, any offence that may be disclosed by the evidence may be dealt with at the trial; and that S. 190 (1) (c) and S. 191 have no application in such circumstances."

Those observations are of much assistance in deciding the point at issue in the present application.

[14] For these reasons I do not think that any illegality has been committed by the learned Magistrate in framing the charge complained of. In this view of the matter, I find no ground for interference in this application the application is dismissed.

V.R.B. *Revision dismissed.*

A. I. R. (37) 1950 Patna 502 *[C. N. 129.]*

SARJOO PRASAD J.

Suraj Narain Rai and others — Petitioners v. *The State.*

Criminal Revn. No. 423 of 1950, D/- 11-5-1950, from order of A. S. J., Monghyr, D/- 4-2-1950.

(a) Criminal P. C. (1898), Ss. 107, 133 and 145 — Dispute as to possession of land—S. 107, if should be applied — Applicability of S. 145 — Dispute regarding land used by public—Action under S. 133.

Where it is a case of dispute as to possession of land, and a case of *bona fide* dispute at that, proceedings under S. 107 of the Code should not be lightly resorted to. This does not mean that in a case of land dispute a proceeding under S. 107 is altogether without jurisdiction but in acting under these preventive provisions the Magistrate has to keep in view the respective scope of the provisions under Ss. 144, 145 and 107 of the Code. The appropriate proceedings in cases of such disputes are proceedings under S. 145. Where, however, the dispute is as regards land used by the public and obstruction alleged affects the rights of the public, the specific provision under which action should be taken is S. 133. [Para 5]

Annotation : ('49-Com.) Cr. P. C., S. 107, N. 2; S. 133, N. 3; S. 145 N. 4 and 11.

(b) Criminal P. C. (1898), S. 107 — Object of section.

Section 107 proceedings are not intended for the purpose of binding over persons who do certain acts in the exercise of their right to property, or in pursuance of a *bona fide* claim of right to property. Action under S. 107 of the Code is in the main intended for persons who are desperate characters and habitually disturb the public peace or who in spite of orders of Civil or Criminal Courts finding possession against them persist in their unlawful conduct of disturbing the possession of others and take the law in their own hands. [Para 5]

Annotation : ('49-Com.) Cr. P. C., S. 107, N. 2.

B. P. Samaiyar — for Petitioners.
Harinandan Singh — for the State.

Order. — This application is directed against an order of Mr. Muhammad Anwar, Magistrate 1st Class of Khagaria, dated 14th December 1949, directing the petitioners to execute bonds of Rs. 2000 each with two sureties of the like amount to keep the peace for a period of one year under S. 107, Criminal P. C., and on their failure to execute the bonds in question to suffer simple imprisonment for one year each. This order binding over the petitioners under S. 107 of the Code has been affirmed on appeal by Mr. Basu Prasad, 2nd Additional Sessions Judge of Monghyr. Petitioners 1 and 2 are brothers, whereas the other two petitioners are the sons of petitioner 1.

[2] The proceedings to which this application relates were started against the petitioners on the basis of a complaint filed on 30th November 1948, by the opposite party in which they alleged that five days before the date of the application the petitioners had gone to a certain field and ploughed the land in spite of the remonstrance of the complainant. The field in question relates to *khata* No. 76 *khasra* No. 100 having an area of about 9 *bighas* 5 *kathas* 7 *dhurs*. In the record-of-rights the *khata* in question has been recorded as *ghairmazrua am* and *parti-kadim*. The case of the opposite party is that the lands in question are used by the people of the village as pasture lands as also as passage for the villagers, and that the opposite party are wrongfully claiming possession of the said lands.

[3] The case of the petitioners is that 8 *bighas* 14 *kathas* out of the lands in question had been settled with them in December 1942 by the Shekhpura Court of Wards of which they have been in cultivating possession ever since on payment of rent to the landlord. They have also produced receipts in support of their alleged possession which are on the record of this case. Their case also is that the other portion of the lands had been settled with other tenants of the Shekhpura Wards Estate, and those tenants have been in cultivating possession of the remaining lands since 1927 or 1928 and have been paying rent to the landlord for which also receipts have been filed in this case. The petitioners, therefore, laid claim to the lands on the basis of the settlement alleged by them. They further stated that in 1944 there was a dispute regarding the lands leading to a *panchayat*, and in the *panchayati* the *panches* made the petitioners agree to this that they should keep possession of 5 *bighas* 6 *dhurs* of the land settled with them and give up possession of the rest of the area in favour of the Bhagwati Asthan.

[4] In support of the respective case of the parties both oral and documentary evidence was adduced, the complainant having examined five witnesses and the petitioners eight witnesses in support of their case of possession and cultivation of the lands. Besides, as I have said they also filed documentary evidence. The learned Magistrate came to the conclusion that the petitioners had failed to establish their case of possession and cultivation of the land, and that, therefore, they should be bound over as directed by his order in revision. The lower appellate Court has affirmed that judgment on the assumption that the land was *ghairmazrua-am* land, and the petitioners had failed to establish their possession of the lands in question by virtue of the alleged settlement. It is extraordinary to find that the learned Judge in appeal does not even condescend to discuss the evidence given by the defence witnesses in support of the case of the petitioners' possession over the disputed land. He also ignores consideration of the fact that the petitioners were not laying claim to the entire area of the *khata* of 9 *bighas* 5 *kathas* and 7 *dhurs*, but only in respect of the area settled with them, whereas the case of the petitioners was that the rest of the area was in possession of other tenants who had been in cultivating possession thereof and had been paying rent to the landlord. The only way in which the learned Sessions Judge appears to dispose of the evidence adduced on behalf of the petitioners is with the observation :

"They, no doubt, put in evidence both oral and documentary to support the alleged settlement; but

> that cannot answer the question, particularly when the appellants' possession as members of the village public was not disputed."

The appellants' possession as members of the village public was not the question at issue. The petitioners gave evidence not to prove such possession but to prove their case of settlement and possession under the Sekhpura Wards Estate, and it was for that purpose that the evidence should have been examined. I would have been inclined to set aside the decision of the learned Sessions Judge and to remand the case for disposal in accordance with law on this ground alone; but I think that in the circumstances of this case a proceeding under S. 107, Criminal P. C., was not justified.

[5] In my opinion, where it is a case of dispute as to possession of land, and a case of *bona fide* dispute at that, proceedings under S. 107 of the Code should not be lightly resorted to. I do not mean to suggest that in a case of land dispute a proceeding under S. 107 is altogether without jurisdiction but in acting under these preventive provisions the Magistrate has to keep in view the respective scope of the provisions under Ss. 144, 145 and 107, Criminal P. C. The decision in *Shebalak Singh* v. ***Kamaruddin Mandal***, 2 Pat. 94 : (A. I. R. (9) 1922 Pat. 435 : 23 Cr. L. J. 519 FB) is a case in point where Sir Jwala Prasad observed :

> "Section 144 is a larger and more general section than S. 145. An order under that section can be made under various circumstances including a danger of a breach of the peace. Section 145 is of limited scope and applies only when there is a danger of a breach of the peace. The former is discretionary; the latter is mandatory. The latter provides for a thorough enquiry into the dispute as to possession of the parties which tends to a breach of the peace. Therefore when the special condition of S. 145 is fulfilled, S. 144 then yields to S. 145 in the sense that when he finds that there is a real dispute tending to a breach of the peace the Magistrate is bound to institute a proceeding under S. 145 and enquire into the possession of the parties, irrespective of any order that he might have originally passed under S. 144. This is a legal obligation cast upon the Magistrate under S. 145."

The learned standing counsel contends that in effect the Magistrate in this case has purported to decide the question of possession and decided against the petitioners. Therefore, although there was no formal proceeding under S. 145, the requirements of S. 107 are attracted in view of the fact that the finding of possession is against the petitioners. Now, the answer to this is that S. 107 proceedings are not intended for the purpose of binding over persons who do certain acts in the exercise of their right to property, or in pursuance of a *bona fide* claim of right to property. Action under S. 107 of the Code is in the main intended for persons who are desperate characters and habitually disturb the public peace or who in spite of orders of civil or criminal Courts finding possession against them persist in their unlawful conduct of disturbing the possession of others and take the law in their own hands. In ***Madho Singh* v. *Emperor***, A. I. R. (29) 1942 Pat. 331 : (43 Cr. L. J. 637), Dhavle J., observed that

> "preventive action under Part IV, Criminal P. C., can be taken under various sections, each with its own scope and conditions of applicability. A dispute likely to cause a breach of the peace concerning land can be dealt with under S. 145, Criminal P. C. It used to be said at one time that the section had no application to disputes which were not *bona fide*. But Rankin C. J., pointed out in the Full Bench case ***Agni Kumar Das* v. *Mantazaddin***, 56 Cal. 290 at p. 304 etc. seq. : (A. I. R. (15) 1928 Cal. 610 : 30 Cr. L. J. 69 FB) how such disputes, be they ever so *mala fide*, are neither outside the scope of S. 145, not peculiarly amenable to S. 107, Criminal P. C., and action under S. 145 in such disputes cannot properly be said to be inadmissible and not warranted by law. . . . It is, however, essential, for the section to apply (S. 107), that the acts committed or likely to be committed should be wrongful. Acts committed in the lawful execise of the right of private defence cannot support proceedings under this section and it is, therefore, to the party who is not in possession of the disputed property that the operation of this section is usually restricted."

The above observations quite clearly show that S. 107 should not be ordinarily applied to cases of disputes in regard to immovable property much less where the dispute is a *bona fide* dispute as to possession as it is in the present case where the petitioners claimed under a settlement from the landlord. The appropriate proceedings, therefore, in cases of such disputes are proceedings under S. 145. In the present case, however, in my opinion, even a proceeding under S. 145 would not be entirely relevant. Here it is a case, according to the opposite party, of dispute regarding land used by the public. In such a case if the obstruction alleged affects the rights of the public, then the specific provision under which the Magistrate should have taken action is S. 133 of the Code. In my opinion, therefore, if the Magistrate thinks that there is still a dispute likely to cause a breach of the peace, then he may, if so advised, take action under S. 133 of the Code. The present proceedings are, in my opinion, therefore, misconceived and must be set aside irrespective of the consideration that the learned Sessions Judge in dealing with the matter of possession did not adequately deal with the evidence adduced on behalf of the petitioners.

[6] I would, therefore, make the rule absolute and set aside the order of the learned Magistrate binding down the petitioners and quash the proceedings under S. 107, Criminal P. C.

V.R.B. *Rule made absolute.*

A. I. R. (37) 1950 Patna 505 *[C. N. 130.]*

RAMASWAMI AND SARJOO PRASAD JJ.

Manindra Nath Bhattacharjee—Appellant v. *Rampada Pal — Respondent.*

A. F. A. O. No. 201 of 1949, D/- 5-4-1950, from order of D. J., Manbhum, D/- 30-6 1949.

(a) **Houses and Rents—Bihar House Rent Control Order (1942), S. 4 — Order of eviction in terms of compromise—Validity—Civil P. C. (1908), S. 9.**

Where the landlord applied for eviction of the tenant on the ground that the house was required for his own use but subsequently the Controller made an order in terms of a compromise by which the tenant agreed to vacate the premises within a certain period : *Held*, that the House Rent Controller had jurisdiction to make the order for eviction in terms of the compromise. [Para 3]

Annotation : ('50-Com.) Civil P. C., S. 9 N. 5.

(b) **Interpretation of Statutes—Repeal—Effect — General Clauses Act (1897), S. 6.**

If a right has once been acquired by virtue of some statute it cannot be taken away again by the repeal of the statute under which it was acquired. [Para 5]

Annotation : ('50-Com.) Civil P. C., Pre N. 7; ('46-Man.) General Clauses Act, S. 6 N. 3.

(c) **Government of India Act (1935), S. 92 (1)—Scope of — Order of eviction under Bihar House Rent Control Order (1942).**

Where there was no notification by the Provincial Government under S. 1 (2) of the Bihar Ordinance II [2] of 1946 extending the Ordinance to the district of Purulia, the notification by the Governor under S. 92 (1), Government of India Act, directing that the Ordinance should be extended to Chota Nagpur Division could not operate to extend the operation of the Ordinance to any area beyond those specified in the Schedule to the Ordinance which did not include Purulia. Hence an order of eviction from a house in Purulia passed under the Bihar House Rent Control Order, 1942, cannot be deemed to be an order made under Ordinance II [2] of 1946 or Act III [3] of 1947 and cannot be executed by the Civil Court. [Paras 8 & 9]

Annotation : ('46-Man.) Government of India Act, S. 92 N. 1.

S. C. Ghosh — for Appellant.
S. C. Mazumdar — for Respondent.

Ramaswami J.—The question for decision in this appeal is whether the respondent can lawfully execute an order dated 10th September 1946 made by the House Controller directing the appellant to vacate a house which is holding No. 175 of the town of Purulia.

[2] The material facts are not controverted. On 1st July 1946 the respondent filed an application before the House Controller asking that the appellant should be directed to vacate the house. The respondent alleged that the appellant had not paid rent and that the house was required for his own use. On 16th September 1946 the parties filed a compromise petition to the effect that the appellant would quit and vacate the premises within six months from that date and would deliver possession of the same to the respondent. The parties asked that the case should be disposed of in terms of the petition of compromise. The Controller accepted the compromise and made an order in terms thereof. As the appellant did not vacate on the agreed date the respondent applied on 5th January 1948 to the Munsif of Purulia for evicting the appellant from the house. The appellant made an objection that the order of 16th September 1946 could not be executed. The objection was overruled by the learned Munsif whose order has been upheld by the Subordinate Judge in appeal.

[3] On behalf of the appellant Mr. S. C. Ghosh argued in the first place that the House Controller had no jurisdiction to make the order dated 16th September 1946. He maintained that S. 4 (1), Bihar House Control Order, 1942, did not in express terms confer jurisdiction on the Controller to order eviction of a tenant on the ground of non-payment of rent, that no order of eviction for non-payment of rent could be validly made under S. 4 of the Order. In support of the argument learned counsel referred to *Brindaban Behari Lal* v. *Badri Prasad*, A.I.R. (36) 1949 Pat. 335 : (27 Pat. 925) in which a Bench of this Court decided that the Controller cannot legally make an order evicting the tenant on the ground of non-payment of rent under S. 4, House Control Order of 1942. But the facts of the present case are different. For it is not disputed that on 1st July 1946 the respondent had applied for evicting the appellant alleging not merely that there was default in payment of rent but that the respondent required the house for his own use. Under S. 4 (1), House Rent Control Order, 1942 the Controller had jurisdiction on the application of a landlord to direct the tenant to vacate the house if he is satisfied that the house is reasonably and in good faith required by the landlord for his own occupation. It is therefore plain that the House Controller had jurisdiction to make the order dated 16th September 1946 directing the appellant to vacate the house in terms of the petition of compromise. As pointed out by West J. in *Amritrav Krishna* v. *Bala Krishna*, 11 Bom. 488

> "jurisdiction consists in taking cognizance of a case involving the determination of some jural relation in ascertaining the essential points of it, and in pronouncing upon them."

In *Pisani* v. *Attorney-General, Gibralter*, (1874) L. R. 5 P. C. 516 : (30 L. T. 729), the Judicial Committee pointed out that where there was jurisdiction over the subject-matter but non-compliance with the procedure prescribed as essential for the exercise of the jurisdiction, the defect might be waived. In *Ledgard* v. *Bull*, 13 I. A. 134 : (9 ALL. 191 P. C.), the Judicial Committee held on the facts of the case that there was no want of jurisdiction but only an irregularity as to its existence. In pronouncing the Committee's opinion Lord Watson stated :

> "When the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot, by their mutual consent convert it into a proper judicial process, although they may constitute the Judge their arbiter, and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when, in a cause which the Judge is competent to try, the parties without objection join issue, and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the ground that there were irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit."

Upon the admitted facts of the present case I am satisfied that the House Controller had jurisdiction to order the eviction of the respondent in terms of the petition of compromise dated 16th September 1946.

[4] Mr. S. C. Ghosh next presented the argument that the order of eviction dated 16th September 1946 was not preserved and kept alive by Bihar Ordiance II [2] of 1946 and therefore the order could not be executed under S. 17 of Act III [3] of 1947. Learned counsel pointed out that the Bihar Ordinance II [2] of 1946 was promulgated by the Governor on 1st October 1946, on which date it came into force. On the same date the Governor of Bihar in exercise of the powers conferred by sub-s. (1) of S. 92, Government of India Act directed that the Act shall apply to Chota Nagpore Division and Santal Perganas District. Learned counsel argued that S. 1 (2) of Ordinance II [2] of 1946 made the Ordinance applicable only to the local areas specified in the schedule annexed to the Ordinance, which schedule did not include Purulia. Learned counsel contended that the order of the Controller dated 16th September 1946 could not continue in force under S. 22 of the Ordinance but the order actually expired with the expiry of the Defence of India Act under which the House Rent Control Order of 1942 was made by the Governor of Bihar. In my opinion this argument is not tenable for the learned counsel has failed to take into account Ordinance XX [20] of 1946 by which the Governor-General specifically provided for the continuance of certain provisions of the Defence of India Act, 1939 and of the Defence of India Rules made thereunder. This Ordinance was promulgated and came into force on 1st October 1946 and extended to whole of British India. Section 2 of this Ordinance is to the following effect :

> "2. *Continuance of certain emergency provisions*—(1) Notwithstanding the expiry of the Defence of India Act, 1939 (XXXV [35] of 1939),—
>
> the provisions of the Defence of India Rules mentioned in the first column of the schedule to this Ordinance shall continue in force and have effect subject to the modifications specified in the second column thereof;
>
> (ii) any order or other instrument made under or in pursuance of any of the said provisions and in force immediately before the expiry of the Defence of India Act, 1939 (XXXV [35] of 1939), shall continue in force so far as consistent with the provisions as continued in force by this section and be deemed to be made under the provisions so continued in force."

Section 3 of the Order enacts :

> "The provisions of the Defence of India Rules as continued in force by S. 2 and all orders made or deemed to be made under such provisions shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Ordinance or in any instrument having effect by virtue of any enactment other than this Ordinance."

[5] Even if the Governor-General had not promulgated Ordinance XX [20] of 1946 it is impossible in my opinion to accept the argument of the learned counsel that the order of 16th September 1946 ceased to have effect on the expiry of the Defence of India Act, 1939, and the rules made under S. 2 of that Act. For the principle is well-settled that if a right has once been acquired by virtue of some statute it cannot be taken away again by the repeal of the statute under which it was acquired. In *Stevenson* v. *Olive*, (1841) 8 M. & W. 234 at p. 241 : (10 L. J. Ex. 338) Parke B. stated :

> "If an Act is repealed, it becomes (except *so far as it relates to transactions already completed under it*) as if it had never existed, but, if an Act expires the duration of its provisions is a matter of construction."

The case related to 6 Geo. IV, C. 133, S. 4, which enacted that every person who held a commission as surgeon in the army should be entitled to practise as an apothecary without having passed the usual examination. This Act was temporary, expiring on 1st August 1826 ; and it was contended that a person who under the Act was entitled to practise as an apothecary would lose his right after 1st August 1826. But the Court held that such a person would not be so deprived of his right, and Lord Abinger C. B., in giving judgment said :

> "It is by no means a consequence of an Act of Parliament expiring that rights acquired under it should likewise expire. The Act provides that persons who hold such commissions should be entitled to practise as apothecaries, and we cannot engraft on the statute a new qualification limiting that enactment."

Alderson B. was even more emphatic :

> "Independently, however, of this consideration, I agree in the opinion already expressed by my brother. Parke. It seems to me that those persons who, during the year for which the last act was to continue in force or previous to that period, had obtained rights under it had obtained rights which were not to cease by the determination of the act, any more than where a person commits an offence against an act of a temporary nature, the party who has disobeyed the act during its existence as a law is to become dispunishable on its ceasing to exist."

Reference should next be made to *Lenn* v. *Mitchell*, (1912) A. C. 400: (81 L. J. P. C. 173) in which a Hong-Kong Ordinance of 1895 had abolished the action for criminal conversation but a later Ordinance of 1908 had repealed the Ordinance of 1895 and had by its retroactive effect given a right of action for criminal conversation committed before the enactment of the Ordinance of 1908. The respondent after 1908 brought an action for criminal conversation committed before 1908, but it appeared that he had already brought such an action before the enactment of 1908, and judgment had been given against him founded on the then state of the law. The Judicial Committee held that this judgment had given the defendant a vested right which was a bar to an action for the same cause brought after the enactment of 1908. Lord Robson stated:

> "The effect of this Ordinance was undoubtedly to revive the right of action for criminal conversation in Hong-Kong, if it had ever been in fact suspended. It is also clear that the Ordinance had a retroactive effect to the extent of enabling actions to be brought in respect of criminal conversation during the period when the right of action had ceased to exist in the Colony, but the question now to be determined is whether it went further and operated to annul a valid and subsisting judgment as between parties whose rights had been duly determined under and according to the law which existed before the new Ordinance was passed."

[6] For the appellant, it was nevertheless contended that even if the order of the House Controller dated 16th September 1946 continued to remain in force, the civil Court has no jurisdiction to execute the order under S. 11 of Act III [3] of 1947. Learned counsel made reference to S. 25 (2) of Bihar Act III [3] of 1947 which provides that:

> " Any rule, order or direction made or given or deemed to be made or given under the said Ordinance and in force immediately before the commencement of the Act shall continue in force and be deemed to be an order or direction made or given under this Act; and anything done and any action taken in exercise of any power conferred by or under the said Ordinance shall be deemed to have been made, done or taken in exercise of powers conferred by or under this Act as if this Act had commenced on the 1st day of 26th October 1946."

Reference was also made to S. 22 of the Ordinance II [2] of 1946 which states:

> "Every order or direction made or given under the provisions of the Bihar House and Business Premises Control Order, 1942, in respect of any of the matters specified in this Ordinance shall, so far as it could validly have been made or given by the Provincial Government or the Controller, continue in force and be deemed to have been made or given under this Ordinance until it is superseded or modified by a competent authority under this Ordinance."

It was conceded that if S. 22 of the Ordinance was applied to Manbhum, the order of the House Controller could be executed by the civil Court under Act III [3] of 1947. But learned counsel maintained that S. 22 of the Ordinance never applied to Manbhum and the House Controller's Order dated 16th September 1946, cannot, therefore, be deemed to be an order under Act III [3] of 1947. Section 1 (2) of Ordinance II [2] of 1946 states that it applied to the "local areas specified in the schedule and such other areas as may be notified by the Provincial Government in the Official Gazette." The Ordinance was promulgated on 1st October 1946. On the same date the Governor of Bihar in exercise of the powers conferred by S. 92 (1), Government of India Act, directed that the Act shall apply in Chota Nagpur Division and Santal Parganas District. For the appellant, learned counsel contended that this notification will not effectively apply the Act to the Chota Nagpur Division and Santal Parganas District unless the Provincial Government had made a previous notification under S. 1 (2) of the Ordinance to the same effect. In my opinion, this argument is well-founded and must prevail. Section 92 (1), Government of India Act is to the following effect:

> "The executive authority of a Province extends to excluded and partially excluded areas therein, but, notwithstanding anything in this Act, no Act of the Federal Legislature or of the Provincial Legislature shall apply to an excluded area or a partially excluded area, unless the Governor by Public notification so directs, and the Governor in giving such a direction with respect to any Act may direct that the Act shall in its application to the area, or to any specified part thereof, have effect subject to such exceptions or modifications as he thinks fit."

[7] This section gives complete authority to the Governor in his judgment and discretion to direct that a Federal or Provincial Act will apply to a particular excluded area or portion of such area. The Governor is further given power to direct that the same shall apply subject to such exceptions and modifications as he thinks fit. Reference should be made in this context to *Chatturam* v. *Commissioner of Income-tax, Bihar*, 1947 F. C. R 116: (A. I. R. (34) 1947 F.C. 32) in which the Federal Court held that the Governor when making a notification under S. 92 (1), Government of India Act was clearly exercising legislative powers and was not a mere administrative delegate.

[8] But the power under S. 92 (1), though legislative in character, is a very limited power. It is a power to apply an existing Act of the Provincial Legislature to excluded or partially excluded area, and it is only on such application by the Governor that the Act can begin to operate in those areas. In my opinion, the Governor cannot go beyond the scope of the Provincial Statute but must function within it. He can exercise his legislative power within that field but he cannot go beyond the limits. This construction of S. 92 (1) is supported by *Jatindra Nath* v. *Province of Bihar*, A. I. R. (36) 1949 F. C. 175: (50 Cr. L. J.

897) in which Patanjali Sastri J. held that the Governor cannot under S. 92 (1) apply an existing Central or Provincial Act to an excluded or partially excluded area with retrospective effect. In the present case Ordinance II [2] of 1946 apply only to the 'local areas specified in the schedule and such other areas as may be notified by the Provincial Government in the official Gazette." The schedule mentions certain specific areas of Chota Nagpur but it does not include Purulia. It is true that the notification of the Governor of Bihar under S. 92 (1) directed that the Act shall apply to Chota Nagpur division. But in my opinion the provisions of S. 1 (2) of the Ordinance effectively limit the Governor's notification to operate only to areas mentioned in the schedule to the Ordinance.

[9] If this conclusion is correct, the order of the House Controller dated 16th September 1946 cannot be deemed to be an order made under Ordinance II [2] of 1946 or Act III [3] of 1947 and the civil Court has no jurisdiction to execute the order so as to evict the appellant.

[10] For these reasons I should allow this appeal and set aside the order of the lower Courts. But I do not propose to make any order as to costs.

[11] **Sarjoo Prasad J.**—I agree that this appeal has to be allowed. The order of eviction dated 6th September 1946, was not capable of execution under S. 17 of Act III [3] of 1947 unless it had been kept alive by Bihar Ordinance II [2] of 1946. This Bihar Ordinance II [2] of 1946 was promulgated by the Governor on 1st October 1946, on which date it came into force. It appears from the schedule to the Ordinance that certain specific areas of Chota Nagpur are mentioned therein, but it does not include the district of Purulia where the house in question lies. Ordinance II [2] of 1946 could not of its own force apply to Chota Nagpur or the district of Purulia, they being excluded areas. It is true that under S. 92 (1) there was a notification by the Governor of Bihar directing that the Ordinance should be extended to Chota Nagpur Division and the Santal Perganas. That, however, only meant that the Ordinance would apply to Chota Nagpur and the Santal Parganas as mentioned in the schedule to the Ordinance which, as I have said, excluded Purulia. Under S. 1 (2) of the Ordinance it was certainly open to the Provincial Government to extend the operation of the Ordinance to "such other areas as may be notified by the Provincial Government in the Official Gazette," but there was no such notification issued by the Provincial Government, and at any rate no such notification has been produced before us on behalf of the respondent showing that the Ordinance was so extended to the district of Purulia. The appellant's learned counsel relied merely upon the notification under S. 92 (1), Government of India Act which, as I have already explained, could not operate to extend the operation of the Ordinance to any area beyond those specified in the schedule to the Ordinance. The notification under S. 92 (1), Government of India Act is distinct from the one contemplated by S. 1 (2) of the Ordinance. That being so, the effect of the order sought to be executed could not be saved by virtue of the provisions of Ordinance II [2] of 1946, nor could it be saved under Act III [3] of 1947, and it was, therefore, inexecutable as such.

D.H. *Appeal allowed.*

A. I. R. (37) 1950 Patna 508 [*C. N. 131.*]

JAMUAR J.

Prayag Dusadh and others — Petitioners v. *Ramjatan Pandey — Opposite Party.*

Criminal Revn. No. 269 of 1950, D/- 24-4-1950, against order of Addl. Dist. Magistrate, Gaya, D/- 20-1-1950.

(a) Criminal P. C. (1898), S. 439—Finding of fact —Interference with.

A question of fact cannot be interfered with by the High Court in its revisional jurisdiction; and mere misappreciation of evidence would not be sufficient to disturb a finding of fact. [Para 5]

Annotation: ('49-Com.) Cr. P. C., S. 439, N. 15 Pt. 1.

(b) Criminal P. C. (1898), S. 342 (2) — Refusal to answer question—Effect.

Where the Magistrate told the accused that he had heard the evidence of the complainant and his witnesses and he was asked what he had to say and the accused having answered that he would file a written statement no further question was asked:

Held, that since the accused did not desire to answer even one question which was put to him and since he undertook to file written statement in support of his defence, no prejudice was caused by the omission of the Magistrate to put further questions. [Para 8]

Annotation: ('49-Com.) Cr. P. C., S. 342 N. 21.

Gorakhnath Singh — for Petitioners.
Baldeo Sahai and Awadh Kishore Prasad — for Opposite Party.

Order.—The petitioners have been convicted under Ss. 379 and 426, Penal Code, and sentenced to pay a fine of Rs. 50 each under the former section with one month's rigorous imprisonment each in default and to pay a fine of Rs. 20 each under the latter section with two weeks' rigorous imprisonment each in default.

[2] The charges framed against the petitioners were in respect of an occurrence which took place on the morning of 11th December 1948, when they, along with others are alleged to have cut away and removed some paddy crops from the land of Sheo Singh, the landlord. The complaint in the case was filed on the next day by Ramjatan Pandey, an employee of the

landlord. The landlord's case was that the petitioners who were the original tenants had abandoned the land and had left off the cultivation several years ago with the result that he (the landlord) had amalgamated this land with his own *bakasht* land and came into cultivating possession of the same.

[3] The defence of the petitioners was that there was no such occurrence as alleged by the complainant on 11th December 1948. They, however, claimed to have been in cultivating possession of the land in question and also to have cut away and removed the paddy crops some days earlier than 11th December 1948. This was in answer to the charge under S. 379, Penal Code. The charge under S. 426, Penal Code was in respect of an allegation that the petitioners had removed some earth from the *dhanihar (dhanhar ?)* and the rabi fields and had put up an *ari* as a ridge indicating a dividing line between these fields. The prosecution allegation was that this *ari* had been put up by the petitioners in order to shew division as against the prosecution case that the land had been amalgamated.

[4] The trial Magistrate came to a finding on the evidence that the landlord was in cultivating possession of the land in question and had grown the paddy which had been cut away and removed by the petitioners as alleged. It also found that the petitioners had dug the earth and had put up a demarcating ridge on the amalgamated land in order to shew their own possession. On these findings the learned Magistrate convicted the petitioners of the charges framed against them. On appeal, the learned Additional District Magistrate who heard the appeal upheld the findings of the trial Court and dismissed the appeal.

[5] In revision in this Court it was argued, in the first place, that the petitioners, in the circumstances of this case, were protected by a *bona fide* claim of right, and, as their claim was an honest one, they cannot be found to have committed any criminal offence. In the first place, the defence does not appear to have taken up such a position either in the trial Court or in the appellate Court; nor was any such ground taken in the petition filed in this Court in its revisional jurisdiction. The question, however, has been argued at length, and in these circumstances it has to be considered. The defence of the petitioners is mainly founded upon certain entries in the record-of-rights which were prepared in the year 1916. The paddy crops are alleged to have been removed from Plot No. 111 which forms part of *khata* No. 45, and *khata* No. 45 finds recorded in the name of Swayambar Dusadh who was the father of Prayag Dusadh, petitioner 1. The lands are *bhaoli* lands. Petitioner 2 is the son of petitioner 1. It is also said that petitioner 14 is a purchaser of half of *khata* No. 45 from petitioner 1. Petitioner 13 is the son of petitioner 14. These petitioners, therefore, claimed to be in cultivating possession of Plot No. 111 from where the paddy crops are alleged to have been removed. It appears that the prosecution led evidence in support of its claim that the landlord has been in cultivating possession of these lands, as the petitioners who are recorded in the record-of-rights had left the cultivation. The question of possession was, therefore, of importance on the date of the occurrence. Both the Courts below have come to a definite finding that possession of these lands was with the complainant's *malik*, namely, the landlord. This is a question of fact which cannot be interfered with by this Court in its revisional jurisdiction. It was, however, contended that this finding was arrived at by the lower appellate Court on an improper consideration of the evidence in the case. So far as the defence is concerned, no evidence was given on behalf of the petitioners regarding their being in possession. As I have already stated, the prosecution led evidence in support of its claim, and the Court of appeal below, on a consideration of that evidence, came to the finding that possession was with the landlord. Mere misappreciation of evidence, even if that be so, would not be sufficient to disturb this finding. (After discussing further evidence his Lordship held that the conviction of the petitioners either under S. 379 or S. 426, Penal Code, could not be interfered with and proceeded:)

[6-8] Another point argued in support of this petition was that the examination of the petitioners in the trial Court under S. 342, Criminal P. C., was not in accordance with law. That section provides for the examination of an accused person at the close of the prosecution case, and it was suggested that in this particular instance the accused persons were examined after the close of the defence evidence which, of course, is long after the close of the prosecution evidence. This argument was sought to be supported from the order sheet dated 28th November 1949. The order-sheet of that date shows what took place in the trial Court on that date. It begins with a statement that the defence witnesses were examined, cross examined and discharged; that certain documents were marked on behalf of the accused; that a date was fixed for argument and then it states that the statement of the accused was recorded. The mention that the statement of the accused was recorded is at the end of the order sheet of that date, and, hence the argument was that this would

show that these statements were recorded after all the other things had been done. I do not think that I can come to this conclusion. The order-sheet does not indicate that the events entered therein had taken place chronologically. It merely states what had taken place on that date. This conclusion finds support from the question which was put to the accused at the time of their examination under S. 342, Criminal P. C. The question was to the effect that they had heard the evidence of the complainant and his witnesses, and they were asked what they had to say. This would rather shew that the examination was made after the close of the prosecution evidence, as is provided for under S. 342, Criminal P. C. I do not think, therefore, that it can possibly be said that the provisions of this section have not been complied with. In this connection it was also contended that the accused were prejudiced by the omission made by the trial Magistrate in not putting further questions to them regarding the sowing of the crops, or possession of the lands, and so forth. I have just stated what question was put to each of the accused and each answered that he would file a written statement. After this no further question was asked. Since the accused did not desire to answer even one question which was put to them and since they undertook to file written statements in support of their defence, I do not think any prejudice has been caused in this case by the omission of the Magistrate to put further questions.

[9] Lastly, it was argued that the prosecution sought to prove a confession made by one of the accused, namely, Prayag Dusadh, and as that confession had not been recorded under S. 164, Criminal P. C., the confession was inadmissible in evidence. In my opinion no confession has been made by any of the petitioners at all in this case. At the trial stage one Babu Ambika Prasad Singh, an Honorary Magistrate, had been deputed to make some enquiry, and he stated in his evidence that Prayag Dusadh had admitted before him regarding the cutting away of the crops from Plot No. 111 and that he had also further admitted the digging of the land in order to separate it from the landlord's land. The argument was that this amounted to a confession of guilt which should have been recorded under S. 164, Criminal P. C. Now, the charge was regarding the removal of the paddy crops and putting up of an *ari* on 11th December 1948. In my opinion, neither Prayag Dusadh nor any of the petitioners admitted this charge or confessed to have committed any offence on this date. The defence was that Prayag Dusadh had put up an *ari* some days prior to 11th December 1948, in pursuance of their claim of being in cultivating possession of the lands. In my opinion, therefore, the evidence of the Honorary Magistrate who went to hold the enquiry does not shew that Prayad (Prayag ?) Dusadh had made any confession to him in respect of the offence with which he had been charged. In these circumstances S. 164, Criminal P. C., can have no application at all.

[10] The result of my consideration is that there is no ground for interference in this application. The application must, therefore, be dismissed.

V.B.B. ***Revision dismissed.***

A. I. R. (37) 1950 Patna 510 *[C. N. 132.]*

SINHA J.

Rajkumar Ram and another — Petitioners v. Chairman, Sasaram Municipality—Opposite Party.

Criminal Revn. No. 15 of 1950, D/- 21-3-1950, against order of Addl. Dist. Magistrate, Shahabad, D/- 24-9-1949.

Municipalities — Bihar and Orissa Municipal Act (VII [7] of 1922), Ss. 218 and 375 — Making of privy without permission of municipality — Prosecution after period prescribed under S. 375 — Sustainability of conviction under S. 218.

The making of a privy without the permission of a municipality is not a continuing offence as the offence is completed as soon as the privy is made. Conviction for such an offence, therefore, cannot be sustained where the prosecution is launched after six months prescribed by S. 375 after the making of the privy. [Para 4]

Gorakh Nath Singh —for Petitioners.
T. N. Sahai—for Opposite Party.

Order.—This is an application against the concurrent orders of the Courts below convicting the petitioners under S. 218, Bihar Municipal Act.

[2] The gravamen of the charge against them was that they had made a privy on the first floor of their premises without permission of the Municipality, and which had been made by encroachment on a portion of the Municipal survey plot No. 440 of Ward No. 3 which belongs to the Municipality.

[3] The defence of the petitioners was that this latrine was made about six years ago, when the second storey was built, and that, under S. 375, Bihar Municipal Act, the prosecution was barred. They further pleaded that there had been no encroachment on the Municipal survey plot No. 440.

[4] Though the Courts below have agreed in convicting the petitioners, none of them has found that the alleged encroachment on the Municipal survey plot No. 440 had been proved. There is no finding either that the latrine was made within six months before the institution of the criminal prosecution. But both the Courts

below have taken the view that it was a continuing offence, and that, therefore, when the matter was brought to the notice of the Municipal Chairman within six months from the launching of the prosecution, the same was not out of time, as contemplated in s. 375, Bihar Municipal Act. Now, the only finding on which the conviction is based is that the privy was made without the sanction of Municipality. The making of the privy, therefore, cannot be a continuing offence, as the offence must have been completed as soon as the privy had been made. The learned counsel for the Municipality has suggested that the case might go back for a fresh decision on these points. But this is not a civil suit where the parties may be given a fresh opportunity of adducing evidence on question not canvassed in the Courts below. In the present case, the prosecution must stand or fall on the findings arrived at by the Courts below. As already indicated, there is no finding that the privy was made only within six months from the date of the prosecution. The learned counsel for the Municipality has not been able to point out any precedent in favour of the view that, in the facts and circumstances of the present case, the offence could be said to be a continuing one.

[5] I am not concerned in this case with what are the rights of the Municipality in relation to the privy. The Municipal Act has given them the powers to deal with the matter even apart from the question of criminal prosecution. Whether the Municipality will exercise those powers is not a matter which can be gone into in this case. But it appears to me that the Courts below have misdirected themselves in holding that the offence was a continuing one.

[6] The result is that the application is allowed, and the conviction set aside. The fine, if paid, will be refunded to the petitioners.

G.M.J. *Application allowed.*

A. I. R. (37) 1950 Patna 511 *[C. N. 133.]*

SINHA AND REUBEN JJ.

Krishna Kumar Singh and others — Appellants v. *Padum Singh and others — Respondents.*

A. F. A. D. No. 591 of 1944, D/- 23rd November 1949, from decision of 2nd Sub-J., Patna, D/- 16th March 1944.

Co-sharers — Joint property—Building, erection of, by cosharer — Right of other cosharer to demand demolition — Limitation Act (1908), Arts. 142 and 144.

The plaintiff, who complains of a building of a permanent structure on the joint property by his co-owner, cannot obtain a decree for its demolition or for joint possession, unless he can establish that he has sustained some substantial injury by reason of the act and that he took reasonable steps in time to prevent the erection: *Calcutta view followed; Case law reviewed.* [Para 7]

Annotation : ('42-Com.) Limitation Act, Arts. 142 and 144, N. 35.

B. N. Rai, K. P. Varma and Sridhar Dayal Sinha —for Appellants.

G. Sharma, Medni Prasad Singh, Shyamnandan Prasad Singh, R. S. Sinha and S. K. Sarkar — for Respondents.

Sinha J.—This is a plaintiffs' second appeal from the concurrent decision of the Courts below dismissing their suit for a mandatory injunction.

[2] The facts found as proved in this case are as follows. Village Amahra comprises a number of estates including Tauzi Nos. 2731 and 2758. The plaintiffs are the proprietors of Tauzi No. 2758, and the first party defendants 1 to 4 are the proprietors of Tauzi No. 2731. It appears that at the time of the partition of the village into several estates certain lands including homestead lands were left joint amongst the proprietors of the different estates carved out of the parent estate. Khewat No. 46 is in respect of such joint lands. It comprises a number of plots including Plot No. 3419, which is the plot in dispute in this case. This plot is included in Khata No. 1202 which is *shamilat* of all the *maliks*. The plaintiffs alleged, as found by the Courts below, that Plot No. 3419 was the joint property of all the proprietors of the different estates thus carved out of the parent estate. The defendants contended that the plot in question belonged exclusively to the proprietors of Tauzi No. 2731. But that has been found against them. The plaintiffs alleged that the first party defendants, now respondents, shortly before the institution of the suit started a structure of a permanent character, and that, in spite of their protest, the defendants continued their building operations which, the plaintiffs apprehended, would deprive them of the right of getting the plot allotted to their estate in the event of a partition of the joint lands. The ground of their preferential claim to this plot was that it was near their residential house. At the trial the plaintiffs attempted to prove that the plot in question was surrounded on three sides by their lands, but that case has failed. The finding of the Courts below is that this plot had been in possession of the contesting defendants first party even since before the preparation of the record of rights some thirty years before the commencement of the suit, and though the defendant's case that their structure was much older than what the plaintiffs alleged had not been accepted by the Courts, the finding is that the structure had been practically completed except for the roof which was being made at the time the

Commissioner appointed by the Court visited the locality. The plaintiffs prayed for the demolition of the structure on the plot so that it might be restored to the condition in which it was before the structures were made. In the record of rights this plot is shewn as *gairmazrua malik* but in possession of the contesting defendants. A large number of persons were impleaded as the defendants second party on the ground that they were the other co-sharer proprietors of the different *tauzis*, and, as such, interested in the result of the suit. Some of those defendants second party died during the pendency of the suit, and one of the questions mooted in the Courts below was whether the suit as a whole abated on account of those deaths.

[3] The defendants first party, who are the contesting defendants, raised a large number of issues most of which have been decided against them by the Courts below, and no more arise for decision in this Court. The defence, which has succeeded in both the Courts below, is that the structure was substantially completed before the commencement of the suit, and that the building was under construction for several months without any protest by the plaintiffs. Some of the defendants second party supported the plaintiffs' claim whereas others by their written statement lent their support to the contesting defendants.

[4] The trial Court dismissed the suit on the ground that, the plot having been in exclusive possession of the principal defendants since before the preparation of the record of rights, they had a right to construct the house in question, and that the defendants had acquired occupancy right in the same as they were also *raiyats* of the village, and that the suit was barred by limitation. On appeal by the plaintiffs, the lower appellate Court has agreed with the trial Court in the result, but not exactly for the same reasons. It held that the defendants had not acquired any occupancy rights in the land in question, and that, though the defendants had remained in possession of the plot all along since before the survey they could not have acquired rights by adverse possession, nor could the plaintiffs' suit be barred by limitation. But it held that the suit had abated as against defendants 19, 28, 44 and 62 with the result, as the Court below conceived, that, even in the event of the plaintiffs' success, the defendants would remain in possession of the house in respect of the interest of those defendants. As will presently appear, the question of abatement was absolutely of no consequence in this case.

[5] In this Court in second appeal the learned counsel for the appellants has contended that, so far as this Court is concerned, this is a case of first impression in the sense that there is no decision of this Court exactly on all fours with the present case. This case was placed for hearing, in the first instance, before Manohar Lall J. who directed it to be placed for hearing before a Division Bench.

[6] On behalf of the appellants reliance was placed on the decision of the Allahabad High Court in the cases of *Najju Khan* v. *Imtiaz-ud din*, 18 ALL. 115 : (1895 A. W. N. 243) ; *Ram Bahadur* v. *Ram Shankar Prasad*, 27 ALL. 688 : (2 A. L. J. 465) ; *Ram Lal* v. *Muhammad Amir Mustafa Khan*, A. I. R. (12) 1925 ALL 700 : (85 I. C. 849) ; *Sheo Harakh* v. *Jai Govind*, A.I.R (14) 1927 ALL. 709 : (01 I. C. 414) and of the Chief Court of Oudh in the cases of *Chandi Prasad* v. *Shyam Behari*, 13 Luck. 442 : (A. I. R. (24) 1937 Oudh 449) ; *Radhye Lal* v. *Kunj Behari*, 15 Luck. 61 : (A. I. R. (26) 1939 Oudh 275) and *Amjad Ali* v. *Mt. Bismillahan*, 184 I. C. 266: (A. I. R (27) 1940 Oudh 24). These cases are authority for the proposition that one of several joint owners is not entitled to erect a building upon joint property without the consent of the other co-sharers, even though the erection of such a permanent structure may not cause direct loss to the other joint owners. Some of them have gone to the length of holding that even when the plot is in the exclusive possession of a co-sharer as his *sahan darwaza*, he has no right to erect a building on any part thereof as that would amount to a change in the method of exclusive possession already enjoyed by that co-sharer (See *Radhey Lal* v. *Kunj Behari Lal*, 15 Luck 61: (A. I. R. (26) 1939 Oudh 275). Mahmood J. sitting singly in the case of *Paras Ram* v. *Sherjit*, 9 ALL. 661: (1887 A.W.N. 253), after discussing a large number of decisions of that Court and of the Calcutta High Court, held that the mere fact of a building being erected by a joint owner of land without the permission of his co-owners, and even in spite of their protest, is not sufficient to entitle such co-owners to obtain the demolition of such building, unless they could shew that it had caused such material and substantial injury as could not be remedied in a suit for partition of the joint land. His Lordship further pointed out that Courts in India in such matters exercised the combined jurisdiction of law and equity, and could not disregard equitable considerations in enforcing equitable remedies. He also pointed out that a distinction must be drawn between a case in which the building had been erected by pure trespasser and a case in which it had been erected by a joint proprietor on joint land without permission of his joint co-owners or in spite of their protest. He further pointed out that the

most important case in India was the decision in the case of *Lala Biswambhar Lal* v. *Rajaram*, 3 Beng. L. R. App. 67. In that case one of the co owners had erected a wall upon the joint land without obtaining the consent of his other co-owner, and it was held by Peacock C. J. that the Court would not interfere by ordering the demolition of the wall. In the course of his judgment his Lordship quoted the following observations of the learned Chief Justice :

> "It appears to me that even if the defendant had not a strict legal right to build the wall upon the joint land, this is not a case in which a Court of Equity ought to give its assistance for the purpose of having the wall pulled down. A man may insist upon his strict rights, but a Court of Equity is not bound to give its assistance for the enforcement of such strict rights."

The decision of Mahmood J. referred to above was considered by a Full Bench of the same Court consisting of five Judges including Sir John Edge C. J. in *Shadi* v. *Anup Singh*, 12 ALL. 436: (1890 A. W. N. 95 F. B.). In that case a cosharer had just started building a *kachcha* structure upon the common land when another cosharer instituted a suit for an injunction to restrain the construction of the building on the ground that the defendant was building the structure on land in excess of his share in the joint estate and was thus in effect ousting the other cosharer. It was found by the Court that the defendant had been building upon the land in excess of his share which would come to him on partition and that on partition the plaintiff could not be adequately compensated. In those circumstances the Full Bench held that the plaintiff was entitled to a perpetual injunction restraining the defendant from proceeding with the building, and directing that the building already constructed be pulled down. The Court further held that, the Court below having exercised its discretion in favour of the plaintiff by granting the injunction, it was for the appellant to shew that the discretion had not been judicially exercised, and, as the appellant failed to shew that the High Court refused to interfere. The Allahabad and the Oudh decisions referred to above have purported to follow the decision of the Full Bench just noticed.

[7] On the other hand, the leading case of the Calcutta High Court, the decision by Sir Barnes Peacock in 1869 referred to above, has been consistently followed by that Court : *see* the cases of *Nocury Lall* v. *Bindabun Chunder*, 8 Cal. 708; *Joy Chunder* v. *Bippro Churn*, 14 Cal. 236 and other cases. The matter was exhaustively discussed by that eminent Judge, Sir Ashutosh Mokerjee, in the case of *Ananda Chandra* v. *Parbati Nath*, 4 C. L. J. 198. In the course of his judgment his Lordship made the following observations :

> "I am not prepared to hold that an exclusive appropriation by one co-owner of a part of the joint land to his own use by the erection of a permanent structure, is necessarily evidence of an ouster .... The rule is well settled that the plaintiff, who complains of the act of his co-owner, cannot obtain a decree for demolition of buildings or for joint possession, unless he can establish that he has sustained some substantial injury by reason of the act of which he complains : *See Shamnugger Jute Factory Co. Ltd.* v. *Ram Narain*, 14 Cal. 189 ; *Joy Chunder* v. *Bippro Churn*, 14 Cal. 236 ; *Atarjan* v. *Ashak*, 4 C. W. N. 788 ; *Madan Mohon* v. *Rajab Ali*, 28 Cal. 223 ; *Soshi Bhusan* v. *Genesh Chunder*, 29 Cal. 500 and *Fazilatunnessa* v. *Ijarz Hassan*, 30 Cal. 901. These cases show that the Court will not interfere, unless it is proved that the injury has accrued to the plaintiff by reason of the erection of the building, and that he took reasonable steps in time to prevent the erection."

With those observations I respectfully agree. In the present case the learned Subordinate Judge, on appeal, has found that no case of substantial injury has been pleaded or made out by the plaintiffs. The learned Judge also pointed out that the only thing alleged on behalf of the plaintiffs was that in the event of a partition the land in question might have been allotted to their share as it was near their residential house. But the Court pointed out further that there were other cosharers also who had got their house near the plot in question, and that, therefore, the Court could not be sure of the position that on partition the plot in question would certainly have been allotted to the plaintiffs. The Court further pointed out that there is no satisfactory evidence to shew that when the defendants began to construct the structures the plaintiffs raised any objection. As a matter of fact, the plaintiffs' own admission in the plaint was that the building was started in February 1939, and the suit was filed in June of the same year. The Court further observed that there was nothing to shew that the structure complained of was on land in excess of the plaintiffs' share in the common lands of the village. In those circumstances the Court below came to the conclusion that it was not at all fair and equitable to grant a decree for demolition of the structures. The question now is whether this Court sitting in second appeal should interfere with the discretion exercised by the Courts below. I am definitely of the opinion that no case for interference by this Court has been made out. That being so, it is not necessary to discuss the further question whether there had been an acquiescence on the part of the plaintiffs as would deprive them of the legal right which they claimed.

[8] In the Tagore Law Lectures of 1895-96 on the Law of Joint Property and Partition in British India by R. C. Mitra this question has been discussed at some length with reference to

the authority of the different Courts at pages 226 to 233, and the learned author has come to this conclusion:

> "The result of the above discussion is, that in no case should the Courts, at the instance of a cosharer, order demolition of *pucca* buildings on a joint land, after the same have been erected by another cosharer, unless it be shown (1) that injury would otherwise accrue to the cosharer-plaintiff and (2) that before the buildings were started objection was taken to their erection; *Nocurry Lall* v. *Brindabun Chunder*, 8 Cal. 708. In short, it is only where a cosharer cannot be adequately compensated otherwise than by the demolition of a building that a Court of Equity should order such demolition."

[9] In my opinion, the preponderance of judicial opinion is in favour of the view that in the circumstances of this case the remedy by way of a mandatory injunction is not available to the plaintiffs. The appeal is, therefore, dismissed. As regards costs, I find that the defendants raised a number of false issues which were all naturally decided against them. I would, therefore, deprive them of the costs of this Court.

[10] **Reuben J.**—I agree.

V.B.B. *Appeal dismissed.*

A. I. R (37) 1950 Patna 514 [*C. N. 134.*]

SARJOO PRASAD J.

Rama Gope and another—Appellants v. *The State.*

Criminal Appeal No. 26 of 1950, D/-12-6-1950, against decision of S. J., Monghyr, D/- 14-12-1949.

Evidence Act (1872), S. 9 — Evidence of test identification parade.

The evidence of the test identification parade can be utilised for corroborating or contradicting the evidence of identification made in Court but not as substantive evidence. Where, however, it corroborates the evidence in Court, it must be regarded as of great value especially when the test identification parade was held without any unreasonable delay. [Para 4]

Annotation : ('46-Man.) Evidence Act, S. 9, N. 5.

Baldeo Singh and Dilkishore Prasad Singh—for Appellants.

Sidheshwar Prasad Singh—for the State.

Judgment.— In this appeal, the two appellants have been convicted under S. 395, Penal Code, and sentenced each to seven years' rigorous imprisonment. The case is one of highway robbery in which the appellants along with several other persons are said to have taken part and assaulted two persons, one of them rather severely, removed the goods and properties in their possession.

[2] The prosecution story is that on the night of the occurrence, that is, on 6th April 1949 in the early hours of morning, the complainant, Baburam Singh, along with his grand-daughter, Padmavati, a girl of about 11 or 12 years, his barahil, Sundar Singh, and a servant, Kesho Kahar, were proceeding from village Onwa to Barbigha to catch a bus there in order to go to railway station Shekhpura for the purpose of entraining for Gaya. This was, as I said, at about 4 A. M. in the morning. The barahil and the servant were carrying luggages, and the barahil had also a lantern in his hand. When they reached a pyne near Barbigha and were proceeding towards the north of the pyne, some brick-bats were thrown at the party, one of which hit the girl Padmavati. This was followed by a number of persons waylaying the complainant and his party. The dacoits assaulted Kesho, who fled away. Baburam himself took to flight, and Sundar, the barahil, who had a lantern in his hand, was hit with lathis and bhalas. He in fact received a severe bhala injury between his thigh and abdomen. He fell down unconscious, and the lantern slipped out of his hand and fell, the kerosene oil being spilt on the ground which caught fire and blazed up. In the light of the lantern, the blaze of oil and the flash of torches, the dacoits are said to have been identified. Baburam, the complainant, fled to the police station where he was soon joined by the servant, Kesho Kahar, who is P. W. 3 in the case, and there a first information was lodged at about 6 A. M., the place of occurrence being two miles from the police station. The girl, Padmavati, who is P. W. 2 in the case, and Sundar Singh, P. W. 4 were left behind at the place of the occurrence. Constables were accordingly sent to the spot who brought the girl and the injured Sundar Singh with the broken lantern. The police then started investigation, and in course of the investigation, they obtained some clues from the villagers leading to the arrest of the appellants on 7th April 1949.

[3] There can be no doubt that the occurrence has been adequately proved. The only question is about the identification of the appellants as being amongst the dacoits. The eye-witnesses to the occurrence are the complainant (P. W. 1), his granddaughter (P. W. 2), the servant Kesho Kahar (P. W. 3), who received injuries, and the barahil Sundar Singh (P. W. 4), who had rather a serious injury in his abdomen. There are two village witnesses, P. Ws. 5 and 6, who deposed that at dawn they noticed the appellants along with eight other persons coming from the opposite direction. The party of the appellants was armed with lathis and bhalas. As the witnesses found the party of the appellants coming in such a manner, which was rather unusual, they enquired as to where the party was coming from and were told that they were returning from Barbigha after seeing tamasha of Mahabir Ji puja. As this was immediately after the occurrence, the evidence has

been considered of some value by the learned Sessions Judge. I may here state that the test identification was held almost within a week of the occurrence, that is on 13th April 1949, and, therefore, the test identification is of great value. The identification of the appellant Rama Gope rests upon the evidence of the complainant, P. W. 1, who identified him at the test identification parade. It is, however, curious that the complainant could not identify him before the committing Magistrate on 25th November 1949. In his evidence, the complainant explains it by saying:

> "It is just possible that I have missed to identify some whom I had identified in Jail. In T. I. parade I used to catch the hand of the accused and the officer used to write his name."

Again, when the question of identification arose before the Sessions Court, he correctly identified the appellant Rama Gope. No substantial criticism could be made against the manner in which the test identification parade was held. It is true that one other witness, P. W. 3, identified the appellant Rama Gope at the test identification parade, but he was unable to identify him before the committing Magistrate or in the Sessions Court. So far as the appellant Aso Mian is concerned, he was identified at the test identification parade by the complainant as also by the girl, Padmavati (P. W. 2). Though both failed to identify him before the committing Magistrate, they were again able to identify him in the Sessions Court. P. W. 3 also appears to have identified Aso Mian at the test identification parade but not before the committing Magistrate or before the Sessions Court.

[4] The learned Sessions Judge, when dealing with the question of identification, observes as follows:

> "Now it is to be noted that identification by Baburam Singh, Padmavati and Kesho Kahar is not consistent throughout this proceeding. For example, in T. I. parade Baburam Singh identified Parmeshwar, Sri Ram, Rama Gope, Ramdhani and Aso Mian, but in the committing Court he identified only Parmeshwar, Sriram and Ramadhani and before this Court he has indentified Parmeshwar, Rama Gope, Baldeo Gope and Aso Mian. P. W. 2 Padmavati identified Aso Mian in T. I. parade but she failed to identify him before the committing Court and identified Parmeswar in his place but before the Sessions Court, she has identified Aso Mian and stated that it was Aso Mian who examined her person to see if she had ornaments on her person. This was stated by her on an enquiring question put to her. P. W. 3 Kesho Kahar identified in T. I. Parade Lutan, Rama Gope, Boldeo Gope, Matin Main and Jang Bahadur. Before the lower Court, however, he identified Parmeshwar, Ramdhani, Matin and Jung Bahadur. Before this Court, he has identified Ramdhani, Aso Mian, Jung Bahadur and Shama Mushar. In connection with the identification by these three witnesses, it is to be noted as already stated that they had opportunity to look at the faces of the dacoits for a very short time, which might be few seconds only. In such circumstances, it is obviously difficult for them to remember the faces for such a long time. In such a case, the most effective and reliable identification is identification in T. I. parade which took place within seven days of the occurrence, when the faces of the dacoits who were seen were fresh in their minds."

Thereafter, it appears from the discussion in his judgment that he seems to treat this evidence of identification as substantive evidence in the case. There is no doubt that the evidence of identification is of great corroborative value, but at the same time it must be remembered that it cannot be substantive evidence in the case. It can be utilised for the purpose of corroborating or contradicting the identification made in Court. But if a witness fails to identify an accused in Court, his identification at the test identification parade cannot be any evidence. I can understand the evidence of identification before the committing Magistrate being utilised as substantive evidence, but not the evidence at the test identification parade; but, of course, where it corroborates the evidence in Court, it must be regarded as of great value specially when the test identification parade was held without any unreasonable delay. I can also understand a statement made by the Magistrate himself, who held the test identification parade, being ultilised as substantive evidence, provided the Magistrate stated that a particular witness did identify a particular accused and he could depose to this fact from his own knowledge as such. In this case however, I do not find that the Magistrate, who held the test identification parade, did make any such statement. All that I find is that he observed only as follows: "I prepared a chart of T. I. parade. This is the chart prepared by me. Marked Ex. 3." He does not say which witness identified which accused. Therefore, merely proving the chart cannot be sufficient.

[5] In this context I would refer to a Bench decision of this Court in *Pesh Mohammad* v. *Emperor*, A.I.R. (29) 1942 Pat. 319 : (43 Cr. L. J. 742) in which, it appears, some of the accused had been identified at a test identification parade by some of the prosecution witnesses. These prosecution witnesses were produced in Court, but they did not give any evidence on the point of identification. They were merely tendered for cross-examination which was declined. Nevertheless, the Courts below convicted the accused relying on the circumstance that they had been picked out at the test identification parade by the witnesses concerned. Their Lordships observed that such a procedure was "entirely wrong" and they stated as follows:

> "These persons had not given any evidence against the petitioners, and the mere circumstance that they had been seen to pick them out at a test identification

> and had then made some statement to the sub-registrar who conducted it, was wholly irrelevant unless and until they gave evidence at the trial when, of course, the previous statement was relevant to corroborate that evidence. The result is that so far as three of the petitioners . . . . there is no legal evidence whatever on which a conviction can be sustained."

Whether the witnesses are tendered and are not made to identify in Court, or they are made to identify but fail to do so, does not make any difference in the eye of the law, because in either case there is "no legal evidence" before the Court and conviction cannot be sustained upon the evidence at the test identification which in that case becomes inadmissible.

[6] I may also refer to another Bench decision of the Allahabad High Court in *Nagina* v. *Emperor*, A. I. R. (8) 1921 ALL. 215 :(27 Cr.L.J. 813). In that case, the accused was identified by two witnesses at the parade held in jail, but they failed to identify him at the Sessions Court. The learned Sessions Judge there observed, "I never attach the slightest importance to success or failure to identify in Court." Their Lordships refuted this view and stated :

> "If by this statement the learned Judge means that he is entitled to treat the evidence of identification in the jail as substantial independent evidence in the trial he is grossly mistaken. . . . .
>
> Identification proceedings-held in the jail seem to us to amount to this, namely that certain persons are brought to the jail or other place and make statements, either express or implied, that certain individuals whom they point out are persons whom they recognise as having been concerned in a particular crime. These statements are of course not made on oath, and again, they are made in the course of extra-judicial proceedings. The law does not allow statements of this kind to be made available as evidence at the trial unless and until the persons who made those statements are called as witnesses. When these persons are called as witnesses then these previous statements become admissible *not as substantive evidence in the case, but merely as evidence to corroborate or contradict the statements made by these witnesses in Court* (Ss. 155 and 157, Evidence Act). *If when a witness to identify is called in the Sessions Court and he states there that he can identify no one, there is obviously nothing to corroborate and so the evidence of the previous statement, express or implied, made in the course of the identification proceedings in the jail is not admissible.*" (The underlines (here italicized) are mine).

[7] To a similar effect is the decision of the Allahabad High Court in *Bindeshri* v. *Emperor*, A. I. R. (14) 1927 ALL. 163 : (27 Cr. L. J. 1358) which follows the above decision.

[8] It is unnecessary to refer to other cases on the point, because, in my opinion, the principle appears to be quite clear, and, in any event, we are bound by the Division Bench decision of our own Court in the case of *Pesh Mohammad* v. *Emperor* (A. I. R. (29) 1942 Pat. 319: 43 Cr. L. J. 742) referred to by me. My view on the point is also strengthened by a decision of the Judicial Committee in *Brij Bhushan Singh* v. *Emperor*, A. I. R. (33) 1946 P. C. 38: 73 I. A. 1 : 21 Luck. 176 : (47 Cr. L. J. 336 P. C.). That was, of course, a case relating to statements made under S. 164, Criminal P. C. The Chief Court of Oudh used those statements as substantive evidence of the truth of the facts stated and their Lordships observed:

> "This was an improper use of such statement. A statement under S. 164 can be used to cross-examine the person who made it, and the result may be to show that the evidence of the witness is false. But that does not establish that what he stated out of Court under S. 164 is true."

The same principle applies to an identification by a witness at the test identification parade.

[9] Counsel for the State, however, relies upon a decision of the Allahabad High Court in *Abdul Jalil Khan* v. *Emperor*, A. I. R. (17) 1930 ALL. 746: (32 Cr. L. J. 152). In that case a witness picked out an accused at an identification held in jail but failed to identify him before the committing Magistrate or before the Sessions Court. There, the learned Judges observed that an identification by a witness in jail, who failed to point him out in the trial Court, was not necessarily worthless, and the evidence of the witness that he did at the jail point out certain persons, though he could not remember them, read with the evidence of other persons who could say who were the persons that were identified, may be of some value. These observations, if I may say so respectfully, are rather loosely expressed and cannot afford any guiding principle. In the decision in question, there is no reference to the earlier decision of the same Court in *Nagina* v. *Emperor*, A. I. R. (8) 1921 ALL. 215: (27 Cr. L. J. 813), and in any case their Lordships did not rely upon the evidence of the witness in spite of his having picked out the accused at the test identification parade.

[10] The other case relied upon is *Bachchu* v. *Emperor*, A. I. R. (17) 1930 Oudh 455: (128 I. C. 739). There, their Lordships observed:

> "The evidence which goes to prove that a person has identified another person as having taken part in a particular offence either in jail identification proceedings or elsewhere is admissible though the value of such evidence is weakened perceptibly as a general rule by failure to identify subsequently in Court."

Of course, this observation suggests that the evidence of identification in jail is by itself some evidence in the case. In my opinion, however, for the reasons already given above, I cannot hold that such an evidence can be substantive evidence at all. That evidence is admissible only for the purpose of corroboration or contradiction.

[10a] The position then is that the only legal evidence of identification of Rama Gope is that of P. W. 1, the complainant. The value of this

evidence is affected by the fact that the witness failed to identify him before the committing Magistrate. It is true that two other witnesses, P. Ws. 5 and 6, did notice him at dawn in a party of men carrying lathis and bhalas, but this affords very slight corroboration, if at all, of his presence in the dacoity; and in any case, even though there may be a possibility that he was one of the dacoits, I think it safe to give him the benefit of doubt.

[11] So far as Aso Mian is concerned, there is legal evidence of identification against him of two witnesses, the complainant as well as his grand-daughter, Padmavati. Padmavati has definitely stated, while identifying him, that he was the man who examined her person to see if she had ornaments on. I see no reason to disbelieve this evidence of identification against him. I am, of course, conscious of the fact that both these witnesses failed to identify him before the committing Magistrate. I confess that in this case I feel that there was something wrong in the manner in which the identification was conducted in the Court of the committing Magistrate. I have a shrewd suspicion in my mind that there may be some truth in the explanation given by the complainant of the manner in which the committing Magistrate examined the witnesses. I, therefore, do not attach much importance to this failure to identify the appellant before the committing Magistrate.

[12] The result, therefore, is that the appeal of Rama Gope is allowed and he is given the benefit of doubt and should be released accordingly. The appeal of Aso Main is, however, dismissed and the order of conviction and sentence passed against him is confirmed.

D.H. *Order accordingly.*

A. I. R. (37) 1950 Patna 517 *[C. N. 135.]*

DAS AND SARJOO PRASAD JJ.

Abdul Wakil Khan—Petitioner v. *Mt. Bibi Talimunnissa—Opposite Party.*

Civil Revn. No 364 of 1949, D/- 14th March 1950, against order of Sub-J., Motihari, D/- 23rd April 1949.

Civil P. C. (1908), O. 33, Rr. 6 and 7—Evidence under—Examination of applicant—Scope—Questions on merits of claim.

An examination of the Rules under O. 33 clearly shows that the evidence given under R. 6 is confined to the question of pauperism only though the Court may come to a fresh decision both as to pauperism and as to the prohibitions in R. 5 after the inquiry under R. 6. It is, therefore, not open to the opposite party to cross-examine the applicant on the merits of his claim at this stage. Where, therefore, a date is fixed for the examination of an applicant lady but the pleader for the opposite party does not avail himself of the opportunity to examine her, the party cannot, in a revision against the order allowing the petition, object that he had no opportunity to cross-examine the applicant and that if he had such an opportunity he would have shown that she had no cause of action. [Para 3]

Annotation : ('44-Com.) Civil P. C., O. 33, R. 7, N. 1.

S. M. Fazl Ali — for Petitioner.
S. S. Asghar Hussain and D. N. Varma — for Opposite Party.

Das J. — This is an application in revision against an order of the learned Subordinate Judge of Motihari, dated 23rd April 1949, allowing an application of the opposite party to sue in forma pauperis. The relevant facts are the following. On 17th January 1949, an application under O. 33, R. 1, Civil P. C., was filed. It is stated by the learned Subordinate Judge that the applicant was examined when she presented the application for permission to sue in forma pauperis. After such examination, the Subordinate Judge was presumably satisfied that the prohibitions mentioned in R. 5 of O. 33 did not apply. It was accordingly ordered that notice should issue to the opposite party and the Government pleader. The date fixed was 5th February 1949. On that date, the opposite party before the learned Subordinate Judge and petitioner before us, appeared and asked for time to file an objection. Such objection was filed on 2nd April 1949. The question of an enquiry into the alleged pauperism then arose, and on behalf of the applicant for permission to sue in forma pauperis, it was prayed that a commission should issue to examine the applicant who was a *pardanashin* lady. A commission was ordered to be issued on 4th April 1949, and a pleader named Mr. Indubhusan Banerji was appointed commissioner to take the evidence of the lady. On 6th April 1949, this pleader commissioner obtained the consent of both parties to the examination of the lady at her village home on 18th April 1949. For some reason or other, the learned pleader for the present petitioner changed his mind, and thought that the date would not suit him, and asked for a postponement. The pleader commissioner fixed 19th April for the examination of the lady. To that date also, the pleader for the present petitioner did not agree, and the matter was heard by the learned Subordinate Judge on that date, who said that the objection made by the present petitioner was frivolous, and directed the pleader commissioner to take the evidence of the lady on that date. The lady was examined on commission, and subsequently certain other witnesses on behalf of both parties were examined on the question of pauperism. On a consideration of that evidence the learned Subordinate Judge came to the finding that the applicant before him was a pauper, and accordingly allowed her to sue in forma pauperis.

[2] The objection taken before us is two-fold. Firstly, it is contended that the present petitioner was not given an opportunity of cross-examining the lady. Secondly, it is contended that if such an opportunity were given, the petitioner would have been in a position to elicit statements from her which would have shown that she had no cause of action for the claim of dower which she had made. As to the first contention, it seems clear to us that the petitioner had an opportunity of cross-examining the lady, but his pleader failed to avail himself of that opportunity. The order for the appointment of a pleader commissioner to examine the lady was passed on 4th April 1949, and on 6th April 1949, the pleader commissioner obtained the consent of both parties to the examination of the lady on 18th April 1949. The arrangement was that a conveyance would be obtained on behalf of the lady for taking the pleader commissioner and other persons to the locality. Subsequently, the pleader of the present petitioner changed his mind. The matter was then heard in Court, and the learned Subordinate Judge thought that the objection raised by the pleader of the present petitioner was frivolous. In these circumstances, it cannot be reasonably said that the petitioner had no opportunity of cross-examining the lady.

[3] The second contention is, I think, based on a misconception regarding the scope of the different provisions of O. 33. Order 33, R. 1 states that subject to the other provisions of the order, any suit may be instituted by a pauper. The explanation to the rule states who is a pauper. Rule 2 states what an application for permission to sue as a pauper shall contain. Rule 3 relates to the presentation of the application. Then comes R. 4 which is important for our purpose. That rule states that where the application is in proper form and duly presented, the Court may, if it thinks fit examine the applicant, or his agent when the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant. In other words, the Court can examine the applicant both with regard to the merits of the claim as also the property of the applicant. No question of cross-examination arises at that stage. Then comes R. 5 which says that the Court shall reject an application for permission to sue as a pauper if, amongst other things, the allegations do not show a cause of action. Obviously, the word 'allegations' there mean the allegations in the plaint as also such allegations as appear from the examination of the applicant made under R. 4. Rule 6 says that where the Court sees no reason to reject the application on any of the grounds stated in R. 5, it shall fix a day, of which notice is to be given to the opposite party, for receiving such evidence as the applicant may adduce in proof of his pauperism, and for hearing any evidence which may be adduced in disproof thereof. In other words, R. 6 ushers in that stage where an enquiry into pauperism takes place. Rule 7 says that on the date fixed, the Court shall examine the witnesses produced by either party, and may examine the applicant or his agent. Sub-rule (2) of R. 7 says that the Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence, if any taken by the Court the applicant is or is not subject to any of the prohibitions specified in R. 5. It is clear that the evidence given under R. 6 is confined to the question of pauperism only, though the Court may come to a fresh decision both as to pauperism and as to the prohibitions in R. 5 after the enquiry under R. 6. If, therefore, the enquiry under R. 6 was confined to pauperism only, it was not open to the present petitioner to cross-examine the lady on the merits of her claim at the stage when a commission was issued for her examination. It is not, therefore, open to the present petitioner to say that if he were allowed to cross-examine the lady, he would have been in a position to elicit some statements which would have shown that she had no cause of action. It is obvious that in this case the learned Subordinate Judge was satisfied that the plaint and the statements made by the lady, when she was examined under R. 4, showed that she had a subsisting cause of action. Thereafter, notice was issued to the opposite party. The opposite party contested the alleged pauperism, and on the evidence the learned Subordinate Judge was satisfied that the lady was a pauper.

[4] In our opinion, there are no grounds for interference with the order of the learned Subordinate Judge. The application in revision, therefore, fails, and is dismissed with costs. Hearing fee, one gold *mohur*.

[5] **Sarjoo Prasad J.**—I agree.

D.R.R. *Revision dismissed.*

A. I. R. (37) 1950 Patna 518 *[C.N. 136.]*

RAMASWAMI AND SARJOO PRASAD JJ.

Sheonath Prasad and another — Appellants v. *Bindeshwari Prasad Chaudhury and another — Respondents.*

A. F. O. O. No. 263 of 1948, D/- 25-4-1950, from order of Sub-J., Begusarai, D/- 25-5-1948.

Limitation Act (1908), Art. 182 (5)—Step-in-aid of execution—Application for transfer of decree for execution is a step-in-aid of execution: A. I. R. (22)

1935 Pat. 485; A. I. R. (32) 1945 Pat. 71; A. I. R. (3) 1916 Cal. 488 (F. B.) and A. I. R. (14) 1927 P. C. 73, *Disting.*; *Case law discussed.* [Para 15]

Annotation: ('42 Com.) Lim. Act, Art. 182, N. 121 Pt. 1.

M. Rahman—for Appellants.

K. K. Sinha—for Respondents.

Sarjoo Prasad J.—This appeal which has been preferred by the judgment-debtors arises out of an application under O. 21, R. 90 read with S. 47, Civil P. C.

[2] The decree under execution was passed on 26th January 1943. It was transferred for execution by the Subordinate Judge, 1st Court, Monghyr, under his order dated 17th January 1946, passed upon an application made by the decree-holder for that purpose. The execution case to whch this appeal relates was filed in the Court of the Subordinate Judge, Begusarai, on 31st January 1947. In the said execution after the service of the various processes certain properties were attached and sold on 1st December 1947. It appears that immediately after the sale but on that very day two of the judgment-debtors appeared and applied for time to pay off the decretal dues. This application was not entertained by the Court, and thereafter on 2nd January 1948, the judgment-debtors including those who had appeared on the date of the sale filed this application under O. 21, R. 90 and S. 47, Civil P. C.

[3] In the application in question the judgment-debtors alleged that the sale was without jurisdiction as notice under O. 21, R. 22 had not been served on them. They also stated that there was fraud and material irregularity and illegality in publishing and conducting the sale, and they further alleged that the execution case itself was barred by limitation.

[4] The decree-holder-auction-purchaser resisted the said application filed by the judgment-debtors and contended that the various processes were duly served, that there was no limitation involved, and that the sale had validly taken place.

[5] The learned Subordinate Judge who heard the application by his order dated 26th May 1948, dismissed the same. He found that the plea of non-service of notice under O. 21, R. 22 was frivolous, that the allegation of material irregularity in publishing and conducting the sale was incorrect, and that the applicants had failed to prove that they had sustained any injury by the sale. On the point of limitation, the learned Subordinate Judge found that the execution case was within time as having been filed within three years from 17th January 1946, which was the date of the order passed on an application for transfer of the decree for execution constituting a step-in-aid.

[6] So far as the service of notice under O. 21, R. 22 is concerned, I agree with the view of the learned Subordinate Judge that the objection is frivolous. A reference to the order-sheet in the execution case shows that on 8th February 1947, notices under O. 21, R. 22 were directed to be issued by the Court. On 10th March 1947, the Court recorded an order that notices had been served. Thereafter proceedings were taken for issue of attachment and sale proclamation on various respective dates. The judgment-debtors have not examined themselves to deny this service of notice but have put into the witness-box a patwari of theirs who was unable to say where he was in February 1947, that is, during the relevant period of the service of notice under O. 21, R. 22. His evidence has been rightly discarded by the learned Subordinate Judge, and I see no reason to differ from his finding on that point. There is the further fact that two of the judgment-debtors-appellants actually appeared before the Court on the date of sale and applied for time to pay up the decretal dues.

[7] The question of illegality or irregularity in the conduct of the sale or consequent prejudice to the judgment-debtors has not been seriously pressed before this Court. Even if the evidence adduced by the decree-holder on the point of service of attachment and sale proclamation is meagre, here is nothing to show that the price fetched at the sale was inadequate. As I have said, the point was not even seriously argued before this Court, and I must uphold the decision of the learned Subordinate Judge thereon.

[8] The contention seriously advanced on behalf of the appellants is the contention that the execution is barred by limitation. The decree under execution is dated 26th January 1943 while the execution case itself was filed on 31st January 1947, evidently three years after the date of the decree. *Prima facie*, a question of limitation will arise. But as stated above, a petition for transfer of the decree from the Court which passed it to the Court of execution was made by the decree-holder and an order for transfer was passed on 17th January 1946. If this application for transfer of the decree for execution and the final order passed thereon constitute a step-in-aid of execution within the meaning of cl. (5) of Art. 182, Limitation Act, the execution is within time. The learned Subordinate Judge correctly formulated the question when he observed:

> "The question for decision therefore is whether an application for transfer of a decree is a step-in-aid of execution and whether the period of 3 years should in the present case be computed from 17th January 1946."

Counsel for the appellants contends that an application for transfer is not a step-in-aid of execution, and he drew our attention to a decision of this Court in *Mt. Keshar Kuer* v. *Rajeshwari Narain Singh*, A. I. R. (22) 1935 Pat. 485: (157 I. C. 791) and *Mahidar* v. *Kalyani Prasad*, 23 Pat. 707: (A. I. R. (32) 1945 Pat. 71). The learned counsel for the respondents relies upon certain other decisions of this Court in *Ramchandra* v. *Krishna Lal*, 1 Pat. 328: (A I R. (9) 1922 Pat. 301), *Bhagwat Sahay* v. *Ram Sukrit Ram*, A. I. R. (23) 1936 Pat. 313: (162 I. C. 984), *Bhagwat Sahay* v. *Ram Sukrit Ram* 16 Pat. 288: (A I. R. (24) 1937 Pat. 351), *Bishundeo Narain* v. *Raghunath Prasad*, 19 Pat. 364 : (A. I. R. (27) 1940 Pat. 677) and some decisions of the Calcutta High Court in *Ahad Bux* v. *Kinkar Chandra*, A. I. R. (22) 1935 Cal. 640: (158 I. C. 590) and *Sreenath Chakravarti* v. *Priyanath Bandopadhyay*, 58 Cal. 832: (A.I.R. (18) 1931 Cal. 312). As there appears to be some show of conflict between some of the decisions of this Court, I consider it desirable to examine the decisions cited by the parties in some detail.

[9] The earliest decision on the point is the decision in *Ramachandra* v. *Krishna Lal*, 1 Pat. 328: (A. I. R. (9) 1922 Pat. 301) In that case, the decree-holder obtained a decree on 23rd May 1911, in the Court of the Munsif of Bhagalpur. Within three years of that date, that is on 1st May 1914, he applied for a certificate to execute the decree in Monghyr where it appeared that the judgment-debtor had certain property. This application was allowed. and the certificate he asked for was granted. It appears that the decree was not actually transferred for execution. On 22nd November 1916, again within three years from the date on which he made the last application, the decree-holder applied for the same relief, namely, for transfer of the decree. Thereafter, he again did not take any further steps. On 3rd september 1919, again within three years from the date of the last application, the decree-holder applied a third time. On this occasion the judgment-debtor, who appeared, objected that the application was time-barred. It was contended by the judgment-debtor that the applications made on 1st May 1914, and again in November 1916, were not steps taken in aid of execution, and, as such, they could not operate to save the bar of limitation. This contention could not find favour with their Lordships who held, Sir Dawson Miller C. J., having delivered the judgment:

> "I have no doubt whatever however that such an application is a step-in-aid of execution and it is a step which is always necessary where the decree-holder desires to obtain execution against property situate outside the territorial limits of the jurisdiction of the Court which made the decree. In fact there are certain decisions to the effect that such an application is a step-in-aid of execution whereas the learned Vakil for the appellant has not been able to put before us any case in which the contrary view has been expressed. I should have thought myself that there could be no question upon this point."

The above decision is a Division Bench decision of this Court.

[10] A contrary view, however, appears to have been taken in *Mt. Keshar Kuer* v. *Rajeshwari Narain Singh*, A.I.R. (22) 1935 Pat. 485 : (157 I. C. 791)—the case relied upon by the appellants. As this is also a Division Bench judgment the case requires closer examination. In this case a previous application for execution was dismissed on 20th September 1929, and a fresh application for execution was filed on 28th September 1932, more than three years after the dismissal of the previous application. On this application, it was contended that a notice under O. 21, R. 22 was served upon the judgment-debtor and there was an order of execution in that case. Then a third application for execution was filed which came up for consideration by their Lordships. The question raised was whether in view of the order passed in the second execution case directing the execution to proceed, it was open to the judgment-debtors to raise the question in the third execution proceeding that the second execution case was barred by limitation; in other words, the point which fell for decision by their Lordships was whether impliedly the point of limitation as to the second execution case would not be deemed to have been decided against the judgment-debtor in view of the direction made by the Court that the execution should proceed. The decree-holder's contention was that notice under O. 21, R. 22 having been served on the judgment-debtors in the second execution case, the plea of limitation would be deemed to have been decided against them, it not having been raised there and that plea could not be available in the third execution proceeding. This plea their Lordships did not accept because they held that the second application for execution was not an application for execution as such, but simply an application for sending copy of the decree and certificate for execution to another Court. For this reason, they held that the plea of limitation was available to the judgment-debtor, and that the third application was, therefore, barred by limitation. Incidentally they have, of course, observed in their judgment that an order for sending a decree to another Court for execution is not an order for execution and it could be made on a simple application without any form. But they have said nothing that such an application could not constitute a step-in-aid of execution. In fact, this point was never argued before them. All that they held

was that such an application was not an application for execution, and they did so only for the purpose for deciding whether the question of limitation was available to the judgment-debtor or it was barred by the principle of constructive *res judicata*. Therefore, this case is no authority for the contention that an application for transfer of a decree from one Court to another and the order passed thereon did not constitute a step-in-aid of execution as contemplated by Art. 182 (5), Limitation Act, and did not, in my opinion, in any manner shake the authority of the previous decision in *Ramchandra* v. *Krishna Lal*, 1 Pat. 328: (A.I.R. (9) 1922 Pat. 301) which does not appear to have been even referred to in this later case. In my opinion, the learned Subordinate Judge has correctly distinguished that decision.

[11] The decision in *Ramchandra* v. *Krishna Lal*, 1 Pat. 328 : (A. I. R. (9) 1922 Pat. 301) was followed in another decision of this Court in *Bhagwat Sahay* v. *Krishna Lal*, A. I. R (23) 1936 Pat. 313 : (162 I. C. 984), where Wort J. sitting singly held that an order made on an application for transferring the decree for execution to another Court, is a step-in-aid of execution and gives a fresh start to the decree-holders under Art. 182 (5). It is true that the observations of Wort J. cast some doubt upon the correctness of the decision in *Ramchandra* v. *Krishna Lal*, 1 Pat. 328: (A. I. R. (9) 1922 Pat. 301) in view of the decision of the Privy Council in *Banku Behari* v. *Naraindas Dutt*, 54 I.A. 129: (A. I. R. (14) 1927 P.C. 73). But Wort J. himself recognised the distinction that the decision of the Privy Council was on Art. 183 and not on Art. 182, Limitation Act. The learned Judge was also in some doubt as to the accuracy of the observations made by Sir Dawson-Miller in his decision in *Ramchandra* v. *Krishna Lal*, 1 Pat. 328: A. I. R. (9) 1922 Pat. 301) when Wort J. pointed out that Art. 182 (5), Limitation Act, does not speak of an application in aid of execution but speaks of an order made on an application as a "step-in-aid of execution." This doubt would not have arisen if, I may say so with respect, Wort J. were conscious of the fact that the article, as it originally stood prior to its amendment by Act IX [9] of 1927, did not contain the words "the final order passed on an application made." Therefore, when Sir Dawson-Miller gave his decision, his judgment was quite in consonance with the language of the article as it then stood.

[12] The other decision relevant on the point is the decision in *Bhagwat Sahay* v. *Ram Sukrit Ram*, 16 Pat. 288 : (A. I. R. (24) 1937 Pat. 351). This was a decision in Letters Patent Appeal against the aforesaid judgment of Wort J. which I have already discussed. In this decision Courtney-Terrell C. J. and James J. affirmed the view taken by Sir Dawson-Miller in the case of *Ramchandra* v. *Krishna Lal*, 1 Pat. 328 : (A. I. R. (9) 1922 Pat. 301). They also distinguished the decision of the Privy Council in *Banku Behari* v. *Naraindas Dutt*, 54 I.A. 129: (A. I. R (14) 1927 P. C. 73), with these observations :

> "It seems, however, quite clear that the distinction has been recognised by many of the other High Courts that the decision of their Lordships of the Privy Council dealt only with Art. 183."

They definitely held :

> "The decision of this Court in *Ramchandra* v, *Krishna Lal*, 1 Pat. 328 : (A. I. R. (9) 1922 Pat. 301), was not affected in the least by the decision of the Privy Council and the order for transfer was a step-in-aid of execution and the subsequent proceedings by the decree-holder were consequently within time under Art. 182, cl. (5)."

[13] To a similar effect is another Division Bench decision of this Court in *Bishundeo Narain* v. *Raghunath Prasad*, 19 Pat 354 :(A.I.R. (27) 1940 Pat. 677), to which Wort J. himself was a party though the judgment in the case was delivered by Meredith J. In that case also their Lordships reiterated the principle that an application for transfer of a decree, if made to a proper Court, is a step-in-aid of execution. Such an application must also be an application in accordance with law.

[14] Having regard to these numerous authorities of this Court, it would have been unnecessary to enter into such details in an examination of the question but for the fact that another discordant note was sounded in the year 1945, despite those earlier pronouncement by Manohar Lall J. to which Beevor J. also agreed in *Mahidar* v. *Kalyani Prasad*, 23 Pat. 707 : (A. I. R. (32) 1945 Pat. 71). Learned counsel for the appellants has very strongly relied upon this decision in support of his arguments. It is gratifying to note that the facts of this case have been very carefully analysed by the learned Subordinate Judge in his judgment under appeal. The decree in the case was obtained on 25th March 1930 in the Purulia Court. In the years 1930, 1932 and 1933 infructuous attempts were made to execute this decree. On 9th July 1935, another execution case was started but it was dismissed on part satisfaction in May. 1936. On 18th June, the same year the decree-holder made an application to the Purulia Court which had passed the decree that the decree should be transferred for execution to the Court at Asansol with a certificate of non-satisfaction, and, on that very date the Court passed an order directing transmission of the decree on preparation of the required certificate of non satisfaction. In pursuance of this order, a certificate was pre-

pared by the office on 25th June 1936 which was signed by the Court with necessary directions. The order and the certificate of non-satisfaction were received by the Court at Asansol on 4th July 1936, but as the decree-holder did not make any application for execution before the Asansol Court, the certificate was returned to the Purulia Court on 4th March 1937. On 6th July 1939, the decree-holder made an application for execution of the decree to the Court at Purulia. Mr P. R. Dass appearing for the appellants-judgment-debtors argued that the date of the final order passed in the application to take the step-in-aid of execution could not be taken to be beyond 25th of June 1936, and therefore, the application for execution filed on 6th July 1939, was barred by limitation being definitely beyond three years from the date of that order. Their Lordships gave effect to this contention of Mr. P. R. Das, and they held that the date of final order was 25th June 1936, and not 6th July 1936. They say so in very clear terms when they observed in the judgment:

> "In my view, therefore, it follows clearly that the final order on the application to take step-in-aid of execution in this case was passed on 25th June 1936, and not on 6th July 1936."

This as the learned Subordinate Judge points out, by necessary implication assumed

> "that an application for transfer of a decree was a step-in-aid of execution and that limitation ran from the date of the final order passed thereon disposing of the case judicially."

I have quoted the words of the learned Subordinate Judge himself. It is true that in the said judgment their Lordships incidentally also observed that the application for transmission of the decree to the Court of Asansol with a certificate of non-satisfaction

> "was not by itself a revival of the decree within the meaning of the Act inasmuch as it was a mere ministerial act of an officer of the Court and not the judicial act of a Judge."

They relied for this observation upon a Full Bench decision of the Calcutta High Court in *Chutterput Singh* v. *Sumarimal*, 43 Cal. 903 : (A. I. R. (3) 1916 Cal. 488 F. B.) and they held that the correctness of this decision was approved by their Lordships of the Judicial Committee in *Banku Behari* v. *Narain Das Dutt*, 54 I. A. 129 : (A. I. R. (14) 1927 P. C. 73). These observations do not constitute the *ratio decidendi* of the case and must be taken to be mere obiter. In any case the observations cannot amount to anything more than saying that an application for transmission of a decree for execution to another Court did not constitute a revivor of the decree. But they nowhere said that it would not constitute a step-in-aid of execution and that the order passed thereon would not operate to save limitation under Art. 182 (5), Limitation Act. On the other hand, as I have pointed out, in agreement with the learned Subordinate Judge their Lordships held by necessary implication that the application for transfer of a decree did constitute a step-in-aid of execution, and the final order passed thereon was a fresh starting point of limitation for execution of the decree.

[15] It would be needless to multiply authorities but the decision of the Calcutta High Court in *Sreenath* v. *Priyanath*, 58 Cal. 832 : (A. I. R. (18) 1931 Cal. 312) furnishes an interesting study. In that case reliance was placed upon the aforesaid Full Bench decision in *Chutterput Singh* v. *Sumarimal*, 43 Cal. 903 : (A. I. R. (3) 1916 Cal. 488 F. B.), and the Privy Council decision in *Banku Behari* v. *Narain Das Dutt*, 54 I. A. 129 : (A. I. R. (14) 1927 P. C. 73), for the contention that an application to a Court which passed the decree for the transfer of the decree to another Court for execution is not a step-in-aid of execution. It must be observed that the point did not actually arise in the case but Mukerji J. repelled the contention in these words :

> "We desire to say that it has no force, that the authorities are the other way about, and that the two decisions, on which reliance has been placed, relate to decrees passed on the Original Side of the Court, which under the practice obtaining there, are transferred for execution under ministerial orders. No question of a step-in-aid of execution arises under the article of Limitation applicable to such decrees, but a question of revivor which such ministerial orders can never amount to. Of course, a mere application to have a decree transferred to another Court is not an application for execution (*Khetpal* v. *Tikam Singh*, 34 ALL. 396 : (14 I. C. 172)), but we do not think it has ever been held that it is not a step-in-aid of execution: in fact it is the first aid that the Court which passed the decree is called upon to give to a decree-holder who stands in need of it when execution has to be had in a different Court."

With all these observations of the learned Judge I respectfully agree. The two decisions, therefore, of the Full Bench in *Chutterput Singh* v. *Sumarimal*, 43 Cal. 903 : (A. I R. (3) 1916 Cal. 488 F. B.), and of the Judicial Committee in *Banku Behari* v. *Narain Das Dutt*, 54 I. A. 129 : (A. I. R. (14) 1927 P. C. 73) should not cause any confusion on the point. They are decisions given under Art. 183, Limitation Act, and have nothing to do with the interpretation of Art. 182 (5) of the said Act. I, therefore, think that the learned Subordinate Judge was right in holding that the application for execution was within time, and the appellants' contention on the point is therefore without any substance.

[16] Counsel for the respondent has also contended that the question of limitation was not available to the judgment-debtors-appellants as it was barred by the principle of constructive *res*

judicata. He contended that notices under O. 21, R. 22 having been served upon the judgment-debtors and thereafter the Court having ordered the execution to proceed by attachment and sale of the properties in execution and the judgment-debtors having never appeared to object to the execution on the ground of limitation, it must be impliedly taken to have been decided against them. He relied for this purpose upon a decision in *Lalit Mohan* v. *Sarat Chandra*, 37 C. W. N. 752 : (A. I. R. (20) 1933 Cal. 855) and *Rajitagiripathy* v. *Bhavani Sankaram*, 47 Mad. 641 : (A. I. R. (11) 1924 Mad. 673). Learned counsel for the appellants, however, contended that the principle of constructive *res judicata* should not be extended so far. He submits that constructive *res judicata* could have been applied if the judgment-debtors had appeared at some stage of the execution case and had done some overt act to indicate that they allowed the execution case to proceed without any such objection on the score of limitation. In any view of the matter it is unnecessary to deal with the question because I have held already that there was no limitation in the present case.

[17] For the reasons stated above, I must uphold the decision of the learned Subordinate Judge and dismiss the appeal with costs.

[18] **Ramaswami J.**— I agree.

D.R.R. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 523 [*C. N. 137.*]

RAMASWAMI AND NARAYAN JJ.

Jamuna Prasad Lala — *Appellant* v. *The Bengal Iron Co. Ltd.*—*Respondent.*

A. F. A. O. No. 264 of 1949, D/- 10-3-1950, from order of A. D. J., Purulia, D/- 22-7-1949.

Houses and Rents — Bihar Buildings (Lease, Rent and Eviction) Control Act (III [3] of 1947), S. 11 — Tenant-at-will of plot of land — Decree against—Executability.

Where a person who is a tenant-at-will with respect to a plot of land of which he was granted possession by the landlord, subsequently constructs a building thereon without the permission of the landlord, he is not a tenant within the meaning of S. 11 and execution of the decree directing him to vacate the land and remove the structures within a certain period is not barred. [Para 6]

S. Anwar and Chandi Pd.—for Appellant.
B. C. De and S. C. Mazumdar—for Respondent.

Ramaswami J.—The question at issue in this appeal is whether the execution of the decree taken by the respondent is barred under S. 11, Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947.

[2] The respondent brought the suit on the ground that the appellant was a tenant-at-will having been let in possession of the disputed plots by virtue of a compromise in a previous title suit. As the appellant refused to quit in spite of the service of notice the respondent claimed that he should be granted a decree for ejectment and for vacant possession of two plots. The appellant contested the suit on the ground that he had constructed a permanent structure upon the plots within the knowledge of the respondent and was therefore not liable to be evicted therefrom. The appellant also denied that the plaintiff had title in respect of the land. The trial Judge granted a decree to the plaintiff which the learned Subordinate Judge reversed. In second appeal the High Court restored the decree of the trial Judge which is to the following effect:

> "The defendants are hereby directed to vacate the land in suit and remove the structures within a period of 3 months from the date of the decree and on their failure to do so they will be evicted in due course of law and shall be liable for costs."

[3] In support of this appeal, Mr. Anwar Ahmad addressed the argument that S. 11 of Bihar Act III [3] of 1947 is a bar to the execution of the decree. In my opinion, this argument is untenable. Section 11 (1) of the Act is to the following effect:

> "Notwithstanding anything contained in any agreement or law to the contrary and subject to the provisions of section 12, *where a tenant is in possession of any building*, he shall not be liable to be evicted therefrom, whether in execution of a decree or otherwise, except—
>
> (a) in the case of a month to month tenant, for non-payment of rent or breach of the conditions of the tenancy, or for sub-letting the building or any portion thereof without the consent of the landlord, or if he is an employee of the landlord occupying the building as an employee, on his ceasing to be in such employment; and
>
> (b) in the case of any other tenant, on the expiry of the period of the tenancy, or for non-payment of rent, or for breach of the conditions of the tenancy:
>
> Provided that nothing contained in this section shall apply to a tenant whose landlord is the Provincial or the Central Government or any local authority constituted under any enactment for the time being in force."

[4] It is of importance to observe that S. 11 (1) is applicable only to a case of eviction of a tenant who "is in possession of any building."

[5] Section 2 (h) of the Act defines a tenant to mean "any person by whom, or on whose account, rent payable for a *building*......". Again S. 2 (a) defines "building" to be

> "any building or hut or part of a building or hut let or to be let separately for residential or non-residential purposes, and includes (i) the garden, grounds and out-houses, if any, appurtenant to such building or hut or part of such building or hut; and (ii) any furniture supplied by the landlord for use in such building or hut or part of a building or hut."

[6] Upon the proper construction of S. 11 (1) read with S. 2 (a) and S. 2 (h) it is manifest that S. 11 only bars the execution of a decree obtained against a tenant who is in possession

of a building for which he is liable to pay rent. Upon the admitted facts of the present case it is clear that the appellant was merely a tenant-at-will with respect to two plots 302 and 318 of which he was granted possession by the respondent; that subsequently the appellant built structures thereon without the permission of the respondent. It is necessary to state that the decree of the learned Munsif which was affirmed by the High Court in appeal directs that the appellant should vacate *the land* and remove structures within a period of three months from the date of the decree. Upon these facts, it is impossible to hold that the appellant is a tenant within the meaning of S. 11 (1) read with S. 2 (h) of Bihar Act III [3] of 1947. That being so it follows that the execution of the decree is not barred by S. 11 of the Act.

[7] In this context reference should be made to *Jaminikanto Harendralal* v. *Bonomali Dey*, A. I. R. (35) 1948 Cal. 172: (I. L. R. (1948) 1 Cal. 146) in which a suit had been filed by a landlord against his tenant not for the recovery of a house but of bare land and the landlord had obtained a decree in his favour before the Calcutta House Rent Control Order came into force. Section 9 of that Order prevented a landlord from getting a decree for recovery of possession or any house from his tenant except in three classes of cases which are provided for in provisos (a), (b) and (c) to that section. It was admitted in that case that none of the provisos applied to the case. But it was argued that in view of the main enactment as contained in S. 9, Calcutta House Rent Control Order, the decree which had been passed in the suit ought not to have been passed. This contention was rejected by Mitter A. C. J. who observed as follows:

> "Section 9 speaks of a decree for the recovery of possession of any house and the word 'house' has been defined in section 2, sub-s. (3) in a manner which would include a hut. But the suit which had been filed by Bonomali De against his tenant was not a suit for the recovery of a house even in that extended sense, but of bare land because he had let out bare land. The main enactment contained in S. 9 is therefore out of the way."

[8] For these reasons therefore I hold that this appeal is without merit and should be accordingly dismissed with costs.

[9] **Narayan J.**—I agree.

D.H. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 524 *[C. N. 138.]*

RAMASWAMI AND NARAYAN JJ.

Hakim Md. Idris and others—Appellants v. *Md. Kabir—Respondent.*

A. F. O. O. No. 106 of 1948, D/- 20-3-1950, from order of Sub-J., Patna, D/- 13-1-1948.

Limitation Act (1908), Art. 182 — Final adjudication with regard to mesne profits—Direction to pay deficit court-fee—Final decree for mesne profits—Starting point of limitation for execution — Civil P. C. (1908), O. 20, R. 12 — Court-fees Act (1870), S. 11.

Where the amount of mesne profits is finally determined by the Court which further directs that no decree shall be prepared unless the deficit court-fee is paid, the direction only means that the formal drawing up of the decree is postponed until the court-fee is paid. The order determining the mesne profits amounts to a final decree and no fresh final decree is necessary to be prepared on payment of the deficit court-fee. The question of court-fee is a matter of mere calculation with reference to the Court-fees Act. No further adjudication by the Court is necessary to determine the amount of court-fee. The time for execution will, therefore, run from the date of the order determining the amount of mesne profits: *Case law referred.* [Paras 5 and 16]

Annotation: ('42-Com.) Limitation Act, Art. 182, N. 30; ('50-Com.) Civil P. C., O. 20, R. 12 N. 2; ('49-Com.) Court-fees Act, S. 11 N. 4.

Qazi Nazrul Hassan — for Appellants.

L. K. Jha and M. Rahman — for Respondent.

Ramaswami J.—This case has a long and complicated history; but the question posed for decision in this appeal lies within a short compass. The appellant brought the suit for a declaration of title, for possession and mesne profits with respect to 1/9th share of certain villages which belonged to her parents Fazl Imam and Bibi Zohra. The respondent who was her eldest brother admitted her claim. The other defendants effected a compromise with the appellant which was recorded by the Court. On 9th February 1926 the appellant obtained a decree for possession of her share and for mesne profits. It is not necessary to trace in detail the further stages of the litigations. On 28th March 1931, the plaintiff filed an application for ascertainment of mesne profits from the respondent with respect to her share according to the preliminary decree. Mr. Bagchi who was the Subordinate Judge at the time issued notice to the parties, recorded evidence of witnesses and on 8th March 1939 adjudicated the quantum of mesne profits. The last paragraph of his order states:

> "I would therefore allow mesne profits for the period of claim at Rs. 652 per year according to the previous finding (*vide* Ex. 1). Interest will be allowed at 6 per cent. per annum from the end of each year of claim up to date. The office will calculate the amount of court-fee payable by the plaintiff and no decree will be prepared till the same is paid. Pleader's fee at 5 per cent. is allowed on the amount of mesne profits decreed. The plaintiff will also get the costs of this application proportionate to her success."

[2] On 21st April 1939, the appellant was informed that she ought to pay Rs 292-8-0 being ascertained amount of court-fee. The appellant apparently took no action but on 13th March 1945 after a lapse of about six years the appellant paid the requisite amount of court-fee and

asked that a final decree for mesne profits should be prepared. The respondent objected that the execution of the decree was time barred and that the decree cannot be revived by payment of court-fee after a lapse of more than three years. Mr. S. K. Prasad, Subordinate Judge, upheld the objection of the respondent holding that the final adjudication between the parties regarding the amount of mesne profits was given on 8th March 1939, which date must therefore be taken to be the date of the decree; and the question of court-fee payable was a mere matter of calculation and the Court had nothing further to adjudicate in order to determine the amount of court-fee. The Subordinate Judge therefore refused to prepare another final decree.

[3] In support of this appeal, Dr. Qazi Nazrul Hassan addressed the argument that on 8th March 1939 the decree was passed on condition that the necessary court fee was deposited, that limitation would run from the date when proper decree was drawn after the amount of court-fee was paid. Learned counsel submitted that the Subordinate Judge ought to have drawn a fresh decree on the date the necessary court-fee was paid.

[4] In my opinion, this argument is untenable. In this case, there can be no doubt that final adjudication between the parties regarding the amount of mesne profits was given on 8th March 1939. That date must therefore be taken to be the date of the final decree. Learned counsel for the appellant laid stress on the last portion of the order of 8th March 1939, that is, "the office will calculate the amount of court-fee payable by the plaintiff and no decree will be prepared till the same is paid." It was argued that something more was necessary to be done by the Court in order to pass the final decree. But it is not possible to accept this argument. "Decree" as defined in S. 2 (2), Civil P. C., means

> "the formal expression of an adjudication which so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final."

The explanation states :

> "A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such an adjudication completely disposes of the suit. It may be partly preliminary and partly final."

[5] The matter in controversy between the parties was the amount of mesne profits. That was finally determined by the order dated 8th March 1939. The amount being determined the question of court-fee was a matter of mere calculation with reference to the provisions of the Court-fees Act. No further adjudication by the Court was necessary in order to determine the amount of the court-fee. It is true that the Subordinate Judge directed that "no decree shall be prepared unless deficit court-fee were paid." But the Subordinate Judge only meant that the formal drawing up of the decree should be postponed until the court-fee was paid. Nothing more remained to be decided by the Court. The moment the plaintiff paid the deficit court-fee in accordance with this order the decree would have been automatically drawn up. The order of the Subordinate Judge dated 8th March 1939 constitutes, in my opinion, the "final decree;" and the appellant is not warranted in asking the Subordinate Judge to prepare a fresh final decree on the date he paid the amount of court-fee.

[6] It was objected for the appellant that the Subordinate Judge did not formally embody his order of 8th March 1939 in the form of a decree. But the objection is of no avail for on principle it is clear that if a decision really determines the rights of the parties fully and finally it is in the eye of law a decree even though the Court giving the decision has not formally embodied its result in the form of a decree.

[7] This opinion is supported by a catena of authorities. In *Raja Bhup Indar Bahadur Singh* v. *Bijai Bahadur Singh*, 27 I. A. 209 : (23 ALL. 152 P. C.) a decree in ejectment dated 12th November 1887, declared the plaintiff entitled to future mesne profits, and was eventually affirmed by the Queen in Council on 11th May 1895. The plaintiff obtained possession on 30th November 1895. On 16th March 1896, he petitioned the District Judge alleging that mesne profits were due from the date of the suit till recovery of possession. The defendant objected that he was not entitled to any further mesne profits under this decree. After hearing the parties the District Judge ordered that the plaintiff was entitled only to mesne profits for three years from 12th November 1887. The Judicial Committee held that the order of the District Judge was in the nature of a final decree as defined in S. 2, Civil P. C. and was appealable. At p. 214 Lord Hobhouse states :

> "It appears to their Lordships that the plain meaning of S. 2 is to make this order a decree appealable under S. 540. Mr. Ross has not shown any reason why the words of the Code should not be construed in their plain and obvious sense. On the contrary the obvious sense is that which best accords with ordinary convenience and ordinary rules of practice."

[8] In *Khub Lal Singh* v. *Raghubans Narayan Singh*, 7 Pat. 491 : (A. I. R. (15) 1928 Pat. 565) a Bench of this Court following the decision of the Judicial Committee held that an order determining the period within which com-

pensation shall be payable was a decree and an appeal lies therefrom.

[9] In *Khatemannessa Bibi* v. *Upendra Chandra*, A. I. R. (15) 1928 Cal. 804 : (115 I. C. 591) there is a decision of the Calcutta High Court to a similar effect.

[10] In *Adinarayana Chetti* v. *Narasimha Chetti*, 54 Mad. 337 : (A. I. R. (18) 1931 Mad. 471), there was a preliminary decree which embodied a scheme by which trustees were appointed for the management of a temple. In the same decree, there was a direction that either the plaintiffs or defendant 1 should apply for the appointment of a commissioner to go into the accounts as between the defendants and the temple, and that the newly elected trustees were to take possession of the temple and its properties only on payment to defendant 1 of whatever sum that might be found due by the commissioner. In pursuance of the decree, a commissioner was appointed who submitted a report upon which the Subordinate Judge gave decision that the trustees were to execute a decree for the amount found due against defendants 1 and 3 on their paying a sum of Rs. 217-7-0 as court-fee. The learned Judges held that the order of the Subordinate Judge was in substance a "decree" as defined by S. 2, Civil P. C. and therefore appealable.

[11] In *Surajdeo Narayan Singh* v. *Musahrao*, 1 Pat. L. J 359 : (A. I. R. (3) 1916 Pat. 235) the decree under execution was a redemption decree. The judgment was pronounced on 27th July 1909, but the decree was not actually signed until 23rd February 1910 because in the meantime a commissioner had been appointed to ascertain the exact amount due under the decree. The application for execution was filed on 29th January 1913, that is to say, within three years of the date of the signing of the decree but beyond three years from the date of the judgment. It was contended that limitation should run from the date on which the decree was actually signed, but this contention was negatived. The High Court held that the judgment of the District Judge dated 27th July 1909 sets forth the exact method of ascertaining the sum to be paid in redemption, that the calculation of the sum and preparation of decree was a matter purely of office routine, that the date of the decree must be the date of the judgment as provided in the Code of Civil Procedure.

[12] In *Hira Lal* v. *Jamuna Prasad*, 5 Pat. L. J. 490 : (A. I. R. (7) 1920 Pat. 111) the judgment was dated 1st May 1915, but the decree was not signed until 15th May 1915. The application for execution was filed on 13th May 1918. It was held that the application was barred by limitation because the date of the decree was the date of the judgment under O. 20, R. 7, Civil P. C.

[13] In *Bhajan Behary* v. *Girish Chandra*, 19 I. C. 410 : (17 C. W. N. 959) the decree under execution was a decree passed in a suit for accounts. Under that decree the deficit court-fee was required to be paid. The application for execution was filed within three years from the date of payment of the court-fee but beyond three years from the date of the decree. Sir Lawrence-Jenkins C. J. stated :

> "Article 182, Limitation Act by which limitation in this case is governed, provides that the period for the execution of the decree is three years from the date of the decree. The date of the decree is that which is indicated in S. 205, Civil P. C. of 1882 and O. 20, R. 7 of the present Code. It is provided by the rule that the decree shall bear date the day on which the judgment was pronounced."

Accordingly the application was held to be time-barred.

[14] In *Kishori Mohan* v. *Provash Chandra*. 72 I. C. 646 : (A. I. R. (11) 1924 Cal. 351) the decree under execution was a partition decree. It was passed on 25th March 1914, but as the plaintiff delayed in filing the stamp duty the decree was not actually drawn up until 2nd January 1920. The application for execution was filed on 21st July 1920. It was contended on behalf of the decree-holder that as the decree could not be drawn up until the necessary stamp duty was paid, limitation should run from the date of the signing of the decree, but Calcutta High Court held that the date of the decree was 25th March 1914, on which the judgment was pronounced and therefore, limitation should run from that date.

[15] On behalf of the appellant reliance was placed on *Babu Ram* v. *Gopal Sahai*, A. I. R. (25) 1938 ALL. 539 : (I. L. R. (1938) ALL. 848) in which a decree was passed on the condition that necessary court-fee was deposited. The decree-holder deposited the court-fee only after three years of the decree. This was accepted by the Court and then the decree-holder sought to execute the decree. It was objected that the decree was barred but the High Court negatived the argument holding that the decree was incomplete until the payment of the court-fee and until there was a decree capable for execution it could not be said that limitation had begun to run under Art. 182, Limitation Act. But the authority of this case is weak in view of the decisions I have already examined and *Mohammad Sadiq Mian* v. *Mahabir Sao*, 21 Pat. 366 : (A. I. R (29) 1942 Pat. 410), which is the decision of a Bench of this Court. In this case a preliminary decree had been passed and a commissioner had been appointed by the Court to

ascertain mesne profits. The Commissioner submitted his report which was accepted by Court on 6th January 1936, and the Court passed the following order on that date:

> "Let final decree be prepared in terms of the commissioner's report. . . . . . , No decree shall be prepared unless deficit court-fees are paid."

On 10th September 1938, the plaintiff applied for assessment of deficit court-fee and for preparation of the final decree and on 26th October the Court ordered the plaintiff to pay the deficit court-fee. On 3rd December the Court ordered "Deficit court-fee stamp filed. Let final decree be drawn up now." On 30th January 1939, the decree was actually drawn up and on 17th January 1940, an application for execution was filed. Upon these facts Rowland and Chatterji JJ. held that the amount of mesne profits having been finally adjudicated by the Court by its order dated 6th January 1938 the date of final adjudication must be taken to be the date of the final decree and therefore the execution was barred by limitation under Art. 182. The learned Judges added that for the purposes of computing limitation under Art. 182 the date of the judgment should be taken to be the date of the decree as provided by O. 20 R. 7, Civil P. C.

[16] From this review of the authorities it is manifest that in the present case the order of Mr. N. Bagchi dated 8th March 1939 was the final decree since it was the final adjudication between the parties as regards the quantum of mesne profits. In my opinion the learned Subordinate Judge rightly rejected the prayer of the appellant to prepare afresh a final decree on the date he paid the amount of the requisite court-fee.

[17] Upon these grounds I hold that this appeal fails and should be dismissed with costs.

[18] **Narayan J.**—Though according to the Civil Procedure Code of 1908 an application for the ascertainment of mesne profits is no more a proceeding in execution, but a continuation of the suit itself, the second paragraph of S. 11, Court-fees Act is in terms which indicate that the ascertainment of mesne profits has still to be made in execution of the decree. The question of court-fee therefore raises some difficult points when a final decree in respect of mesne profits is passed in accordance with sub-r. (2) of R. 12 of O. 20, Civil P. C. And, in fact, in *Subhaga Singh* v *Shiba Nath Singh*, 1 A. L. J. 350, the view was taken that when no time is fixed by a Court within which additional court-fees have to be paid, the execution of the decree merely remains in abeyance and that when the fees are paid in, execution can be taken out for the mesne profits . Unfortunately, in this case, the Court after making an order on 21st April 1939 that the court-fee of Rs. 292/8 should be paid by the plaintiff forgot completely that court-fee had to be realised from the plaintiff, and the plaintiff himself filed the court-fee stamp in March 1945. The proceeding was never closed by the Court and after 21st April 1939 no time was fixed for the payment of the additional fee required. And in a case like this it has sometimes been held that because of the provision of O. 20, R. 12 (2), Civil P. C., a regular final decree for mesne profits does not come into existence until the court-fee required is paid (See *Collector of Etawah* v. *Brindaban*, A. I. R. (18) 1931 ALL. 588 : (136 I. C. 77). In *Babu Ram* v. *Gopal Sahai*, A. I. R. (25) 1938 ALL. 539 : (I. L. R. (1938) ALL. 848), which my learned brother regards as a weak authority reference was also made to S. 149, Civil P. C. and their Lordships definitely held after considering S. 11, Court-fees Act, that until the court-fee is paid there is no decree capable of execution. I would therefore suggest that S. 11, Court-fees Act, should be so amended that it may be in absolute conformity with the provisions of O. 20, R. 12 (2). For the present, the decision in *Mahomad Sadiqmian* v. *Mahabirsao*, 21 Pat. 366 : (A. I. R. (29) 1942 Pat. 410) is binding on us, and according to this decision limitation would run from the date on which the Court ascertained the mesne profits.

[19] I therefore agree to the order proposed by my learned brothers.

G.M.J. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 527 *[C. N. 139.]*

REUBEN AND JAMUAR JJ.

Babu Rameshwar Prasad Singh and others —Appellants v. *Md. Ayyub—Respondent.*

A. F. O. O. Nos. 8 and 9 of 1950, D/- 23-3-1950, against orders of Sub-J., 2nd Court, Gaya, D/- 11-1-1950.

(a) Civil P. C. (1908), O. 39, R. 1; S. 95—Temporary injunction — Grant of—Issues in suit, if can be considered—Specific Relief Act (1877), S. 53.

Where an application for temporary injunction is made, the Court has to consider, on *prima facie* grounds, the existence of the legal right alleged and the respective strength and weakness of the cases of the parties. The mere fact, therefore, that the points raised are points which will ultimately have to be decided as issues in the suit does not exclude them from the consideration of the Court at the stage of an application for a temporary injunction. [Para 6]

Annotation : ('46-Man) Specific Relief Act, S. 53, N, 2; ('50-Com) Civil P. C., S. 95, N. 5 and O. 39 R. 1, N. 3.

(b) Civil P. C. (1908), O. 1, R. 10 (2)—Validity of Provincial Act challenged — Province if necessary party.

When the Province is impleaded in a suit it comes in as representative of the executive Government. Even if the Provincial Government sponsors the bill which becomes an Act and pilots it through the different stages of legislation, it is the Legislature which is ultimately responsible for the Act and the Province does not become a necessary party to a suit merely because the validity of an Act of the Legislature is challenged in the suit. [Para 7]

Annotation: ('50-Com) Civil P.C., O. 1 R. 10, N. 25.

(c) Civil P. C. (1908), O. 27A — Order, if supersedes S. 80 of Code — Civil P. C. (1908), S. 80 and O. 1, R. 10 (2).

Order 27A is not intended to supersede S. 80. The failure to implead the State in a suit where the State is a necessary party and to give the notice required by that section will not be cured because the Advocate-General gets a notice under O. 27A and can apply to make the State a party. [Para 7]

Annotation : ('50-Com) Civil P. C., S. 80 N. 2, O. 1 R. 10, N. 25, O. 27, General N. 1.

(d) Civil P. C. (1908), S. 80—Public officer stated to be sued in his personal capacity— Suit, if maintainable.

The suits in respect of which protection is given to public officers by S. 80 are suits against them in their personal capacity. Hence, the mere fact that the public officer is stated to be sued in his personal capacity makes no difference to the maintainability of the suit and the Court has to examine the pleadings in the light of the provisions in the Civil Procedure Code to see whether a notice under S. 80 is necessary. [Para 17]

Annotation: ('50-Com.) Civil P. C., S. 80, N. 5.

P. R. Das, Khaleel Ahmad, Baldeo Sahay, K. K. Sinha and Balbhader Prasad Singh— for Appellant.

The Advocate-General, Shyamnandan Prasad Singh, S. K. Mitra, B. B. Saran, S. C. Chakravarti and Bajrang Sahay—for Respondent.

Reuben J.—This judgment will govern M. A. Nos. 8 and 9 of 1950, both directed against orders of the Subordinate Judge, 2nd Court, Gaya, refusing temporary injunctions in two suits pending in his Court. The appeals were heard separately but as they cover the same ground and there was necessarily a considerable amount of overlapping in the arguments it will be convenient to deal with them in one judgment.

[2] In Title Suit No. 1 of 1950 out of which M. A. 8 arises the plaintiffs-appellants are the proprietors of the Sambey Estate in respect of which Estate a notification under S. 3, sub-s. (i), Bihar State Management of Estate and Tenures Act, 1949 was issued by the Governor of Bihar on 24th November 1949 and was published in the Bihar Gazette on 10th December 1949, designating the defendant Mr. Ayyub, Additional Collector, as the Manager under the Act. Under the provisions of this Act, the Estate was due to come under the management of the Provincial Government on the expiry of one month from the publication of the notice, that is to say, on 11th January 1950, and thereupon Mr. Ayyub as Manager would have been entitled to enter into possession of the Estate and to take such other steps towards management and control as are provided for by the said Act. In preparation for this, Mr. Ayyub called upon the employees of the plaintiffs to make over the papers relating to the Sambey Estate and made known on 6th January his intention of entering into possession on the commencement of the management under the Act. In anticipation of this, the plaintiffs on 7th January 1950 filed the suit challenging the State Management Act as *ultra vires* of the Provincial Legislature and asking for a permanent injunction restraining Mr. Ayyub from taking possession. They impleaded as a defendant only Mr. Ayyub. No notice as contemplated by S. 80, Civil P. C. was served by them on Mr. Ayyub; they alleged instead that they were suing him in his private capacity and that, therefore, no notice was necessary. Pending the disposal of the suit, the plaintiffs asked for a temporary injunction to the same effect.

[3] Title suit No. 2 of 1950 giving rise to M. A. 9 relates to the 9 annas Tikari Raj Estate which is the leasehold of the plaintiff-appellant. The notification under S. 3, sub-s. (1), State Management Act relating to this Estate is dated 24th November 1949 and was published in the Bihar Gazette on 14th December 1949. The present suit, filed on 7th January 1950, seeks on the same ground as the other suit to restrain Mr. Ayyub, who is designated Manager in the notification, from taking possession of the Estate. The plaint mentions as the cause of action the fact that Mr. Ayyub is "threating to take actual possession." It describes Mr. Ayyub as "Additional Collector, Gaya," but says nothing about the service of notice under S. 80, Civil P. C. A temporary injunction to the same effect was asked for during the pendency of the suit.

[4] The Subordinate Judge held that the suits raise a substantial point of law as to the validity of the State Management Act and that the balance of convenience is on the side of the plaintiffs, but refused a temporary injunction on the ground *firstly*, that the Province of Bihar is a necessary party and has not been impleaded and *secondly*, that the suits are defective by reason of the absence of notice under S. 80, Civil P. C. According to him the Province of Bihar is a necessary party because it is "responsible" for the Act and because a determination as to whether or not the Act is *ultra vires* "affects" the province. As regards the other ground he is of the opinion that Mr. Ayyub is a public officer and was purporting to act in his official capacity within the meaning of S. 80, Civil P. C.

[5] It is contended before me

(1) that the Provincial Government is not a necessary party; at best it is a proper party, and its absence will not defeat the suits; that if it considers itself a necessary party, O. 27A, Civil P. C.

provides the means by which it can intervene;

(2) that notice under S. 80 was not necessary because

(a) Mr. Ayyub was not a public officer,

(b) Even if he was, he did not purport to act in his official capacity as such, and

(c) The acts of Mr. Ayyub in respect of which these suits have been brought are apprehended or further acts, and S. 80 has no application to future acts, and

(3) that the questions as to whether the Province of Bihar is a necessary party and whether notice under S. 80 should have been given are issues in the suit, and the test at this stage is whether the plaintiffs have a fair case to raise. The test to be applied by the Court in considering whether an interlocutory injunction should be granted has been recently enunciated by a Division Bench of this Court in *Brajendra* v. *Kashibai*, 24 Pat. 656 at pp. 659 and 660: (A.I.R. (33) 1946 Pat. 177) :

> "I entirely agree that the learned Subordinate Judge is wrong in holding that in order to make out a *prima facie* case necessary for granting an interlocutory injunction the plaintiff should establish his title. But it is enough for the plaintiff for granting an interlocutory injunction if he can show that he has a fair question to raise as to the existence of the right which he alleged and can satisfy the Court that the property in dispute should be preserved in its present actual condition until such question can be disposed of. In interfering by an interlocutory injunction the Court, in general, does not profess to anticipate the determination of the right but merely gives it, if, in its opinion, there is a substantial question to be tried, and if, till the question is ripe for trial a case has been made out for the preservation of the property in the meantime in *status quo*. He is not required to make out a clear legal title but has to satisfy the Court that he has a fair question to raise as to the existence of legal right, and that there are substantial grounds for doubting the existence of the alleged legal right the exercise of which he seeks to prevent. It is no less important to observe that the Court must also, before disturbing any man's legal right, stripping him off any of the rights with which law has clothed him, be satisfied that the probability is in favour of his case ultimately failing in the final issue of the suit. It has to be, at the same time, borne in mind that a mere existence of a doubt as to the plaintiff's right to the property does not itself constitute a sufficient ground for refusing an injunction though it is always a circumstance which calls for the attention of the Court."

[6] It is clear from this that the Court has to consider, on *prima facie* grounds, of course the existence of the legal right alleged and the respective strength and weakness of the cases of the parties. The mere fact, therefore, that the points which will ultimately have to be decided as issues in the suit does not exclude them from the consideration of the Court at the stage of an application for a temporary injunction. This disposes of the third contention.

[7] The learned Subordinate Judge has not made by any attempt to define what he means by his statement that the Province is 'responsible' for the Act in question. When the Province is impleaded in a suit it comes in as representative of the executive Government. It is rightly urged on behalf of the appellants that, even if the Provincial Government sponsored the bill which became the Act and piloted it through the different stages of Legislation, it is the Legislature which is ultimately responsible for the Act in its present form, and the Province does not become a necessary party to a suit merely because the validity of an Act of the Legislature is challenged in the suit. It is hardly necessary to cite authority for this proposition, and I need only mention *United Provinces* v. *Mt. Atiqa Begum*, 1940 F. C. R. 110 : (A. I. R. (28) 1941 F. C. 16), as a result of which O. 27A was inserted in the Code of Civil Procedure providing machinery by which the State may intervene in any suit in which a substantial question of Constitutional Law is involved. Had the mere challenge to the validity of a statute been sufficient to make Government a necessary party, a provision of this kind would have been unnecessary. We must guard ourselves, however, from misunderstanding the effect of this provision. It is not intended to supersede S 80, Civil P. C. The failure to implead the State in a suit where the State is a necessary party and to give the notice required by that section will not be cured because the Advocate-General gets a notice under O. 27A and can apply to make the State a party.

[8] The learned Subordinate Judge is equally vague as to how the interest of the Province is 'affected,' but the learned Advocate-General has given a definition. According to him an 'interest' of the Government is created when a statute confers powers or imposes obligations over the Government, and the Government is a necessary party to a suit affecting that 'interest.' This contention is not quite in accord with *United Provinces* v. *Mt. Atiqa Begum*, 1940 F. C. R. 110 : (A. I. R. (28) 1941 F. C. 16), which case as pointed out by Gwyer C. J. at pp. 127 and 128 of the report concerned an Act purporting to confer certain powers on the Government, so that a decision that the statute was *ultra vires* would put a restriction on that power and to that extent rights of the Crown would cease to exist. The test which their Lordships of the Federal Court seem to have had in their minds was the existence of pecuniary or proprietary rights or interest (*vide* pp. 123, 124 and 125). But there are cases which seem to support the proposition that the existence of such an interest is not essential (*vide Bhagchand Dagadusa* v.

Secy. of State, 54 I. A. 338 : (A. I. R. (14) 1927 P. C. 176) and *Singara Singh* v. *C. H. D. O. Callaghan*, I. L. R. (1947) 28 Lah. 22 : (A. I. R. (33) 1946 Lah. 247 (S. B.)). The learned Advocate-General has also referred to *Sital Prasad* v. *Asho Singh*, 2 Pat. 175 : (A. I. R. (9) 1922 Pat. 651) and *Jogendra Nath* v. *Secy. of State*, 16 C. L. J. 385 : (17 I. C. 921), in which the test applied was whether the interest of the persons in question will necessarily be affected by the decree asked for. These two cases do not help here because they relate to interest of the nature of a pecuniary or proprietary interest.

[9] Accepting, for the sake of argument, this as the correct test, the learned Advocate-General has argued that on the pleadings in the plaints it is not open to the plaintiffs to say that the Province has no interest of this kind. His reasoning is that such an interest follows from the ground on which the plaintiffs rely as making the State Management Act *ultra vires*, namely, that the provisions in it amount to acquisition within the meaning of S. 299, Government of India Act, 1935, and Art. 31 (2) read with Art. 13 (1) of the Constitution of India. The simple answer is that the case of the plaintiffs is not that the legislation in question is effective of such an acquisition, but that the legislation is void because if valid it would have that effect. Besides, from a perusal of the State Management Act it is obvious that the State cannot and is not intended to claim any interest of a pecuniary or proprietary nature under it; its interest is that of a Sovereign responsible for the proper government of the State, to see that the law is justly administered and that the proprietary interest of the estate owners is duly preserved.

[10] Another test suggested by the two decisions last cited is the identity of the person against whom the plaintiffs are really seeking relief. On behalf of the plaintiffs it is urged that they will be content with the relief asked for against Mr. Ayyub; that, under the provisions of S. 52, Specific Relief Act, they are entitled to sue for an injunction against Mr. Ayyub as a substantive relief; that he alone is threatening to invade their rights and purports to act under powers, which, it is true, he derives by virtue of the Government notification, but which come directly from the provisions in the statute. Unlike *Bhagchand Dagadusa* v. *Secy. of State*, 54 I. A. 338: (A. I. R. (14) 1927 P. C. 176), it is not necessary for them, they say, to impugn the Government notification which is the only act of the Government with which they are concerned; if the Court in dealing with the prayer for injunction hold the statute to be unconstitutional, the notification automatically goes (Cooley's Constitutional Limitations, 1927, Vol. I, p. 382; *Norton* v. *Shelby County*, 118 U. S. 425: 30 Law Ed. 178.

[11] This argument raises several considerations. First of all, how far will Government be bound by a decision, in a suit to which only Mr. Ayyub is a party, that the statute is unconstitutional. In this connection, the learned Advocate-General has urged on the other side that the temporary injunction must necessarily be refused, because the Government not being a party to the suit can always defeat it by exercising its power under S. 34, State Management Act and appointing a new Manager. This argument seems to have impressed the Full Bench in *Singhara Singh* v. *O'Callaghan*, I. L. R. (1947) 28 Lah. 22 at pp. 43-44: (A. I. R. (33) 1946 Lah. 247 S. B.), but an answer in terse language has been suggested by Greaves J. in *Manik Chand* v. *Corporation of Calcutta*, 48 Cal. 916 at p. 925: (A. I. R. (8) 1921 Cal. 159).

> "Am I to assume that the Local Government and the Land Acquisition authorities will ignore any injunction which I may grant and continue the acquisition proceedings ? It will be sufficient I think in this connection to assume that they will stay their hands in view of my decision and not be parties to what I hold to be illegal and *ultra vires* action on the part of the Calcutta Corporation and the Improvement Trust. As to this see generally *Rex* v. *Spyer*, 1916-1 K. B. 595 : (85 L. J. K. B. 630) and the statement by Lord Reading C. J. on p. 610: 'This is the King's Court: we sit here to administer justice and to interpret the law of the realm in the King's name. It is respectful and proper to assume that once the law is declared by a competent judicial authority it will be followed by the Crown.'
>
> A statement which I venture to think is as apposite here in India as in the United Kingdom."

Vide also *Fischer* v. *Secy. of State*, 26 I. A. 16 at pp. 27-29 : (22 Mad. 270 P. C.) and the *United Provinces* v. *The Governor General-in-Council*, 1939 F. C. R. 124 at pp. 136-137 (A. I. R. (26) 1939 F. C. 58: 40 Cr. L. J. 403). This, of course, assumes that the suit is properly constituted. Government cannot be put in a disadvantageous position merely because it can be trusted to respect the lawful decisions of a Court of Law, and different considerations will arise if Government is a necessary party and has not been impleaded.

[12] Next, it has been argued by the learned Advocate-General that the suits are not maintainable because no declaration has been asked for and an injunction cannot be granted without a declaration that the State Management Act is unconstitutional. This proposition is of doubtful validity (vide *Ramkhelawan Sahu* v. *Bir Surendra Sahi*, 16 Pat. 766 at p. 783: (A. I. R. (25) 1938 Pat. 22 F. B.) and also *Ramautar Sao* v. *Ram Gobind Sao*, 20 Pat. 780 : (A. I. R. (29) 1942 Pat. 60)).

[13] The correctness of *Norton* v. *Shelby County*, 118 U. S. 425: 30 Law. Ed. 178 has also been challenged and our attention has been drawn to the foot-notes at p. 383 of Cooley's Constitutional Limitations, 1927, Vol. I and at p. 1355 of Cooley's Constitutional Limitations, 1927, Vol. II and to the observations at pp. 35-36 of Rottschaefer, Handbook of Constitutional Law, 1939. The decision in *Norton* v. *Shelby County*, (118 U. S. 425 : 30 Law Ed. 178) represents the view of the Supreme Court of the United States and the foot-notes at p. 383 of Cooley contain the view of some of the State Courts which have taken a different view. The passage in Rottschaefer referred to contains an apt commentary on the differing views. It is only as regards *de facto* officers that according to the learned author the weight of authority is contrary to *Norton* v. *Shelby* (118 U. S. 425: 30 Law Ed. 178). This subject is dealt with in the foot-notes referred to in Vol. II of Cooley. They are more pertinent to the question whether Mr. Ayyub in this case was purporting to act in an official capacity. Speaking in general terms whether a person performing under an invalid statute the duties of an office is an officer *de facto* depends on whether there can be said to be an office of which the duties are to be performed. The test is different under the definition of public officer contained in Cl. (17) of S. 2, Civil P. C.

[14] There is perhaps more weight in the contention of the learned Advocate-General that the relief sought in these suits is really a relief against the Provincial Government. It is pointed out that on expiry of the notice under S. 3 (1), State Management Act, the estate comes "under the management of the Provincial Government." The Manager, it is said, is merely the instrument through which the Provincial Government operates; the control and responsibility is that of the Provincial Government (vide Ss. 9 (2), 11, 18 (1), 19, 23 (b) and (c), 25 (1), 25 (2) first proviso, 26, 28, 29, 33 especially 37). As against this we have been referred to *Hukum Chand* v. *Ran Bahadur Singh*, 51 I. A. 208: (A. I. R. (11) 1924 P. C. 156) as an authority that the Manager is not merely an agent of the Government, but is himself the principal under the Act and capable of being sued independently of the Government. It is pointed out that, as is the case under the Chota Nagpur Encumbered Estates Act, the management *vests* in the Manager under S. 3 (2) (c) of the impugned Act. Reference is also made to *A. M. Ross* v. *Secy. of State*, 39 Mad. 781 at p. 785: (A. I. R. (3) 1916 Mad. 1157) which decided that a Government officer exercising statutory power does not act as the agent of Government and to *Kailash Mal* v. *Dwarika Nath*, 35 I. C. 788: (A. I. R. (3) 1916 Cal. 825) that the fact that an official is appointed by Government does not make Government necessary party to a suit relating to land appertaining to the office.

[15] In this connection the learned Advocate-General cited *Mine Safety Appliances Co.* v. *James V. Forrestal*, 326 U. S. Supreme Court Rep. 371: 90 Law. Ed. 140. The suit in that case was directed to prevent an Under-Secretary of the United States Navy from taking action to prevent payment by the Government of money lawfully in the United States Treasury to satisfy the Government's, not the Under Secretary's debt. It related to a contractual liability of the Government, a liability in respect of which a Government servant is not ordinarily bound in his personal capacity. The distinction between that case and the one before us is drawn by Black J. who in the course of his judgment pointed out that the case would have been different if it had related to a trespass on property by a public servant in reliance on an unconstitutional statute.

[16] On the other side, much weight has been attached to the observations of Gwyer, C. J. at p. 136 of the *United Provinces* v. *Governor-General in Council*, 1939 F. C. R. 124: (A. I. R. (26) 1939 F. C. 58 : 40 Cr. L. J. 403) to the effect that a suit for crediting the fines in question to the Provincial Fund could have been brought against a named Cantonment Board. It was not necessary for his Lordship to consider whether the Central Government would have been a necessary party to such a suit and he did not express an opinion on the point.

[17] Before dealing with the second contention on behalf of the appellants, it is necessary to consider a point raised by the learned Advocate-General, that a suit brought against Mr. Ayyub in his personal capacity will not lie, because neither the action so far taken by him nor the future action sought to be restrained is action taken by him in his private capacity. In reply, I would suggest that the suits in respect of which protection is given to public officers by S. 80, Civil P. C. are suits against them in their personal capacity (vide *Bhagchand Dagadusa* v. *Secy. of State*, 54 I. A. 338 at p. 353: (A. I. R. (14) 1927 P. C. 176); *Revati Mohan* v. *Jatindra Mohan*, 61 I. A. 171 at p. 176: (A. I. R. (21) 1934 P. C. 96); also Halsbury's Laws of England, Edn. 2 (Hailsham) Vol. VI, Arts. 537 and 602, and Vol. XXVI Art. 579). Hence, the mere fact that Mr. Ayyub is stated to be sued in his personal capacity makes no difference to the maintainability of the suit and we have to examine the pleadings in the light of the provisions in the Civil P. C. to see whether a notice under

S. 80 is necessary: *Shingara Singh* v. *O'Callaghan*, I. L. R. (1947) 28 Lah. 22 at p. 41 : (A. I. R. (33) 1946 Lah. 247 S. B.).

[18] Section 80 protects a public officer in respect of "any act purporting to be done by such public officer in his official capacity". Two conditions are clearly necessary, *firstly* he must be a public officer; *secondly* he must purport to act in his official capacity. The appellants would add a third requisite, namely, that the act in question is not a future act.

[19] The Code defines a public officer by enumerating a number of categories (S. 2, cl. (17)). The relevant category here is,

> "(h) every officer in the service or pay of (the Crown), or remunerated by fees or commission for the performance of any public duty",

the meaning of which is explained in *Bansi Lal* v. *Mohamad Hafiz*, 17 Pat. 706 at p. 710: (A. I. R. (26) 1939 Pat. 77).

[20] Much stress has been laid by the learned advocate on the fact that Mr. Ayyub is an Additional Collector. He urges that the appointment of Mr. Ayyub as a Manager under the impugned Act would not make him cease to be Additional Collector. On the other side *Muhammad Ekram Khan* v. *Mirza Muhammad*, A. I. R. (22) 1935 ALL. 106: (152 I. C. 817) is cited as authority to the contrary, but its correctness has been doubted in *Shinghara Singh* v. *O'Callaghan*, I. L R. (1947) 28 Lah. 22: (A. I. R. (33) 1946 Lah. 247 S. B.). Perhaps the correct approach is not by an insistence on the name of the permanent post which the officer in question holds under the Government. The act must purport to be done in his official capacity; can it be said here that he did or proposes to do the acts complained of in his capacity as Additional Collector.

[21] *Cecil Gray* v. *Cantonment Committee of Poona*, 34 Bom. 583: (7 I. C. 679) cited by the learned Advocate-General deals with category of 'public officers' coming under sub-cl. (g) of S. 2, cl. (17), Civil P. C. This clause *prima facie* appears to relate to pecuniary or proprietary interests of the State, though I am not prepared to express an opinion without a more detailed consideration of the question than we gave it in the course of the hearing.

[22] On the other side it is contended that Mr. Ayyub's actions, completed or intended, are in purported exercise of powers under the impugned Act and, if that Act is *ultra vires*, Mr. Ayyub is merely a trespasser and not a public officer, *Ganoda Sundary* v. *Nalini Ranjan*, 36 Cal. 28 : (1 I. C. 514) and *Frewin* v. *Lewis*, (1938) R. R. 88 cited at p. 85 of *Administrator, City of Lahore* v. *Abdul Majid*, A I. R. (32) 1945 Lah. 81: (I. L. R. (1945) Lah. 382 F. B.); vide also *Norton* v. *Shelby*, 118 U. S. 425 and the connected reference mentioned at pp. 7-8 (*supra*). The answer suggested by the learned Advocate-General is that S. 80 must be considered on its own terms. The use of the word "purporting" makes the section very wide in its application and it will protect even corrupt, malicious and illegal acts of a public officer (*Nand Kumar* v. *Pashupati Ghosh*, 20 Pat. 417 : (A. I. R. (28) 1941 Pat. 385 : 42 Cr. L. J. 375); *Jageshwar Thakur* v. *Mahabharath Thakur*, A. I. R. (37) 1950 Pat. 32; *Hori Ram Singh* v. *The Crown*, 1939 F. C. R. 159: (A .I. R. (26) 1939 F. C. 43: 40 Cr. L. J. 468); *Gurucharan Kaur* v. *Province of Madras*, 1944-6 F. C. R. 195 : (A.I.R. (31) 1944 F. C. 41) and *Gill* v. *The King*, 75 I. A. 41: (A. I. R. (35) 1948 P. C. 128: 49 Cr. L. J. 503). The Court should consider the nature of the act complained of and the attendant circumstances: *Gurucharan Kaur of Nabha* v. *Province of Madras*, 1944-6 F. C. R. 195 at p. 210 : (A. I. R. (31) 1944 F. C. 41), the test being: "Does the act lie within the scope of his official duty ? Can he reasonably claim that he did this by virtue of his office ?" *Gill* v. *The King*, 75 I. A. 41 : (A. I. R. (35) 1948 P.C. 128 : 49 Cr. L. J. 503). If the contention of the learned Advocate-General is correct the question remains: "Was Mr. Ayyub a public officer ? Did he purport to act as such ?

[23] The learned Advocate-General contends that, apart from his being an Additional Collector, Mr. Ayyub was a public officer because even after his appointment as Manager under the Act he remained in the service and in the pay of Government, in other words that there was a post of public officer which existed and which he occupied, independently of whether the Act is unconstitutional or not. In this connection he points out that under the impugned Act the management of the estate is the management of the Government and the Manager is merely the executive through which the Government acts—a contention in support of which he points out that S. 3 (1) (c) provides that the Manager shall be "an *officer* not below the rank of a Deputy Collector". This argument is not the same as saying that the Manager is the agent of the Government, it is prepared to concede that he is the principal and can be sued without separately impleading the Government, but asserts that the authority he exercises is the authority of Government. I have indicated at page 10 *supra* the sections of the impugned Act on which this argument depends. In reply our attention is drawn to cl. (c) of S. 25 (1) of the impugned Act and it is urged that this provides for the Manager to be paid out of the funds of the estate, and, therefore, the Manager cannot be regarded as in the service or the pay of

Government. But is that the effect of this section ? Or does it merely contemplate that Government will continue to pay the officer but will reimburse itself by means of a levy under this provision ? In this connection it may be useful to refer to a similar provision contained in S. 4, Government Management of Private Estates Act, 1892, printed at p. 405 of the Bihar Wards Manual, 1941. These are points which call for serious consideration.

[24] If Mr. Ayyub can be regarded as being a public officer at the relevant time the acts complained of would *prima facie* be acts purporting to be done in his official capacity, for it is obvious that he intended to act in his official capacity. It is urged, however, that, if the Act is *ultra vires*, the office of Manager never came into being and so he cannot purport or have purported to act in an official capacity: (*Norton* v. *Shelby*, 118 U. S. 425 : 30 Law. Ed. 178). The answer suggested to this argument has been set out by me at page 14 *supra*.

[25] It remains to consider the contention that these suits are in respect of threatened acts of Mr. Ayyub and that they are in consequence outside the scope of S. 80. The correctness of both these propositions is contested.

[26] As regards the first it is pointed out that there are certain acts of Mr. Ayyub which are not merely threatened acts, viz., the acts which are stated to have given rise to the cause of action in the respective suits. Some support for this contention is to be found in *Bhagchand Dagadusa* v. *Secy. of State*, 54 I. A. 338 at pp. 353 and 357 : (A. I. R. (14) 1927 P. C. 176) and *Shingara Singh* v. *O'Callaghan*, I. L. R. (1947) 28 Lah. 22 at p. 40 : (A. I. R. (33) 1946 Lah. 247 S.B.). On the other hand, it is said in *Arunachelam Chetty* v. *J. A. David*, 50 Mad. 239 at p. 243 : (A. I. R. (14) 1927 Mad. 166), that the cause of action may be a past act but it does not necessarily follow that the suit is in respect of a past act. Here it is argued, however, that the functions of the Manager as such were not to begin till after the institution of the suits—an argument which is subject to the considerations mentioned at p. 14 above. So, it is necessary to set out the arguments as to the proposition that future acts are outside the scope of S. 80.

[27] Stress is laid on *Ganoda Sundary* v. *Nalini Ranjan*, 36 Cal. 28 at p. 39 : (1 I.C. 514), and *Trustees for the Improvement of Calcutta* v. *Chandra Kanta*, 44 Cal. 219 at p. 253 : (A.I.R. (4) 1917 Cal. 445), as authorities of the Calcutta High Court, which should be followed by this Court. The former is an *obiter dictum* of Woodroffe J., sitting singly on the original side. It was followed without any discussion in the latter case, though the point was not raised as argued before their Lordships. As notice under S. 80 can be waived (*Vellayan Chettiar* v. *Government of the Province of Madras*, A. I. R. (34) 1947 P.C. 197 : (I.L.R. (1948) Mad. 214), this is also an *obiter dictum*.

[28] The point was expressly decided in *Arunachelam Chetty* v. *J. A. David*, 50 Mad. 239 : (A. I. R. (14) 1927 Mad. 166), in which case Ramesam and Reilly JJ., proceeding on a strict interpretation of the language of S. 80 held that the section does not extend to future acts. There was another line of reasoning by which this result was arrived at by the Bombay High Court based on the purpose of the section (vide *Naginlal* v. *Official Assignee, Bombay*, 37 Bom. 243 : (17 I. C. 876)). Their Lordships of the Madras High Court expressly dissociated themselves from this line of reasoning and distinguished *Superintending Engineer, Bezwada* v. *Ramakrishnayya*, 58 I. C. 885 : (A. I. R. (7) 1920 Mad. 723), a case relied on for the contrary proposition by the learned Advocate-General.

[29] *Secretary of State* v. *Gajanan Krishna Rao*, 35 Bom. 362 : (10 I. C. 639) and *Secy. of State* v. *Gulam Rasul*, 40 Bom. 392 : (A. I. R. (3) 1916 Bom. 296), arising out of suits against the Secretary of State in Council, are on a line with *Naginlal Chunilal* v. *Official Assignee, Bombay*, 37 Bom. 243 : (17 I. C. 876). These three Bombay cases were overruled by the Privy Council in *Bhagchand Dagadusa* v. *Secy. of State*, 54 I. A. 338 : (A. I. R. (14) 1927 P.C. 176), which has been very strongly relied on by the learned Advocate-General as disposing finally of the argument of the appellant that S. 80 does not cover future acts. This is not correct. The proposition refuted by their Lordships was stated by them at p. 354 of the report:

> "If the immediate result of the Act would be to inflict irremediable harm, S. 80 does not compel the plaintiff to wait two months before bringing his suit, though if nothing is to be apprehended beyond what payment of damages would compensate, the rule is otherwise and the section applies."

And in the pages which follows their Lordships state and reject the grounds on which this proposition was based : (1) the assumed practical objects with which S. 80 was framed, (2) the desire to protect the plaintiff from exposure to the risk of the execution of an invalid order without practical redress and (3) the application of certain English decisions. The argument about future acts seems to have been raised before their Lordships but they refrained from deciding it, pointing out that there was a completed act, "the order for recovery of tax". (vide p. 357) by which their Lordships meant the order issued by the Collector in pursuance of the Government notification (vide p. 353).

[30] In support of his view of the effect of *Bhagchand Dagadusa* v. *Secy. of State*, 54 I.A. 338 : (A. I. R. (14) 1927 P. C. 176), the learned Advocate-General has referred to *Mariyam Hakim* v. *Secy. of State*, A.I.R. (14) 1927 Bom. 649 : (105 I. C. 756) but that contains nothing inconsistent with what I have said above.

[31] In addition to the cases mentioned above the appellants rely on *P. Krishnaswami* v. *Syed Ahmed*, 136 I.C. 777 : (34 M. L. W. 993) in which Curgenven J. expressed the view that *Arunachelam Chetty* v. *J. A. David*, 50 Mad. 239 : (A. I. R. (14) 1927 Mad. 166) is not overruled by *Bhagchand Dagadusa* v. *Secy. of State*, 51 I.A. 338 : (A. I. R. (14) 1927 P. C. 176). It is not quite clear how the point arose in that case, for his Lordship held on the authority of *Kashi Bai* v. *Chunilal*, A.I.R. (17) 1930 Bom. 11 : (122 I. C. 857) that S. 80 had no application to the suit at all. Reference has been made also to *Muradally Shamji* v. *B. N. Lang*, 44 Bom. 555 : (A. I. R. (7) 1920 Bom. 419) in which Pratt J. followed *Naginlal Chunilal* v. *Official Assignee, Bombay*, 37 Bom. 243 : (17 I.C. 876). But he did so because he felt himself bound by the previous decision of a larger Bench, at the same time recording his dissent as follows :

> "It is said that the words 'act purporting to be done by such public officer in his official capacity' refer to past and not to future acts. If the matter were *res integra* I should have found no difficulty in deciding that they do refer to future acts. If the words were limited to past acts it would have been easy to express that limitation by such words as 'purporting to have been done' as for instance in S. 167, Bombay District Municipalities Act, 1901. I think it quite clear that the clause 'purporting to be done by such public officer in his official capacity' is merely an adjectival clause qualifying the substantive word 'act'. The section refers to official acts without any reference to the time when the act was or is or is expected to be performed. The act may be past, present or future; but the only qualification imposed by the section is that it is one committed or likely to be committed in the execution or intended execution of some public duty."

It is also urged that their Lordships of the Privy Council have themselves paraphrased S. 80 as if it read "purporting to have been done" (vide *Bhagchand Dagadusa* v. *Secy. of State*, 51 I. A. 338 at p. 353 : (A.I.R. (14) 1927 P.C. 176) and *Revati Mohan* v. *Jatindra Mohan*, 61 I. A. 171 at p. 175 : (A. I. R. (21) 1934 P. C. 96)), but this has very little weight since the paraphrase related to the facts of the particular case and their Lordships had not in their mind the question which is now in issue.

[32] On the other side the learned Advocate-General relies on *Superintending Engineer, Bezwada* v. *C. Ramkrishnayya*, 58 I. C. 885 : (A.I.R. (7) 1920 Mad. 723). I have noted above that this case was distinguished in *Arunachelam Chetty* v. *J. A. David*, 50 Mad. 239 : (A. I. R. (14) 1927 Mad. 166). It is not necessary to examine here whether the distinction was correctly made, as the whole question was examined at great length and answered against the restricted interpretation of S. 80 by a Full Bench of the Lahore High Court in *Singhara Singh* v. *O'Callaghan*, I.L.R. (1947) 28 Lah. 22 : (A. I. R. (33) 1946 Lab. 247 S. B.). We have thus a direct conflict between *Arunachelam Chetty* v. *J. A. David*, 50 Mad. 239 : (A. I. R. (14) 1927 Mad. 166) and *Singhara Singh* v. *O'Callaghan*, I. L. R. (1947) 28 Lah. 22 : (A.I.R. (33) 1946 Lah. 247 S. B.). It will be necessary in the suit on a consideration of the terms of S. 80 to decide which view is correct. In the present proceeding it will suffice to say that on *prima facie* grounds I am not so satisfied with the correctness of the view urged on behalf of the appellants that I feel justified in interfering with the decision of the learned Subordinate Judge, and in issuing interlocutory injunctions preventing the proposed action of Mr. Ayyub.

[33] On behalf of the appellants in M. A. 8 it has been urged that the refusal of an interlocutory injunction will make the suit infructuous. This is taking rather an extreme view. The suit can no longer proceed as a suit for an injunction, of course, but there is nothing to prevent the plaintiffs from amending the plaint and asking for recovery of direct possession.

[34] In the view I have taken on the points discussed above, it is not necessary to deal at length with another ground urged by the learned Advocate-General for the refusal of a temporary injunction, namely that the plaintiffs are not entitled to ask for a temporary injunction unless there are good *prima facie* grounds for thinking that the State Management Act is unconstitutional. The Court, he urges, must start with the presumption that the impugned statute is *intra vires* of the Legislature. (Rottschaefer, at p. 16). He has taken us through the provisions of the Act. According to him the Act is within the scope of Item 21, Provincial Legislative List in Sch. VII, Government of India Act, 1935, and involves adjustments of property rights which are as much within the powers of the legislature as was held to be the case in *Megh Raj* v. *Allah Rakhia*, A.I.R. (34) 1947 P.C. 72 : (74 I.A. 12), *Jagannath Baksh Singh* v. *United Provinces*, A.I.R. (33) 1946 P. C. 127 : (I.L.R. (1946) Kar. P. C. 139), *United Provinces* v. *Mt. Atiqa Begum*, 1940 F. C. R. 110 : (A. I. R. (28) 1941 F. C. 16) and *Hulas Narain Singh* v *Deen Mohammad*, 1943 F.C.R. 33 : (A I.R. (30) 1943 F. C. 9). On the other side it is pointed out that the Act involves very far-reaching interference with all the proprietors' rights to property, including particularly the right of possession, of which Rich J. of the High

Court of Australia in the *Minister of State for the Army* v. *Dalziel*, (1943-44) 68 C. L. R. 261 said :

> "*Possession vaut titre* in more senses than one. Not only is a right to possession a right of property, but where the object of proprietary rights is a tangible thing it is the most characteristic and essential of those rights. 'So feeble and precarious was property without possession, or rather without possessory remedies, in the eyes of medieval lawyers, that possession largely usurped not only the substance but the name of property; and when distinction became necessary in modern times, the clumsy term 'special property' was employed to denote the rights of a possessor not being owner' (Pollock & Wright, Possession in the Common Law, (1888), p. 5). 'Possession confers more than a personal right to be protected against wrongdoers : it confers a qualified right to possess, a right in the nature of property which is valid against everyone who cannot show a prior and better right.' 'Possession is a root of title' (*ibid*, p. 22). 'The rule that possession is a root of title is not only an actual but a necessary part of our system' (*ibid*, p. 93). 'The standing proof that English law regards, and has always regarded, possession as a substantive root of title, is the standing usage of English lawyers and landowners' (*ibid*, p. 94). A vendor of land cannot require a purchaser to accept his title unless he can give vacant possession at the time for completion (*Cook* v. *Taylor*, (1942) Ch. 349 : (111 L. J. Ch. 214)); and a lessee incurs no liability under his covenant to pay rent if the lessor cannot give him vacant possession: *Neale* v. *Mackenzie*. (1836) 1 M. & W. 747 : 150 E. R. 635 ; *Hughes* v. *Mockbell*, (1909) 9 S. R. (N.S.W.) 343; *see* also, as to the interest and title of a person in possession of land, *Perry* v. *Clissold*, (1907) A. C. 73 at p. 79 : (95 L. T. 890).

When citing this decision learned counsel very properly drew our attention to *Tan Bug Taim* v. *Collector of Bombay*, A. I. R. (33) 1946 Bom. 216 at pp. 236-239 : (I. L. R. (1946) Bom. 517), where Bhagwati J., took a different view. Our attention was also drawn to *Ex parte Edward T. Young*, 209 U. S. 123 : 52 Law. Ed. 714 as authority that an *ad interim* injunction may be given pending an investigation into the constitutionality of the impugned statute.

[35] To sum up, for the reasons indicated above I am not satisfied that a case has been made out for interfering with the orders passed by the learned Subordinate Judge. As the points discussed will form issues in the trial of the suits I have avoided, as far as possible, expressing an opinion as to the final answer to be given. Such opinions as I may have expressed are based on *prima facie* considerations.

[36] In the result, I would dismiss the appeals with costs.

[37] Since this judgment was dictated the State Management Act has been certified under cl. (6) of Art. 31, Constitution of India. In view of the order proposed by me it is not necessary to consider what effect the certification will have upon pending litigation relating to the Act.

[38] **Jamuar J.**—The grant of an injunction is in the discretion of the Court. But the discretion is not to be exercised arbitrarily; it must be sound and reasonable, guided by judicial principles.

[39] The important points raised in these appeals are, amongst others, whether the State of Bihar is a necessary party to the suits — it has not been made a party on the ground that it is not a necessary party—for, if it be so, the suits are not maintainable and whether Mr. Ayyub, the sole defendant, can be sued in his personal and individual capacity making the service of notice under S. 80, Civil P. C., on him unnecessary, for admittedly no such notice has been served upon him at all.

[40] Although the points raised are serious and will have to be finally determined at the proper time, the appellants have not succeeded in showing for the purposes of these appeals that the Court below could not have reasonably taken the view which it has taken in refusing to grant the injunction. In this view of the position, I do not think that at this stage of the suits, it would be right to decide these points which will form issues in the suits.

[41] I agree in the circumstances that the appeals should be dismissed.

V.R.B. *Appeals dismissed.*

A. I. R. (37) 1950 Patna 535 *[C. N. 140.]*

JHA C. J. AND REUBEN J.

Jatadhari Prasad and others—Appellants v. *Kishun Lal Daruka and others—Respondents.*

A. F. O. D. No. 399 of 1946, D/-27th July 1950, from decision of Sub-J., Darbhanga, D/-24th May 1946.

(a) Contract Act (1872), S. 11 — Specific performance of contract.

In a suit by a promisee for enforcement of specific performance of a contract it is necessary that the parties should have the capacity to contract. [Para 13]

Annotation : ('46-Man.) Contract Act, S. 11, N. 1.

(b) Hindu law—Manager — Suit for specific performance — Specific Relief Act (1877), S. 27— Civil P. C. (1908), O. 22, R. 4.

In a suit instituted against the karta of a joint family for specific performance of an agreement entered into by him, a decree for specific performance can be passed and it would be binding on all the other members of the joint family, including a minor co-parcener, if the transaction is found to be warranted by legal necessity or benefit of the estate. The position would not be different if the minor co-parcener was substituted for the karta on his death during the pendency of the suit. [Paras 18, 19]

Annotation : ('46-Man.) Specific Relief Act, S. 27, N. 3; ('44-Com.) C. P. C., O. 22, R. 4, N. 15.

(c) Specific Relief Act (1877), S. 21 — Mutuality.

A contract to be specifically enforced by the Court must, as a general rule, be mutual, i. e., it must be such that it might, at the time it was entered into, have been enforced by either of the parties against the other. The Specific Relief Act does not anywhere expressly repudiate the doctrine of mutuality. [Para 15]

Annotation: ('46-Man.) Specific Relief Act, S.21, N. 3.

(d) Hindu law—Manager—Alienation.

An alienation by a karta, even if not warranted by the necessities of the family, is not void *ab initio*. [Para 14]

(e) Civil P. C. (1908), O. 8, R. 2—Suit against member of joint family.

If in a suit for specific performance of an agreement entered into by the manager of a joint family against the member of a joint family the defendant does not plead that the property in suit formed part of his joint family it must be taken to have been admitted that the agreement was not vitiated for want of legal necessity or benefit to the estate. [Para 14]

Annotation : ('44-Com.) C. P. C., O. 8, R. 2, N. 1.

B. C. De and S. P. Srivastava—for Appellants.

S. K. Mitra, R. Misra, S. K. Mazumdar and A. K. Sinha—for Respondents.

Jha C. J.—This is an appeal by the plaintiffs from a decree of the Subordinate Judge at Darbhanga, dated 24th May 1946.

[2] The appeal arises out of a suit for specific performance of an agreement, or, in the alternative, for recovery of possession of the property in suit on the ground that the court sale of the property held on 4th March 1940, is vitiated by fraud.

[3] Originally one joint family firm, Pali Ram Parma Nand, was impleaded as defendant first party, and one Ajodhya Prasad along with others was impleaded as defendant second party. On the death of Paliram on 22nd April 1945 (during the pendency of the suit) his minor son, Kissen Lal Daruka, and other members of his family were substituted in his place and were impleaded as defendants first party. Separate written statements were filed by the members of the family of Paliram, and it is common ground that Paliram's son alone is interested in the property in suit because on partition among the members of Paliram's family the property in suit was allotted to Paliram's share.

[4] Paliram filed his written-statement and on his death his minor son, the present defendant 1, adopted the written-statement of his father. It may be stated here that the relief is claimed only against defendants first party and not against defendants second party and the contest is only by the present defendant 1, hereinafter to be referred to as the defendant.

[5] The material facts of the case relevant to the points for consideration are these: Paliram was the karta of his joint family which owned the firm Pali Ram Parma Nand. Paliram obtained a money decree against the plaintiffs in the name of the firm on 22nd December 1933, for a sum of about Rs. 15,000. Execution of the money decree was taken out, being Execution Case No. 12 of 1939, in the Court of the Additional Subordinate Judge of Darbhanga. The property in suit measuring 71 bighas and odd was attached on 21st July 1939. An objection was taken by the defendants second party on 24th July 1939, under O. 21, R. 58, Civil P. C., in respect of a portion of the attached property, and was numbered, as Miscellaneous Case No. 38 of 1939. It is now conceded that the defendants second party were really farzidars of the plaintiffs judgment-debtors. Another objection was taken by the plaintiffs judgment-debtors on 20th November 1939, under S. 13, Bihar Money-lenders Act and was numbered as Miscellaneous Case No. 59 of 1939. While the two miscellaneous cases were pending a joint petition, dated 2nd December 1939, (Ex. 2) was filed on behalf of the contesting parties in Miscellaneous Case No. 38 of 1939, praying for two weeks' time on the ground that there was a talk of a compromise between the judgment-debtors and opposite parties, namely, the plaintiffs and the defendants first party in the present suit. The Court, as it appears from the order-sheet (Ex. 6), adjourned the case to 9th December 1939, for hearing, and the parties were required either to file a compromise petition or come ready on the date fixed. On 7th December 1939 there was an agreement between the parties (hereinafter to be referred to as the first agreement) through the intervention of Mr. Dharnidhar (P. W. 1 examined on commission) a pleader of the Darbhanga Bar. The terms of this agreement were not, however, reduced to writing. There is difference as regards some of the terms between the plaintiffs and the defendants first party. From the evidence of Mr. Dharanidhar, who is relied upon by both parties it appears that it was settled between the parties that Rs. 7,500 would be paid in full satisfaction of the decretal amount and a further sum of Rs. 1000 would be paid by the plaintiffs to Paliram for payment of arrears of rent in respect of the property under attachment for which three rent suits were pending in the 1st Court of the Munsif of Darbhanga. Thus, in all, Rs. 8,500 was to be paid by the plaintiffs to the defendants first party under the agreement, for which the plaintiffs were to execute a *bai maiadi kebala* (a deed of conditional sale) in favour of Paliram, because the plaintiffs could not manage to pay the sum in cash. I may state here that, according to the plaintiffs' case, it was settled that if the plaintiffs paid Rs. 8,500 to the defendants first party within a period of six years, the latter would execute a deed of reconveyance in favour of the plaintiffs. The case of defendant 1, however, is that the plaintiffs were to pay Rs. 8,500 in cash before 5th December 1939 (written statement 5 'ka') and he denies that the period fixed for the reconveyance was six years. Mr. Dharanidhar in his evidence does not support this part of the defendant's case. Another term of the first agreement, according to the

plaintiffs, was that the parties were to give up making pairvis in the execution case and the two miscellaneous cases and the same would be allowed to be dismissed for default. From the order-sheet (Ex. 6) it appears that the plaintiffs took no steps and the two miscellaneous cases were dismissed for default on 9th December 1939, but the defendant first party proceeded with the execution.

[6] The plaintiffs' case is that according to the terms of the agreement defendants first party paid to the plaintiffs Rs. 127-8-0 for purchase of stamp and, in fact, on 12th December 1939, the plaintiffs purchased the stamp through plaintiff 1 from the Treasury at Darbhanga for the execution of the deed of conditional sale, and on 17th December 1939, Shib Chandra Prasad (D. W. 1), a servant of the defendants first party, wrote the contents of the deed on the aforesaid stamp paper and the plaintiffs put their signatures thereon, and thereafter the document was handed over to the defendants first party. Registration of the document could not be completed because there was a second appeal (Second Appeal No. 569 of 1939) pending in the High Court in which the title of Ajodhya Prasad, one of the defendants second party was in dispute, and the defendants first party wanted to wait till the title of Ajodhya Prasad was finally decided by the High Court. The allegation of defendant 1 in his written statement is that the *bai maiadi kebala* (deed of conditional sale) was not executed by the plaintiffs and the first agreement was not given effect to because the defendants second party refused to execute the *kebala*. I have already stated that the defendants first party proceeded with the execution. The property in suit was put up to court-sale on 4th March 1940, and Paliram purchased it for a sum of Rs. 2000 and took delivery of possession on 24th December 1940. The plaintiffs' case is that the defendants first party committed an act of fraud in proceedings with the execution and getting the property in suit sold at court-sale. According to them, they got information of the sale on 24th December 1940, when delivery of possession was taken, and thereupon plaintiffs 3 and 10 went to Mr. Dharanidhar and informed him of the fraud committed by the defendants first party. Mr. Dharnidhar thereupon sent for Parmanand, the younger brother of Paliram, and again through his intervention a fresh agreement was arrived at between the parties on 3rd January 1941 (hereinafter to be referred to as the second agreement). According to the second agreement, it was agreed that on payment by the plaintiffs of a sum of Rs. 8500 to the defendants first party within a period of three years the defendants first party would execute a deed of reconveyance in favour of the plaintiffs in respect of the property in suit. It was further agreed that till the payment of the aforesaid money the defendants first party would remain in possession and occupation of the disputed property. Defendant 1 now admits that there was a second agreement but denies that the term fixed for reconveyance was three years. The plaintiffs' case is that according to the terms of the agreement they went in the month of June 1943, and several times thereafter, to the defendants first party with Rs. 8500 and requested them to accept the money and execute a registered deed of reconveyance and relinquish possession of the properties in suit and put the plaintiffs in possession thereof, but the defendants first party declined. They have, therefore, instituted the present suit, claiming specific performance or, in the alternative, recovery of possession on the ground of fraud as already stated.

[7] The learned Subordinate Judge dismissed the suit. He did not record his finding with regard to the first agreement, but with regard to the second agreement he found that it is highly improbable that Parmanand independently of Paliram's consent would have agreed to the payment being made within three years from the date of the subsequent agreement. He also found that the story of tender as alleged by the plaintiffs is false; and lastly, he found that, defendant 1 being a minor, a decree for specific performance could not be made in favour of the plaintiffs. In view of these findings, he dismissed the suit.

[8] Three questions arise for determination in this appeal : (1) Whether there were agreements as alleged by the plaintiffs ; (2) Whether specific performance can be granted in respect of the second agreement, if any ; (3) Whether a suit for setting aside the auction-sale, dated 4th March 1940, in Execution Case No. 12 of 1939, on the ground of fraud is maintainable, in view of O. 21, R. 92, Civil P. C.

[9] As regards the first question, there is, as already stated, no document embodying the terms of settlement arrived at between the parties. Therefore, the plaintiffs have to rely upon the oral evidence as well as the admitted circumstances and resulting probabilities in support of their case. The learned Subordinate Judge has not recorded his finding with regard to the first agreement. But, in my opinion, it is necessary to find whether there was an agreement between the parties on 7th December 1939; because the two agreements are inter-connected, and if it is found that there is ample evidence in support of the plaintiffs' story of the first agreement, the necessity for entering into the second agreement becomes highly probable. The

defendant totally denied the existence of the second agreement in his written statement. At the hearing, however, it was admitted that there were two agreements, but the parties differ as to the terms. (After discussing evidence his Lordship concluded.)

[10] On a careful consideration of the evidence and circumstances of the case I am satisfied that the plaintiffs have proved that there were two agreements between the parties as alleged by them, and there is ample evidence to show that the plaintiffs have succeeded in proving that on payment of Rs. 8500 at any time within three years from the date of the second agreement they are entitled to claim specific performance of the contract.

[11] The next question that arises is whether there was any tender of Rs. 8500 by the plaintiffs to the defendants first party in June 1943, as alleged by them and there was refusal by the defendants to accept the same. Mr. Dharnidhar says that he advised Kesho Babu (one of the plaintiffs) to arrange money for cash payment and get the property reconveyed. He further says "I fell ill in December 1942, and Kesho Babu came to me after my illness complaining that he was ready with the money but Babu Paliram was not willing to execute a reconveyance. I express my inability to help him on account of my illness." P. W. 2 says that money was tendered to Paliram and he refused to accept it and he is supported in his evidence by P. Ws. 10 and 13 and we see no reason to disbelieve their testimony. In view of all these facts there is no reason why I should not accept the plaintiffs' evidence of tender. But once the agreements are proved the question of tender is not material at all when the plaintiffs have come to Court within three years of the second agreement.

[12] Now the question is whether specific performance of the second agreement can be enforced against the present defendant 1, who is a minor son of Paliram. I have already stated that the suit was originally instituted against the joint family firm; and the minor son of Paliram, the present defendant 1, was brought on the record by substitution on Paliram's death, during the pendency of the suit. Therefore, the point for consideration is whether a decree for specific performance could be made against the joint family firm if Paliram had been alive, and secondly, whether such a decree can be made against his minor son who has been brought on the record after his death.

[13] In a suit by a promisee for enforcement of specific performance of a contract it is necessary that the parties should have the capacity to contract; and if the contracting parties are Hindus and the agreement is entered into by the **karta or kartas of a joint Mitakshara Hindu family, it is further necessary for the plaintiff to prove either legal necessity or benefit to the estate.**

[14] It may be stated here that in the plaint there is no allegation of either legal necessity or benefit to the estate, nor is there any allegation in the written statement filed by Paliram, which was subsequently adopted by his minor son, the present defendant 1, after the death of Paliram, that the contract is unenforceable for want of legal necessity or benefit to the estate, nor was any issue raised on the point. But it was argued at the bar on behalf of the respondent that a decree for specific performance of the contract entered into by Paliram cannot be passed against defendant 1, who is a minor, because the contract on the very face of it was adverse to his interest. This argument is founded on the observation of the learned Subordinate Judge which runs as follows :

> "It has been urged that the agreement arrived at is not enforceable at law but even if it be presumed that it was capable of being enforced in that case the contract could not be enforced against defendant 1 who is a minor. It may have been one thing for Paliram, his father, who was a major, to have agreed to sacrifice some of his interest, but it is extremely doubtful if a decree for specific performance of a contract could be passed against defendant 1. who is a minor, in respect of a contract which on the very face of it was adverse to his own interest."

I think this argument is not sustainable. It is true that the karta's power to alienate the joint family property is, under the Hindu law, a limited and qualified power. But an alienation by a karta, even if not warranted by the necessities of the family, is not void *ab initio*. The plaintiffs came forward with a clear case that the property in suit belonged to them and the same had passed into the hands of the defendant by reason of a fraudulent court sale; they stated the relevant facts and simply asked for the restoration of their property by execution of a sale-deed under the terms of the compromise arrived at between the parties at the instance of Mr. Dharanidhar. The defendant in his written-statement did not take the plea that the property in suit formed part of his joint family property and specific performance could not be granted for want of legal necessity or benefit to the estate. It was necessary for the defendant to allege, in the first place, that the property in suit forms part of his joint family property. If only such an allegation had been made, it would have been necessary for the plaintiff to allege legal necessity or benefit to the estate. Under O. 8, R. 2, Civil P. C., the defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law. If such a plea had been raised in the defence, the plaintiffs, if so advised, might have filed, with the leave of the Court, a written statement pleading legal necessity or benefit to the estate, and such written-statement might have formed part of the plaintiffs' pleading. On the pleadings as they stand the question of legal necessity or benefit to the estate did not arise. In my opinion, it must be taken to have been admitted that the agreement was not vitiated for want of legal necessity or benefit to the estate. It is quite probable that the plea was not raised because the act of Paliram in entering into the second agreement was considered a prudent act beneficial to the estate. However, in my opinion, the learned Subordinate Judge does not seem to be right in his view that the contract on the face of it is adverse to the minor's interest. Paliram contracted to sell for Rs. 8,500, a property which he had purchased at court-sale for Rs. 2,000. This was obviously a prudent act on the part of Paliram and there was a clear benefit to the family. Besides Paliram knew that the sale had been obtained by fraud. Therefore, it was considered by Paliram a prudent act to put an end to the litigation and not to take the risk of the sale being set aside by an application under O. 21, R. 90, or by some other appropriate proceedings. It may be observed that the property in suit belonged to the family of the plaintiffs. The sale was brought about by the fraudulent conduct of Paliram. The executing Court conducting the sale was not informed of the circumstances under which the plaintiffs had given up pairvi in the two miscellaneous cases, nor was the Court informed of any of the terms of the contract. Therefore, in view of all these facts and circumstances I think it cannot be said that Paliram or his brother Parmanand, who according to the allegation in the plaint, carried on the court affairs of the family of the defendants first party, did any imprudent act in entering into either the first or the second agreement or that any of these agreements was not justified in the interest of the estate of the defendants. Therefore, the contract can be challenged only on the ground of lack of mutuality.

[15] The fundamental rule of equity is that a contract will not be specifically enforced unless it is obligatory on both parties, nor unless both parties at the time it is executed have the right to resort to equity for specific enforcement of it. Therefore, a contract to be specifically enforced by the Court must, as a general rule, be mutual, that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other. The Specific Relief Act does not anywhere expressly repudiate the doctrine of mutuality. On the contrary, the language used in respect of the last nine illustrations of cl. (b) of S. 21, Specific Relief Act supports the position that the doctrine is part of the Indian law. The doctrine of mutuality was judicially recognized so far as India is concerned by their Lordships of the Judicial Committee in the case of *Mir Sarwarjan* v. *Fakhruddin Mahomed*, 39 Cal. 232 : (39 I. A. 1 P. C.), and since then the following propositions are firmly established:

> "(1) A contract entered into by a minor being void, an agreement entered into by him either for sale or for purchase of immovable property cannot be specifically enforced either by or against him.
>
> (2) A contract either for sale or for purchase of immovable property entered into by the guardian of a minor or his manager cannot be specifically enforced either on his behalf or against him."

[16] In either case there being lack of mutuality the Court cannot order specific performance of a contract even if the transaction be beneficial to the minor.

[17] In the case before us the joint family was sued. Admittedly Paliram was the karta of the joint family. The position of the karta is *sui generis*. He represents the family and has power as karta of making contracts, giving receipts and compromising or discharging claims ordinarily incidental to the family business: *Kishan Parshad* v. *Harnarain Singh* 38 I. A, 45 at p. 51 : (33 ALL. 272). He can sue and be sued in a representative capacity. In the case of *Sheo Shankar Ram* v. *Mt. Jaddo Kunwar*, 41 I. A. 216 at p. 220 : (A. I. R. (1) 1914 P. C. 136), their Lordships of the Judicial Committee have held that

> "the managers of a joint Hindu family so effectively represent all other members of the family that the family as a whole is bound."

While discussing the doctrine of *res judicata* Lord Phillimore, in the case of *Lingangowda* v. *Rastangowda*, 54 I. A. 122 at p. 125 : (A. I. R. (14) 1927 P. C. 56), observes as follows:

> "It is impossible to allow each member of the family to litigate the same point over and over again, and each infant to wait till he becomes of age, and then bring an action, or bring an action by his guardian before; and in each of these cases, therefore, the Court looks to Explanation 6 of S. 11, Civil P. C., 1908, to see whether or not the leading member of the family has been acting either on behalf of minors in their interest or if they are majors, with the assent of the majors."

It was pointed out in the case of *Lalchand Thakur* v. *Seogobind Thakur*, 8 Pat. 788 : (A. I. R. (16) 1929 Pat 741), by Chatterji J. that in a suit against a joint Hindu family the karta may effectively represent the other members of the family even though he is not described as such. Recently in the case of *Ramsewak* v. *Ramaprasad*, 26 Pat. 1 : (A. I. R. (35) 1948 Pat. 215), which related to the power of a manager to refer a certain dispute to arbitration, Sinha J. has observed that it is competent to the father of a joint Hindu family in his capacity of the managing member of the family to refer to arbitration the partition of the joint family property, and the award made on such a reference, if in other respects valid, is binding on the sons and grandsons, even if some of them happen to be minors.

[18] Therefore, in my view, Paliram effectively represented all the members of the family including his minor son, and the contract entered into by him as karta of the joint family could be specifically enforced against him, had he been alive. If a decree had been passed against him, it would have been binding on his minor son as well because there was no lack of mutuality. This view gets support from the observation of Rachhpal J. in the case of *Mt. Dhapo* v. *Ram Chandra*, 57 ALL. 374 at p. 379 : (A. I. R. (21) 1934 ALL. 1019) where he observes as follows :

> "In the case before us, it was open to the plaintiffs to have sued Reoti alone for the specific performance of the contract as representing the joint family. If a decree had been passed it would have been binding on the other member of the joint family, the minor."

(Reoti was the karta and managing member of the family consisting of himself and his minor brother).

In my opinion, there is no change in the legal position simply because the present defendant, who was not originally impleaded in the suit, was substituted for Paliram. The law is that want of mutuality to be fatal to a claim for specific performance must exist at the time the action is brought. This view gets support from a passage in the case of the *Eastern Counties Railway Co.* v. *Hawkes*, (1855) 5 H. L. C. 331 at p. 365: (24 L. J. Ch. 601) where Lord Campbell is reported to have stated the law thus :

> "But I am of opinion that whereas, in considering the validity of the agreement, the proper time to regard is the time when it was entered into-as to the specific performance, regard is to be had to the state of things when the bill was filed. No authority has been cited in support of the position, that the decision upon a bill for a specific performance is to depend upon what has happened between the filing of the bill and the day when the decree is to be pronounced; and it would be strange if the plaintiff, being entitled to what he prays for when he files his bill, could be defeated by the chicanery of the defendant in vexatiously resisting the suit."

The same view was taken in the case of *Narayana Chetty* v. *Muthiah Chetty*, 47 Mad. 692 at p. 697 : (A. I. R. (11) 1924 Mad. 680) where the law is stated by Ramesam J. as follows :

> "Where a contract is by a manager on behalf of a family, and for the benefit of the family and the manager dies, it can be enforced against the survivors when they are all majors; *Venkateswara Aiyar* v. *Raman Nambudri*, 3 M. L. W. 435 : (A. I. R. (4) 1917 Mad. 358). Should it make any difference that some of the survivors are minors, and does the case of ***Mir Sarwarjan* v. *Mahomed Fakhuruddin Mahomed***, 39 Cal. 232 support such a distinction ? The matter is *res integra* and I am inclined to answer the above queries in the negative."

[19] Therefore, in my opinion, in a suit instituted against a joint family a decree for specific performance can be passed and it would be binding on all the other members of the joint family, including a minor coparcener, if the transaction is found to be warranted by legal necessity or benefit of the estate. It has been held by a Full Bench of this Court in the case of *Hari Charan* v. *Kaula Rai*, 2 P. L. J. 513 : (A. I. R. (4) 1917 Pat. 478 F. B.) that there is no lack of mutuality if the contract is entered into by the karta simply by reason of the fact that a minor coparcener is impleaded in the action. But it has been held that the suit for specific performance cannot be decreed in the absence of proof of legal necessity or family benefit. Chamier C. J. states the law thus :

> "(1) The interest of a member of a joint Hindu family in the family property is not individual property at all. The manager of such a family is not an agent of the other members nor is he a mere manager. He is much more like a trustee for the other members.
>
> (2) I apprehend that the decisions of their Lordships in the cases of *Mahori Bibee* v. *Dharmo Dass Ghosh*, 30 Cal. 539 : (30 I. A. 114 P. C.) and *Mir Sarwarjan* v. *Mahomed Fakhruddin*, 39 Cal. 232 : (39 I. A. 1 P. C.) do not apply to contracts made by the managing member of a joint Hindu family for family necessities or for the benefit of the family, i. e., contracts made by the managing members which bind the minor members of the family. Such contracts can be enforced on behalf of the family by the persons who make them and I find nothing in the decisions of their Lordships which requires us to hold that such contracts cannot be enforced against the family. Contracts made not by minors but by persons who have power to make contracts on behalf of a joint family do not appear to come within those decisions. I am not prepared to dismiss this suit for specific performance on the ground that the contract lacks mutuality having been made by or on behalf of minors who are not competent to contract."

In the case of *Mt. Dhapo* v. *Ram Chandra*, 57 ALL. 374 : (A. I. R. (21) 1934 ALL. 1019), where the managing member along with his minor brother was impleaded, the Allahabad High Court followed the view taken in the case of *Hari Charan Kuar* v. *Kaula Rai*, 2 P. L. J. 513 : (A. I. R. (4) 1917 Pat. 478 F. B.). After a review of the case law on the point the Nagpur High Court has recently adopted in *Ramrao Shamrao* v. *Suganchandra*, A. I. R. (33) 1946 Nag. 139 : (I. L. R. (1946) Nag. 116) the view taken by the Full Bench of this Court in *Haricharan* v. *Kaula Rai*, 2 P. L. J. 513 : (A. I. R. (4) 1917 Pat. 478 F. B.).

[20] I have already held that the second agreement was entered into by Paliram for the benefit of the estate and there was no lack of mutuality simply because his minor son was brought on the record by substitution on the

death of Paliram. Therefore, the plaintiffs are entitled to a decree for specific performance against the present defendant 1.

[21] **It may be observed that the plaintiffs claimed an alternative relief that if for some reason a decree for specific performance of contract be not possible, then it may be adjudged that the court sale held on 4th March 1940, in Execution Case No. 12 of 1939 is entirely fraudulent, illegal, inoperative, useless and ineffective, and the defendants first party neither have nor can have any title on the basis thereof, and that the plaintiffs are entitled to get khas possession together with mesne profits. This point gives rise to the consideration of the third question raised before us, namely, where a suit for setting aside the auction sale on the ground of fraud is maintainable in view of O. 21, R. 92, cl. (3), Civil P. C. I have already held that the plaintiffs are entitled to a decree for specific performance and in that view of the matter consideration of this question becomes unnecessary.**

[22] In the view that I have taken the appeal must be allowed and the judgment and decree of the Subordinate Judge set aside.

[23] It is therefore ordered that upon payment into Court of the purchase money Rs. 8,500 on or before 22nd November 1950, or within such further time as the Court below, at its discretion, may allow, defendant 1 do execute and register a proper deed of conveyance of the properties in suit and do put the plaintiffs in possession thereof. The appeal is allowed accordingly with costs throughout.

[24] **Reuben J.**—I agree.

D.H. *Appeal allowed.*

A. I. R. (37) 1950 Patna 541 *[C. N. 141.]*

NARAYAN J.

Sirikishun Singh and others — Appellants v. *Jaimangal Singh and others—Respondents.*

A. F. A. D. No. 2188 of 1948, D/- 11th August 1950, from decision of A. D. J., Muzaffarpur, D/- 13th September 1948.

Civil P. C. (1908), S. 100—Question of benami — Interference.

If on the findings of the Courts of fact the necessary elements of a benami transaction are found to have been established for supporting the conclusion that the transaction was a benami one then High Court in second appeal would not interfere with the decision of the lower appellate Court. [Para 3]

Anno. Civil P. C., S. 100, N. 38.

G. C. Banerji — for Appellants.
Baijnath Prasad Samaiyar, B. C. De and P. Jha — for Respondents.

Judgment. — This is a second appeal by the defendants arising out of a suit in which the plaintiffs had prayed for a declaration of their title to and recovery of possession of certain plots of land described as plots Nos. 15 and 17. The case, as made out by the plaintiffs, was that this property had been purchased by their ancestor Ghina Mahto in the frazi name of Lakhu Mahto, the father of the defendant appellants, by a registered sale-deed dated 23rd October 1899 and that ever since the execution of the Kebala it has been in their possession. The alleged cause of action for this suit was an interference by these defendant-appellants with the possession of the plaintiffs leading to a proceeding under S. 144, Criminal P. C. The defence was that Lakhu Mahto was the real purchaser of the property, and it was further alleged that a few years before the institution of this suit the original sale-deed by which this property had been acquired was lost or stolen from the dalan of the defendants and that the plaintiffs having obtained the custody of the document had filed this suit dishonestly.

[2] The Courts below have concurrently held that the plaintiffs have been able to prove that the sale-deed was in their custody, that they have been in possession of the property in suit, and that they have been paying its rent. On these findings they have decreed the suit.

[3] The learned counsel appearing for the defendants appellants contended that, as held by this Court in *Mt. Janki Bai* v. *Najaf Ali Khan*, 3 Pat. L. W. 339; (A.I.R. (5) 1918 Pat. 632), a question of benami was not a pure question of fact and that it was a mixed question of fact and law, and he asked me to follow this decision in spite of the decision in *Benarsi Das* v. *Mt. Bhawani Kuer*, 23 P. L. T. 364 :(A. I. R. (29) 1942 Pat. 386) by Harries C. J. and Manohar Lall J. in which their Lordships had observed that the question of benami was eminently a question of fact and the finding on this question could not be interfered with in second appeal. The learned counsel submitted that if this decision of Harries C. J. and Manohar Lall J. is in conflict with the earlier decision reported in *Mt. Janki Bai* v. *Najaf Ali Khan*, 3 Pat. L. W. 339 : (A. I. R. (5) 1918 Pat. 632), then on the principle laid down by Fazl Ali and Manohar Lall JJ. in *Mahabir Das* v. *Udit Narain*, 19 P. L. T. 570 : (A. I. R. (25) 1938 Pat. 613) the earlier decision should be followed by me. Speaking for myself, I do not consider that the two decisions are irreconcilable. In every case in which the question of benami is raised the circumstances which are usually taken into consideration are among others the possession of the property, the source of the consideration money, the custody of the title deed, the relationship between the parties and the motive for the transaction. In second appeal it is certainly

open to us to see how far the Courts have considered whether the ingredients which are required to be established in a case of benami have been established. But if on the findings of the Courts of fact the necessary elements are found to have been established for supporting the conclusion that the transaction was a benami one then this Court in second appeal would not interfere with the decision of the lower appellate Court. No doubt in this case there is no finding of the Courts below to the effect that there was a sufficient motive for taking a sale-deed in the benami name of Lakhu Mahto and that the consideration money was paid by the plaintiffs' ancestor, but there are very definite findings to the effect that the custody of the document has been with the plaintiffs that the plaintiffs have been in possession of the land in dispute ever since the execution of the sale-deed and that they have been paying its rent. The defendants had put forward a story that the title deed was stolen or removed from their dalan some years back but the Courts below discredited this story and they have given very good reasons for rejecting the defendants' version that the title deed was taken away from their house. If the defendants filed a petition before the S. D. O. in 1944 regarding the loss of the document in 1942 that raises a very strong suspicion that it was not a *bona fide* petition and that there was an ulterior motive behind it. It is true that merely because the plaintiffs have produced this document it cannot be held that they have been able to prove their title to this property. But there can be no doubt that the question of the custody of the title deed is a very important question and the finding on this point has to be considered along with the definite finding on the question of possession. The plaintiffs, it appears, produced a number of rent receipts, showing payment of rent for a good number of years and the learned Additional District Judge has rightly pointed out that

> "production of so many receipts of the different landlords by the plaintiffs is a factory which goes to show continuous possession of the plaintiffs."

He has then discussed the oral evidence adduced by the parties regarding possession and he has observed that "the real evidence of possession adduced by the defendants is not at all satisfactory as that of the plaintiffs." Thus the learned Additional District Judge has held that the oral evidence adduced by the plaintiffs on the question of possession is preferable to the oral evidence adduced by the defendants on this point. The question of possession was certainly a very important question and if the plaintiffs have been able to prove that they were in possession ever since the year 1899 then there can be no doubt that the case of benami, as put forward by them has been fully established. It was difficult for the plaintiffs in this case to prove as to who actually paid the consideration for this transaction which took place in the year 1899 and it was also difficult for them to show as to what was the motive for taking a benami document in the year 1899. In my opinion, this appeal is concluded by the findings of fact arrived at by the lower appellate Court and as was pointed out by the Judicial Committee in the well-known case of *Muhammad Mahbub Ali Khan* v. *Bharat Indu*, 23 C. W. N. 321 : (A. I. R. (5) 1918 P. C. 137), in regard to benami transaction, Courts of law should not approach them with that scrupulous rigour which in other systems of jurisprudence may demand the existence of the clearest positive evidence that the *ex facie* owner of a property is a trustee for or holds the same for the interest of another. Because of the clear findings on the question of possession I think there is no merit in this appeal.

[4] The result is that the appeal fails and is dismissed with costs.

G.M.J. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 542 [*C. N. 142.*]

S. K. DAS J.

Hira Mistiry — Petitioner v. *Ram Briksh Singh — Opposite Party.*

Criminal Revn. No. 694 of 1950, D/- 8-8-1950, from order of S. J., Patna, D/- 29-3-1950.

(a) Interpretation of Statutes — Proceedings of legislature — Report of Select Committee can be looked into in interpreting a statute only when language of statute is not clear or unambiguous. [Para 3]

(b) Criminal P. C. (1898), Ss. 539, 526 (8) and 537 — Application under S. 526 (8) — Rejection of — Interference in revision against conviction.

An application for adjournment under S. 526 (8) filed by the accused at the close of prosecution arguments was rejected on the ground that it was filed too late and that it was merely intended to defeat or delay justice. No ground whatever was alleged as to why transfer of case was thought necessary. The accused was ultimately convicted :

Held that the High Court would not exercise its discretionary powers of revision and interfere with the conviction merely on the ground of rejection of application under S. 526 (8) especially when the application was not *bona fide* the accused had a fair trial and the case was a petty one. [Paras 4 and 5]

Anno. Criminal P. C., S. 439, N. 23; S. 526, N. 19; S. 537, N. 22.

Dr. Qazi Nazrul Hasan — for Petitioner.
K. K. Sinha —for Opposite Party.

Order.—The petitioner has been sentenced to a fine of Rs. 10 only for contravening a District Board bye-law by placing some logs of wood on a District Board road. The point which has been urged before me in support of the petition for quashing the conviction and sentence, is that on 1st February 1950, the petitioner made an application under the provisions of sub-s. (8) of S. 526, Criminal P. C., for an adjournment in order to enable the petitioner to make an application for transfer of the case, and to get an order thereon. The learned Magistrate refused to grant an adjournment for the purpose. It is contended that this was an illegality which vitiated the entire trial. The rule which was issued by this Court was confined to this ground only.

[2] In order to appreciate the point raised, it is necessary to state some more facts. The case against the petitioner was a summons case. The prosecution evidence closed on 11th January 1950. On 19th January 1950, defence was declined. Later on, on the same date, a petition was filed with a prayer that the trying Magistrate should hold a local inspection. The trying Magistrate held a local inspection on 21st January 1950. On 31st January 1950, arguments for the prosecution were heard. The defence lawyer was not free on that date, and the case was adjourned to 1st February 1950. On that date an application was filed purporting to be an application under S. 526 (8), Criminal P. C. The learned Magistrate refused to grant an adjournment on the ground that the defence had closed its case much earlier, and the application was merely intended to defeat or delay justice. I may state here that no ground whatsoever was alleged why the case should be transferred, and up till now no ground has been alleged why it was considered necessary that the case should be transferred from the file of the Magistrate who tried it.

[3] It is true that there are several decisions which have laid down that the provisions of sub-s. (8) of S. 526, Criminal P. C., are mandatory, and the Court is bound to grant an adjournment if the conditions laid down in that sub-section are fulfilled. The question in the case before me hinges upon the meaning of the expression "at any stage before the defence closes its case" occurring in that sub-section. Sub-section (8), as it stood before the amendments of 1932, did not contain the words mentioned above. Those words were introduced by the amendments made in 1932. In the report of the Select Committee, it was stated as follows :

> "We recognise the necessity of greater safeguards against the abuse of the section than those now existing. We think that provision should be made for a compulsory adjournment if a party notifies its intention to move for a transfer at any time before the arguments begin, that is to say, at any time before the defence closes its case."

It is correct to say that if the words in a section are clear and admit of no ambiguity, then the report of the Select Committee cannot be looked into for the purpose of giving an interpretation which the words used in the statute cannot bear. Where, however, there is ambiguity, the report of the Select Committee may, I think, be looked into as a matter of history to find out what was the previous law, what mischief the framers of the statute wished to avoid and what remedy they wished to advance. The meaning of the word 'trial' in connection with sub-s. (8) of S. 526, as it stood before the amendments of 1932, gave rise to a diversity of decisions in some of which very strong criticisms were made of the chances of abuse of the right given by the sub-section. So far as I am aware, there is no direct decision bearing on the question as to the exact meaning of the words "at any stage before the defence closes its case." There is one decision of this Court to which my attention has been drawn, namely, *Ishar Singh* v. *Shama Dusadh*, 17 P. L. T. 627 : (A. I. R. (24) 1937 Pat. 131), where certain observations were made by way of *obiter dicta*. The learned Judge, who made the observations guarded himself by saying :

> "I do not think I am called upon to decide this point in this case as it does not arise; any expression of my opinion will be purely *obiter dictum*."

There is, therefore, no decision which has held that an application for an adjournment under S. 526 (8) can be made in a summons case after the arguments of one of the parties had been concluded.

[4] In my opinion, it is not quite necessary in this case to decide the vexed question as to when the defence closes its case in a summons case. The revisional jurisdiction which this Court exercises, is a discretionary jurisdiction. It seems clear to me on the facts of this case that the application for adjournment made on 1st February 1950, was really a trick, a device to defeat and delay justice. No ground whatsoever was alleged for a transfer of the case. It is true, as has been contended by learned counsel for the petitioner, that sub-s. (8) of S. 526, Criminal P. C., merely contemplates that an intimation should be given to the Court that the party intends to apply for a transfer, and the grounds need not be mentioned. But so far nothing has been stated in the various petitions filed by the petitioner right up to this Court as to why it was thought necessary to apply for a transfer of the case. Nothing had happened up till 1st February 1950, which would give any indication of any reason for a transfer of the case. It seems to me that the only conclusion which can be drawn from the facts and circumstances of this case, is that the application for an ad-

journment under S. 526 (8), Criminal P. C., was not a *bona fide* application, and was meant merely to prevent the learned Magistrate from proceeding to judgment.

[5] In these circumstances, I do not feel called upon to exercise the discretionary jurisdiction of this Court, and interfere with the conviction and sentence passed. The case is a petty one. The petitioner has had a fair trial, and there is no reason why further wastage of public time and money should be encouraged.

[6] I would accordingly dismiss the application.

K.S. *Revision dismissed.*

A. I. R. (37) 1950 Patna 544 *[C. N. 143.]*

SARJOO PRASAD J.

Ramlakhan Ram—Petitioner v. *The State.*

Criminal Revn. No. 762 of 1950, D/- 8th August 1950, from order of A. S. J., Shahabad, D/- 20-3-1950.

Penal Code (1860), S. 186 — Voluntary obstruction—What constitutes.

In order to constitute an obstruction physical force is not necessary. It may be in various ways. But where a tenant states to a peon who wants to effect delivery of possession of the house to a decree-holder, that he had rented the house from certain persons and would vacate it only if they asked him to do so, make such endorsement of the writ and the person returns without doing anything further, the action on the part of the tenant does not amount to obstruction as the peon has not persisted in the performance of his duties and is not obstructed as such. [Para 6]

Anno. Penal Code, S. 186 N. 1.

A. B. N Sinha—for Petitioner.
K. P. Varma—for the State.

Order. — This is an application against the order of conviction under S. 186, Penal Code, the petitioner having been sentenced to one month's rigorous imprisonment under that section.

[2] The prosecution case is that there was a civil Court decree in which the petitioner's father was also judgment-debtor. A writ of delivery of possession was issued in execution of that decree and a peon went to the spot to effect delivery of possession of a certain house to the decree-holder on 11th December 1948. When the drum was being beaten, the petitioner who was in occupation of the house at the time stated to the peon that he had taken the house on rent from Sonik Ram and Parmeshar Ram, the landlords, and that he could not vacate the house unless the landlords asked him to do so. It is also stated that the petitioner made an endorsement on the back of the writ to the same effect. The peon then submitted a report saying that he had been obstructed in delivering possesssion, and that in the circumstances delivery of possession could not be effected without deputation of the Nazir of the Court. The proceeding accordingly was started against the petitioner for voluntarily obstructing a public servant in the discharge of his duties.

[3] The defence of the petitioner is that when the peon asked the petitioner to vacate the house, the petitioner replied that he had taken the house on rent from two persons named above, and would call the owners of the house to corroborate the statement of the peon so liked. He, had, therefore, no intention to obstruct the peon in the discharge of his duties and his conduct was absolutely *bona fide*.

[4] The two Courts below have held that there was obstruction on the part of the petitioner and have, therefore, convicted him as stated above.

[5] On behalf of the petitioner it has been urged that the facts alleged by the prosecution do not constitute a case of voluntary obstruction so as to amount to an offence under S. 186 of the Code. I have examined the evidence of the peon and the report submitted by him. The peon's evidence only shows that when he went to execute the writ of delivery of possession, the petitioner stated to him that he was in occupation of the house under a tenancy from some other persons. It does not appear that the petitioner threatened the peon with any violence in case he persisted in effecting the delivery of possession, and he offered to call to the alleged landlords under whom the petitioner claimed the tenancy. The peon, however, does not appear to have waited for all this, but he went back and immediately submitted a report against the petitioner. The endorsement on the back of the writ runs as follows:

> "Sheo Pd. Sonik Ram, Parmeshar Ram ka makan hai. Osme ham kiraya lekar rahte hain. Ham Ramlakhan Ram rahte hain. On logan ke anese hat jayenge. Is ghari nahin hatenge."

[6] The endorsement, therefore, makes it clear that the petitioner was prepared to vacate the house on the arrival of those persons viz. Sheo Pd. Sonik Ram, Parmeshar Ram, about whom he alleged were the owners of the house. This part of the defence has not been accepted by the two Courts below. Even if the allegation that Sheo Pd. Sonik Ram Parmeshar Ram were the owners of the house was found to be false, it does not appear that the peon warned the petitioner that he would not listen to any such excuse as he was bound to deliver possession to the decree-holder. As there was no threat or assault or violence on the part of the petitioner, there was no reason for the peon not to execute the writ and to go back and submit a report. The mere fact that such a statement was made before the peon does not necessarily amount to obstruction. It is true that in order to constitute an obstruction physical force is not necessary. The obstruction may be in various ways

but here it does not appear that the peon persisted in the performance of his duties and was obstructed as such. All that he did was that on hearing that statement he returned back without even waiting to verify whether the statement was true or false. I, therefore, do not find that a case of voluntary obstruction has been made out beyond any shadow of doubt. I would, accordingly give the benefit of doubt to the petitioner and allow the application, set aside the order of conviction and sentence against him and make the rule absolute.

D.R.R. *Application allowed.*

A. I. R. (37) 1950 Patna 545 [*C. N. 144.*]

SARJOO PRASAD J.

Deobrat Shastri and another—Petitioners v. *Rang Bahadur Singh —Opposite Party.*

Criminal Revn. No.589 of 1950, D/-7-8-1950.

(a) Criminal P. C. (1898), S. 198 — "Person aggrieved" —Defamation —Manager of Co-operative Bank — Penal Code (1860), S. 500— Bihar and Orissa Co-operative Societies Act (VI [6] of 1935), S. 2 (9).

Under S. 2 (9), Bihar and Orissa Co-operative Societies Act, the manager functions as a statutory person. In the case of a Co-operative Bank even though it is under the supervision of a Board of Directors the manager is a person who is primarily concerned with the day to day management of the Bank, and it is he who is responsible for any laches or mismanagement of its affairs. Therefore, there is prima facie no reason to hold that the manager is not a person aggrieved as contemplated by S. 198, Criminal P. C. [Para 3]

Annotation: Criminal P. C. S. 198, N. 4; Penal Code Ss. 499, 500 N. 15.

(b) Penal Code (1860), S. 499 — Bank whether can be defamed.

Dicta — An imputation against a company or an association or collection of persons as such amounts to defamation. Therefore, the mere fact that the reputation of a Bank is sought to be affected by the publication does not take it away from the mischief of a defamatory publication. [Para 5]

Annotation: Penal Code Ss. 499 & 500 N. 3.

(c) Penal Code (1860), S 499 — "Intending to harm or knowing" — Matter published *per se* defamatory.

In the case of news item published in a newspaper forming the subject of a proceeding under S. 500, where the matter published is *per se* defamatory, the only thing that the prosecution is called upon to prove in the first instance is the fact of the publication itself. When the tenor of the document shows that the publication tends to harm the reputation of any person, a Court would be justified in gathering from the terms of matter itself that the publishers intended to harm or knew or had reason to believe that such imputation would harm his reputation. [Para 5]

Annotation: Penal Code, Ss. 499-500 N. 4.

Nageshwar Prasad, Gorakhnath Singh and R. B. Singh —for Petitioner.

Baldeo Prasad Singh and U. C. Sharma — for Opposite Party.

Judgment. — This is an application for quashing or, in the alternative, for transfer of a criminal prosecution pending against the petitioners. Petitioner No. 1, Deobrat Shastri, is said to be the Chief Editor of a daily Hindi newspaper called 'Navarastra'. Petitioner No. 2, Sumangal Prakash, is the Editor of that paper which is printed and published at Patna. In the Dak Edition of that paper dated 30th November 1949 the following news was published·

> "Begusarai Samachar— *Tin Hazar man Chawal Barbad Karne ka Prayatan* — Tin Mahine se Begusari ke kote ka karib tin Hazar man Arwa Chawal Begusarai men akar Para hai. Par ab tak uske bitaran ke liya adhikarion dwara koi prayatan nahi kia ja raha hai. Kaha jata hai ke ukta chawalke stockist Sthaniva Mulya Niyatran ke kramchariyon ko apne prabhav men lakar ukta chawal ke bitran karne men janbujh kar deri karwa rahe hain, jisme kuchh aur samaya bit jane par ukta chawalko kharab ghosit kara kar use free sale men beche jane ki anumati prapat kar saken Smaran rehe ki ukta chawal ke control dar karib 28 rupeya man hai tatha chor bazar dar karib chalis rupeya man hai."

The English literal rendering of the above quotation would be as follows:

> "Begusarai News. — *A scheme to waste 3000 maunds of rice.* —About 3000 maunds of arwa rice in respect of the quota of Begusarai has been lying in stock for about the last three months since its arrival, but up till now no arrangement has been made for its distribution through the authorities. It is said that the stockist of the said rice having brought under its influence the officers of the local price control department deliberately trying to delay the distribution of the said rice so that after a lapse of some further time, the said rice may be declared unfiit and approval may be obtained for its free sale in the market. It may be remembered that the control price of the rice is about Rs. 28 a maund, while the black market price is about Rs. 40."

[2] On the publication of this news, the opposite party, who is the manager of the Central Co-operative Bank, Begusarai, the Bank being the sole Government Stockist at the place, filed a petition of complaint before the Subdivisional Magistrate of Begusarai against the petitioners along with three other persons on 1st April 1950, and on the said complaint the Subdivisional Magistrate issued summonses against the petitioners. It may be stated that the three other persons against whom summonses had been issued are (1) Mulchand Agrawal, Chief Editor of another paper 'Vishwamitra', (2) Harishchandra Agrawal, also an Editor of the same paper 'Vishwamitra', this paper having also its head office at Patna, and (3) Jagat Narain Lal Agrawal, a resident of Begusarai who is alleged to be a correspondent of both these papers 'Navarastra' and 'Vishwamitra'.

[3] Mr. Nageshwar Prasad who has appeared on behalf of the petitioners has urged various points in asking this Court to quash the proceedings. He contends that the petition of complaint has not been filed on behalf of "a person aggrieved", and therefore, no Court should take cogni-

zance of an offence under Ss. 500 and 501, falling under Chap. XXI, Penal Code, in the absence of such a complaint. Admittedly the Government stockist of rice in Begusarai is the Central Co-operative Bank of Begusarai of which the complainant-opposite party is the manager. The affairs of the Bank are also under the supervision of a Board of Directors presided over by the Sub-divisional Magistrate of the place. Mr. Nageshwar Prasad, therefore, submits that if the the Bank stood aggrieved by the publication in question, then the complaint should have been either by the Board of Directors or by the President of the Board. The question of distribution of the rice stocked by the Bank as the Government stockist affects the persons who dictate the policy of the Bank, and therefore, it is primarily they who should have lodged a complaint, if at all, because they come within the definition of a person aggrieved. According to his contention, the manager is merely an executive authority who has no choice in the matter but he only carries out the biddings of the board of management. On behalf of the complainant opposite party it has been contended, on the other hand, that the manager is primarily the person aggrieved. Under S. 2 (9), Bihar and Orissa Co-operative Societies Act, the manager functions as a statutory person. It is not only that he carries on the biddings of the Board presided over by the President but he is also a person who is primarily concerned with the day to day management of the Bank, and it is he who is, therefore, responsible for any laches or mismanagement of its affairs. Therefore, there does not appear to me to be prima facie any reason to hold that the manager is not a person aggrieved as contemplated by S. 198, Criminal P. C., In any case this is a question of fact to be decided on the evidence in the case and also upon the rules and procedure relating to the management of the Bank and the distribution of the stock of rice which the Bank holds as a Government stockist. It cannot, therefore, be a sufficient ground for quashing the proceedings at this stage.

[4] The next ground urged on behalf of the petitioners is that the petitioners have been summoned jointly with the Editors of the other paper 'Vishwamitra'. This apparently may be irregular because although the offences may be similar offences, yet there may be no identity of purpose between the present petitioners and the Editors of the other paper 'Vishwamitra' in making the publication. But this is a matter which is to be considered at the time of trial, and does not affect the issue of summonses against the petitioners. Perhaps the prosecution may have been well-advised to have separate trials of the present petitioners and the Editors of the other daily paper.

[5] The most important ground, however, on which the prayer for quashing is pressed is that the petitioners have acted *bona fide* and in public interest in making the publication, and that the prosecution of the petitioners would be fruitless and harassing. There is no doubt that for the purpose of deciding whether the proceeding should be quashed this Court would ordinarily take into account the allegations made in the petition of complaint itself. If the allegations made in the complaint petition are not sufficient to make out any offence, then in that case obviously a prosecution does not lie, and this Court should direct that the proceedings should be quashed. But this Court can also take notice of certain admitted facts which emerge clearly from the affidavits filed by the parties, and if those facts taken along with the allegations in the complaint petition do not constitute an offence, then the prosecution of the petitioners would be a mere wild goose chase, and it would be useless to waste public time and money over such a prosecution especially when the complainant does not represent a private individual but another public body. I have quoted in full the publication in question. The publication quite clearly shows that the Government stockist of rice with some ulterior motive is making delay in distribution of the rice in stock. It also purports to cast an aspersion against the local officers of the price control department, and seems to suggest that the stockist in question acting in collusion with the officers of the control department is delaying the distribution of the food grains. *Prima facie*, therefore, the publication in question is an imputation concerning the Central Co-operative Bank of Begusarai which is the stockist and the local officers of the price control department, and it is clear that the imputation is calculated to harm the reputation of these persons. This, in my opinion, is sufficient to constitute defamation within the meaning of S. 499 of the Act. Even an imputation against a company or an association or collection of persons as such does amount to defamation. Therefore, the mere fact that the reputation of the Bank is sought to be affected by the publication does not take it away from the mischief of a defamatory publication. I am saying all this without any prejudice to whatever may happen at the trial of any one of the other accused who are not parties to this application. For the petitioners it has been very strongly argued that a further fact which requires to be proved in an offence under S. 500 or 501 is that the accused should know or have reason to believe that such an imputation will harm the

reputation of the person concerned. It is urged that in the complaint petition itself there is nothing to indicate that these petitioners had knowledge or reason to believe that the imputation will harm the reputation of the Bank or that of the price control authorities. In my opinion, this knowledge has to be gathered from the contents of the publication itself. The publication is in the vernacular language, and it has not been contended, nor could it be contended that these petitioners, who are the editors of this daily journal in which the publication in question appeared, did not know the language of the publication. Therefore, it must be assumed that they had knowledge that the publication was defamatory when per se on a mere perusal of the news, it would appear that the tendency of the publication was to harm the reputation of the persons concerned. Where the matter published is per se defamatory, the only thing, in my opinion, that the prosecution is called upon to prove in the first instance is the fact of the publication itself. When the tenor of the document shows that the publication tends to harm the reputation of any person, a Court would be justified in gathering from the terms of the matter itself that the publisher intended to harm or knew or had reason to believe that such imputation would harm his reputation. The position may have been different if there was anything to show that the publication was made at a time when the petitioners were absent and somebody else was put in charge of the journal concerned, and that, therefore, these petitioners could not be attributed any knowledge of the contents of the publication. There is, however, no such case here, and in the circumstances the only possible inference is that the publication was made with their knowledge, and that the document being per se defamatory, they would be deemed to have known or had reason to believe that the imputations contained in the publication tended to harm the reputation of the parties against whom they have been made. This, however, does not conclude the matter.

[6] The contention of the learned counsel for the petitioners is that under S. 501, the onus is upon the prosecution to establish not only that the matter is defamatory and that the publishers had knowledge thereof, but that it must be further proved by the prosecution that the publication did not come within any one of the exceptions to S. 499 of the Act, and in particular reliance is placed upon Exceptions 1, 2, 3 and 9 to S. 499. Exceptions 2 and 3 which appear to me to be more relevant are as follows:

> "It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions or respecting his character, so far as his character appears in that conduct, and no further."
>
> "It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character so far as his character appears in that conduct, and no further."

Whether the Government stockist is a public servant may be a moot question, but there seems no doubt that the third exception may be more pertinent in that it at least answers the term "any person" as used in that exception. The opinion is in respect of conduct of a person touching a public question and respecting his character so far as it appears from that conduct. The matter undoubtedly does refer to a public question and does affect that conduct of the persons concerned in regard to that public question. The only question then is about the element of good faith. The learned counsel suggests that it must be proved by prosecution that there was want of good faith. As at present advised I do not feel inclined to accept this contention of the petitioners. Ordinarily, if a certain offence comes under the definition of the offence as provided in the Code it would be for the accused to establish that his conduct came within any one of the exceptions to that section of the Code and not for the prosecution to prove the contrary. But I think, the point loses its importance in view of the admitted facts which have emerged from the affidavits. In a supplementary affidavit filed on behalf of the petitioners in reply to the counter affidavit references have been made to the contents of certain letters which passed between the Editor of the 'Navarastra', on the one hand, and the then Sub-divisional Magistrate of Begusarai who was the President of the Central Co-operative Bank of Begusarai on the other. It must be observed that the petitioners ought to have made these letters a part of the original affidavit when they filed this application for quashing or transfer, and they not having done so according to the normal rules of procedure, they could not be allowed to refer to additional facts in their supplementary affidavit which was only in reply to the counter-affidavit filed on behalf of the opposite party. The opposite party, however, did not throw any challenge to these facts in reply. The original letters have been produced before this Court, and since my attention has been drawn to these materials which, as I have already said, have not been assailed by the opposite party, I cannot ignore them in considering whether it would be expedient to proceed with the trial in view of the facts disclosed by them. The letters indicate that as soon as the Sub-divisional Magistrate made a protest to the petitioners in regard to the falsity of the matters contained in the offending publication; they observed that they did make the publication in ordinary course of journalism in order to throw light on facts especially when they concerned the interest of the public. They also observed that if the news in question was inaccurate, they would be glad to publish a contradiction, and they also stated that if the publication had injured the prestige of the Subdivisional Magistrate or that of Government, they apologized for the same. This shows that these petitioners did not act in any bad faith, but they thought that they were making the publication of the news for the good of the public, and they placed reliance upon the local correspondent of the paper. Indeed in one of the letters to the Chief Editor the learned Subdivisional Magistrate himself say "We may not blame you and we appreciate the spirit in which you have written the letter". The Subdivisional Magistrate, however, insisted that the local correspondent of the paper who had deliberately sent those false news for publication should be prosecuted, and wanted that the original correspondence should be produced by the petitioners before him; and probably because these petitioners failed to comply with this request of the learned Sub-divisional Magistrate, the Magistrate thought that the petitioners also should be joined as accused along with the correspondent; otherwise these petitioners should have faired as witnesses against the correspondent. Whatever the other compelling factor may be for impleading these petitioners as accused in the case, there is no doubt from the letters that even the Subdivisional Magistrate thought that these petitioners were not to blame in the matter.

[7] Mr. Baldeo Prasad Singh for the opposite party very vehemently contends that these opinions expressed by the Sub divisional Magistrate are in no way binding upon the complainant who is the manager of the Central Co-operative Bank. It must be borne in mind that admittedly the Sub-divisional Magistrate is also the President of the Board of Directors and presumably the prosecution could not have been launched without his knowledge or approval. In fact the learned Magistrate in his explanation himself admits that before filing the complaint the matter had been referred to the Board of Directors. Therefore, the facts disclosed in the letters cannot be said to be irrelevant for the purposes of this prosecution. A newspaper editor has a public duty to ventilate abuses, and if an official is remiss in the discharge of his duties, a newspaper would be absolutely within its rights in publishing facts even derogatory to such official. But it must be said at the same time that the editor or publishers of the newspaper must get hold of probable facts. They should be watchful not to publish defamatory attacks upon individuals unless they have taken reasonable pains to ascertain that there are good grounds for believing the information sent to them to be true; in other words, they must act with due care and attention. But in judging the conduct of a newspaper editor a Court of law cannot weigh the materials too finely in the balance, and has to excuse a little exaggeration here or a small innuendo there. Newspapers are like the proverbial watchdogs of national interest and public welfare. They may sometimes have to bark even on false alarm but the alarm must be there. The simile is not very felicitous but is at any rate quite expressive. In this case there does not appear to be any reason why the publishers should not have relied upon the correspondent concerned. This publication is said to have fairly a large circulation in the outlying parts of the province, and those responsible for it must have chosen their correspondents with care. The larger the circulation of the paper, the greater undoubtedly is the responsibility upon the shoulders of the publishers to see that defamatory statements which are incorrect do not find place in the paper, because the effect is likely to be more mischievous. But in the circumstances disclosed on the admitted materials in this case, there is nothing to indicate that these petitioners have not acted with due care and attention. Therefore, even if the publication was defamatory, there was no want of good faith on the part of these petitioners. They in fact immediately tendered an apology when they came to know of the publication being inaccurate or false and were prepared to publish any contradiction that the authorities liked to send. On these materials, in my opinion, it would be useless to pursue these petitioners any further as they might well claim the benefit of third exception to S. 499 of the Code. On these grounds, I allow the application of these petitioners and direct that the proceedings against them should be quashed.

[8] It is unnecessary for me to indicate that the opinion which I have expressed above as to good faith on the part of these petitioners does not in any manner affect the trial of the local correspondent who is also an accused in the case. It may be found that he had no justification for sending the news which may be held to be false and mischievous and done with some ulterior purpose. For the opposite party it has been contended, and indeed this was the main consideration as the letters indicate for the petitioners being impleaded as accused, that the petitioners failed to assist the authorities by refusing to produce the original correspondence

leading to the publication in question. The document undoubtedly would be an important piece of evidence in the trial of the local correspondent. The petitioners' counsel assures me that there is no reason to think that the petitioners would not comply with the orders of the Court made in course of the trial of any accused. The petitioners are editors of an important journal, and it is a part of their public duty to co-operate in the administration of justice and to see that justice is done. They cannot, therefore, withhold from the Court any relevant material that may be called for from them or even refuse to give evidence if required to do so. Even if they do, they can be compelled to obey the orders of the Court under due processes of law.

[9] In view of what I have said above, it is unnecessary to deal at length with the grounds on which the application for transfer has been pressed before me. The case has been transferred for disposal to a Munsif Magistrate of Begusarai. The allegations which have been made are all directed against the then Sub divisional Magistrate. It is true he went to the length of cancelling or forfeiting the bail bond of those petitioners on account of their failure to attend Court on a day when the proceedings had been already stayed by this Court. The petitioners may have been ill-advised in not being present in Court on the date in question which in terms of the bail bond they were bound to do, and their failure to appear may have annoyed the learned Magistrate yet I do not see any sufficient reason why the learned Magistrate should have gone to the length of forfeiting the bail bond of these petitioners. The learned Magistrate should have realised that there was some justification for the absence of these petitioners, because they were given to understand that the proceedings having been stayed by this Court, it was unnecessary for them to appear on the date fixed. This may be a wrong advice, but they acted upon this advice, and they are persons who are carrying on important public duties as Editors of a daily journal. Therefore, the annoyance on the part of the learned Magistrate in forfeiting their bail bond may have raised a genuine apprehension in the mind of these petitioners to move for transfer. But the case is now pending before the Munsif Magistrate and the Sub-divisional Magistrate himself has been transferred to Patna. The mere fact that the local correspondent who is also an accused in the case has instituted a suit against that Sub-divisional Magistrate for some reason of his own connected with this prosecution does not afford any good ground for transfer. There is no reason to believe that the learned munsif Magistrate who is now the trying Magistrate will be in any manner influenced by extra-judicial considerations. Nor does the ground of convenience on which the petition has been pressed on behalf of the petitioners appeal to me. It may be that these petitioners or rather four of the accused are residing in Patna and carrying on business here. But so far as the witnesses are concerned they would be witnesses largely from Begusarai. The Bank, as stated in its counter affidavit, has to carry on the sales according to certain procedure and supply rice to a particular section under certain permits. These persons will have to be examined and also their books of account produced. Under these circumstances, even the balance of convenience leans in favour of the trial being held at Begusarai. In my opinion, therefore, the prayer for transfer is without merit.

[10] I have held that the proceedings against these petitioners should be quashed and direct accordingly. The rule is made absolute.

V.S.B. *Revision allowed.*

A. I. R. (37) 1950 Patna 549 *[C. N. 145.]*

DAS J.

Nur Dewan and others—Petitioners v. *The State.*

Criminal Revn. No. 770 of 1950, D/- 9th August 1950, from order of S. J., Motihari, D/ 9th May 1950.

(a) Criminal P. C. (1898), S. 162— Failure to examine Police Officer.

If the police Sub-Inspector recording the statement of the prosecution witnesses is not examined by the prosecution the statements made by the witnesses during investigation and put to them in cross-examination cannot be proved. [Para 2]

Annotation: Cr. P. C., S. 162, N. 10.

(b) Criminal P. C. (1898), Ss. 162, 537—Non-compliance with S. 162.

The breach of the proceedings of S. 162 is a mere irregularity. [Para 2]

Annotation: Criminal P. C., S. 162, N. 20a; S. 537, N. 15.

S. Basiruddin and S. S. Asghar Hussain—for Petitioners.

J. C. Sanyal—for the State.

Order.—The five petitioners have been convicted of the offence under S. 147, Penal Code, and sentenced to rigorous imprisonment for three months each. In view of the arguments advanced before me on behalf of the petitioners, it is not necessary to state the facts in detail. It appears that over the demolishing of a cattle trough in a sahan near the houses of the parties, there was a quarrel, and in the course of that quarrel, some persons on the side of the petitioners and the informant himself were injured. There were two counter cases. The case in which the petitioners were accused resulted in a conviction, and the case in which the informant was an accused, resulted in a discharge.

[2] Learned counsel for the petitioners has urged two points before me. Firstly, it is contended that there was a breach of the provisions of S. 162, Criminal P. C. It appears that the Sub-Inspector of Police, who recorded the statement of some of the prosecution witnesses, was not examined by the prosecution on the ground that he had been gained over. The result of such non-examination was that the earlier statements made by the prosecution witnesses during investigation and put to them in cross-examination could not be proved. The learned Judge, in appeal, however, considered those statements, gave effect to them and in so far as two of the witnesses were concerned, did not accept their evidence in view of their earlier statements. In view of the observations made by their Lordships of the Judicial Committee in *P. Kottaya v. Emperor*, A. I. R. (34) 1947 P. C. 67: (48 Cr. L. J. 533), the breach of the provisions of S. 162, Criminal P. C., was a mere irregularity. That irregularity has caused no prejudice, inasmuch as the learned Judge, in appeal, considered the earlier statements made by the prosecution witnesses during investigation, and gave effect to such discrepancies and inconsistencies as were disclosed by the questions put to the prosecution witnesses in cross-examination.

[3] The second point which has been urged, is about the sentence. It is clear that both parties indulged in the assault which took place, and having regard to all the circumstances of the case, I do not think that a sentence of imprisonment is called for in this case. I would, accordingly, reduce the sentence to a fine of Rs. 75 each, or in default, rigorous imprisonment for two months each. Subject to the reduction of the sentence mentioned above, the application is dismissed. Out of the fines, if realised a sum of Rs. 25 will be paid to Dhuman Mian, the injured person, as compensation.

D.H. *Application dismissed.*

A. I. R. (37) 1950 Patna 550 *[C. N. 146.]*

JHA C. J. AND REUBEN J.

G. L. Biswas and others—Petitioners v. *The State.*

Criminal Misc. Nos. 342 to 345 and 360 of 1950, D/- 8-8 1950.

(a) Criminal P.C. (1898), S. 208—Magistrate acting under S. 347—Proceeding under Ch. 21 converted into one under Ch. 18—Right of accused to cross-examine prosecution witnesses before charge.

Where it appears to the Magistrate at any stage of the proceeding under Ch. 21 that the case is one which ought to be tried by the Court of Sessions or High Court and if he is empowered to commit for trial, he has under S. 347 to commit the accused under the provisions contained in Ch. 18. Therefore even if an opportunity is given to some of the accused to cross-examine the witnesses under S. 252 of Ch. 21 before the framing of the charge, the rest of the accused cannot be deprived of their right to cross-examine the witnesses if the procedure of Ch. 18 is adopted. The framing of the charge under S. 210 by the Magistrate without complying with the provision of S. 208 (2) is illegal. **[Para 11]**

Annotation: Criminal P. C., S. 208, N. 10,

(b) Criminal P. C. (1898), Ss. 252, 256—Trial under Ch. 21—Right of accused to cross-examine before and after framing of charge.

In a case tried under Ch. 21, an accused is given an opportunity to cross-examine the prosecution witnesses under S. 252 even though the charge may not be framed. This is not a statutory right but is done by virtue of a well established practice. But even where the accused has cross-examined the witnesses before the charge, it is not open to the Magistrate to disallow cross-examination after the charge on the ground that the provisions of S. 256 have been substantially complied with by the cross-examination before the charge. The reason is that an absolute right of cross-examination by the accused is expressly given only by S. 256 after the charge is framed. [Para 7]

Annotation: Criminal P C., S. 252 N. 10; S. 256 N. 6.

(c) Criminal P. C. (1898), Ss. 208 (2), 252 and 256—Right of accused to cross-examine prosecution witnesses under these sections.

Reading the relevant sections of Chapters XVIII and XXI in juxtaposition it is clear that S. 252 does not give the accused a statutory right of cross examination before charge, which in practice he is given; whereas S. 208 (2) expressly gives an absolute right to the accused to cross-examine the witnesses for the prosecution before the charge and the Magistrate has no power to refuse to the accused the right of cross examination if the latter insists on his right to cross-examine the witnesses for the prosecution Section 256 gives a statutory right to the accused to cross-examine the witnesses for the prosecution after the charge is framed. There is no corresponding right in the accused if the enquiry is under Ch. XVIII. [Para 10]

Annotation : Criminal P. C., S. 208 N. 10; S. 252 N. 10; S. 256 N. 6.

(d) Criminal P. C. (1898), S. 347—"Provisions hereinbefore contained" refer to Ch. 18 of the Code. [Para 8]

Annotation: Criminal P. C., S. 347 N. 5.

(e) Prevention of Corruption Act (1947), S. 5 (2) Offence under—Court, triable by—Criminal P. C. (1898), S. 29.

An offence charged under S. 5 (2) is exclusively triable by the Court of Session under the Provision of S. 29 read with Sch. II, Criminal P. C. [Para 5]

(*Note*:—The purport and effect of S. 5 on the Penal Code is explained in para 16 of the judgment).

Annotation: Criminal P. C., S. 29 N. 1.

J. N. Varma and A. K. Mitra (in Nos. 342 and 344). A. K Dutt (In No. 343), Nageshwar Pd., R. P. Jaruhar, Dhyanchand and B. A. Simaiyar (in No. 345) and Khalil Ahmad and M. L. Sen (in No. 360)—for Petitioners.

S. C. Chakravarty for Government Advocate —for the State.

Judgment.—An important question of law is involved in these five petitions and so they have been referred to a Division Bench. As the point of law in all these cases is common and arises out of the facts of the same case, this judgment will govern them all.

[2] The petitioners moved this Court for the transfer of the case from the Court of Mr. S. N. Prasad, Subordinate Judge of Patna, who is invested with the powers of a Magistrate of the first class (hereinafter to be referred as the Magistrate) to the Court of some other Magistrate of competent jurisdiction. In the alternative there is a prayer for a direction that the petitioners may be allowed an opportunity to cross-examine the prosecution witnesses according to the provisions of S. 208, Criminal P. C. It may be stated that the petitioners have withdrawn their applications for the transfer of the case and the only point pressed before us is that the learned Magistrate is wrong in law in rejecting the prayer of the petitioners to cross-examine the prosecution witnesses under S. 208 of the Code. In order to appreciate the argument the relevant facts may be shortly stated as follows.

[3] Two separate investigations were started by the Provincial C. I. D. and the Delhi Special Police Establishment in connection with an illegal disposal of distillary molasses. Several persons, including one Ramji Lal Marwari and his four servants or agents, are alleged to have taken part in the disposal thereof. The Provincial Police submitted a charge sheet on 4th November 1948, against some of the accused. Cognizance of the case was taken by the Subdivisional Magistrate, Samastipur. While the case was pending before him, an application was made to this Court for the transfer of the case to a competent Court of sum other district. This Court by its order dated 12th January 1949, transferred the case to the Court of the Subordinate Judge Magistrate, Patna and ultimately the case came up for trial in the Court of Mr. S. N. Prasad. While the case was pending in his Court, the Central Police submitted a charge-sheet on 25th May 1949, against several persons including some of those against whom the Provincial Police had submitted the charge sheet. It may be stated here that the Central Police submitted the charge sheet under various sections of Penal Code as well as under S. 5, Prevention of Corruption Act, 1947 (Act II [2] of 1947) while the Provincial Police had submitted the chargesheet only under different sections of the Penal Code. On 25th May 1949, the Public Prosecutor made an application to the Court for the withdrawal of the case against Ramji Lal Marwari and four other persons who are said to be his servants or agents, on the ground (as it appears from the order sheet) that he wanted to examine them as prosecution witnesses. The learned Magistrate gave his consent as required by S. 494, Criminal P. C. and by his order dated 25th May 1949, allowed the prayer for withdrawal and discharged Ramji Lal Marwari and his four servants.

[4] The trial commenced on 23rd June 1949, and the procedure adopted, at the instance of the Public Prosecutor, was that of warrant cases as laid down in Chap. XXI, Criminal P. C. In all, 99 prosecution witnesses were examined including Ramji Lal Marwari and his four servants out of whom about 38 prosecution witnesses were cross examined by some of the accused at some length under S. 252 of the Code. Some of the accused, however, did not cross-examine any of the prosecution witnesses. The prosecution closed its case on 18th March 1950. After hearing arguments on the evidence for seven days the Court framed charges on 11th May 1950, under several sections of the Penal Code and also under S. 5, sub-s. (2) of Act II [2] of 1947, against some of the accused who are petitioners before us.

[5] It may be stated that the last mentioned charge is exclusively triable by the Court of Session under the provisions of S. 29 read with Sch. II, Criminal P. C Apparently, the Magistrate did not realise this and arranged that cross-examination of the prosecution witnesses under S. 256, Criminal P C., should commence on 25th May 1950. On that date, however, a petition was filed by the Public Prosecutor to commit the case to the Court of Session. The petitioners protested against such a course and the Public Prosecutor was directed by the Magistrate to consult the State and Central Government and intimate by 15th June 1950 "if the case to proceed as a warrant one or it should be tried by Sessions." This is a surprising order. The Magistrate having held that there was sufficient evidence to justify a charge under S. 5 (2), should have been prepared to proceed on that basis under the provisions of Chap. 18, Criminal P. C., without bothering about the wishes of the State and Central Government. On 15th June 1950, the Public Prosecutor said "that the case should be committed to Sessions" (we are quoting from the Magistrate's order sheet) and the Magistrate decided to proceed under Chap. 18 of the Code from the stage of S. 210. The petitioners wanted to cross-examine the prosecution witnesses on the ground that they have the statutory right under S. 208 of the Code to cross-examine the prosecution witnesses before the commitment. The learned Magistrate refused to allow the accused to cross-examine the prosecution witnesses as most of them had been cross-examined at length before the charges in the trial under Chap. 21. He took the view that the cross-examination of the prosecution witnesses by some of the accused before the charge in the trial under Chap. 21, is substantial com-

pliance with the requirement of S. 208 (2) of the Code, and in this view of the matter the prayer for the further cross-examination was rejected.

[6] It has been argued before us that the provisions of S. 208, cl. (2) of the Code are mandatory and, therefore, the Magistrate has no power to deprive the accused of their statutory right to cross-examine the prosecution witnesses even though a few of them cross-examined some prosecution witnesses in the trial of the case under Chap. 21 before the charge. The contention of the petitioners is right, and in our opinion, a survey of the provisions of some of the relevant chapters of the Code of Criminal Procedure clearly supports it.

[7] Chapter 18, in which Ss. 206 to 220 occur, relates to the procedure of an enquiry into cases triable by the Court of Session or High Court. Similarly, Chap. 21, in which Ss. 251 to 259 occur, relates to the procedure of the trial of warrant cases by the Magistrates. Chapter 24, in which Ss. 337 to 352 occur, contains general provisions as to enquiries and trials. In the present case, the initial proceedings before the learned Magistrate were conducted under Chap. 21, as a warrant case. In a trial of a warrant case when the accused appears the Magistrate has to proceed under S. 252 to hear the complainant (if any) and "take all such evidence as may be produced in support of the prosecution." If upon taking all the evidence referred to in S. 252 of the Code, the Magistrate finds that no case against the accused has been made out he shall discharge the accused under S. 253. If however, after such evidence the Magistrate is of the opinion that there is ground for presuming that the accused has committed an offence triable under Chap. 21, which he is competent to try, he shall frame in writing a charge against the accused. After the charge has been framed, the accused is required under S. 256 to state, at the commencement of the next hearing of the case or forthwith, whether he wishes to cross-examine any of the witnesses, and, if so, which of the witnesses of the prosecution whose evidence has been taken. Under S. 257, the accused, after he has entered upon his defence, has a right to apply to the Magistrate to issue processes for the attendance of any witness for the purpose of the examination or cross-examination. But if the accused has cross-examined, or had an opportunity of cross-examining any witness after the charge is framed, the attendance of such witness shall not be compelled unless the Magistrate is satisfied that it is necessary for the purposes of justice. Under S. 258, if the Magistrate finds the accused not guilty, he shall record an order of acquittal. Thus, an examination of the provisions of these different sections of Chap. 21 of the Code clearly shows that an absolute right of cross-examination by the accused is expressly given only by S. 256, after the charge is framed. Before the framing of the charge, there is no express statutory provision for the cross-examination of any of the prosecution witnesses. The phrase" take all such evidence as may be produced in support of the prosecution" occurring in S. 252 of the Code has been interpreted in several cases to mean that the Magistrate should give the accused an opportunity to cross-examine the prosecution witnesses, if he should so desire, even though the charge may not be framed, a procedure that is well established in this State. But that is not the same thing as saying that the Magistrate must give the accused an opportunity to cross-examine the prosecution witnesses before the charge (*Ashirbad* v. *Maju*, 8 C. W. N. 838; and *Emperor* v. *C. A. Mathews*, A. I. R. (16) 1929 Cal 822 : (31 Cr. L. J. 809)). The Magistrate has no power to prohibit cross-examination of the witnesses for the prosecution after the charge has been framed; if he does so, there will be a clear violation of the mandatory provision of S. 256 of the Code. Even if the accused has cross-examined the witnesses before the charge, it is not open to the Magistrate to disallow cross-examination after the charge on the ground that the provisions of S. 256 have been substantially complied with by cross-examination before the charge. It may be observed that S. 256 does not prohibit cross-examination before a charge, and the principle upon which the accused is given an opportunity to cross-examine the prosecution witnesses before the charge is framed seems to be that the accused should be discharged and not unnecessarily harassed by a criminal prosecution if it can be shown by cross-examination before the charge that the materials produced before the Court are not sufficient to warrant a conviction.

• [8] But if it appears to the Magistrate at any stage of the proceeding under Chap. 21 that the case is one which ought to be tried by the Court of Session or High Court and if he is empowered to commit for trial, he shall, under S. 347 commit the accused "under the provisions hereinbefore contained." The phrase "under the provisions hereinbefore contained" occurring in S. 347 must be referable to Chap. 18 of the Code, which, as we have already stated, lays down the provisions for conducting an enquiry into cases triable by the Court of Session or High Court. Section 347, as it stood before the amendment of 1923, reads as follows :

"If in any inquiry before a Magistrate, or in any trial before a Magistrate, before signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or High Court and if he is empowered to commit for trial, he shall stop further proceedings and commit the accused under the provisions hereinbefore contained."

The words "stop further proceedings and" have been omitted by S. 91, Criminal Procedure Code Amendment Act, 1923 (Act XVIII [18] of 1923). The intention of S. 347 as originally enacted was that the subsequent enquiry should be in accordance with Chap. 18. Some confusion was caused by the words "stop further proceedings and". Hence they have been omitted.

[9] We have already stated that under S. 347 the Magistrate has to follow the provisions of Chap. 18 of the Code before passing an order of commitment to the Court of Session. A reference to the different sections occurring in Chap. 18 shows that the main provisions of the Chapter are mandatory. Section 207 of the Code says that

"the following procedure shall be adapted in inquiries before Magistrates where the case is triable exclusively by a Court of Session or High Court, or, *in the opinion of the Magistrate, ought to be tried by such Court.*"

The words which we have been underlined (here italicized) seem to be a clear reference to S. 347. Then follows S. 208. It is relevant to read here S. 208 (2) which runs thus:

"The accused shall be at liberty to cross-examine the witnesses for the prosecution, and in such a case the prosecutor may re-examine them."

Section 209 empowers a Magistrate to discharge the accused if he considers the charge to be groundless. If, however, he is satisfied that there are sufficient grounds for committing the accused for trial, he shall frame a charge under his hand declaring with what offence the accused is charged. Therefore he can frame the charge only after the provisions of S. 208 of the Code are complied with. That is to say, it is only after the accused has been given an opportunity to cross-examine the witnesses for the prosecution that the occasion for his discharge or the framing of the charge against him arises. Section 211 of the Code provides that

"the accused shall be required at once to give in orally or in writing a list of the persons whom he wishes to be summoned to give evidence on his trial."

Section 212 gives discretion to the Magistrate to summon and examine any witness named in any list given to him under S. 211. After the framing of the charge and compliance with the mandatory provisions of S. 211, the Magistrate under S. 213 may make an order committing the accused for trial by the High Court or the Court of Session as the case may be. But if the Magistrate after hearing the witnesses for the defence is satisfied that there are not sufficient grounds for committing the accused, he may cancel the charge and discharge the accused. This shows how anxious the Legislature was that the accused should not be unnecessarily committed to the Court of Session. Thus, it appears from the examination of these various sections of Chap. 18 that the accused has an absolute statutory right to cross-examine witnesses for the prosecution before the charge is framed. After the framing of the charge, the Magistrate may, in his discretion summon and examine any witness named in the list given by the accused under S. 211 and if after hearing the witnesses for the defence he is satisfied that there are not sufficient grounds for committing the accused he may cancel the charge and discharge the accused.

[10] Reading the relevant sections of Chaps. 18 and 21 in juxta-position it is clear that S. 252 does not give the accused a statutory right, and the opportunity of cross-examination before charge, which in practice he is given, is given as a matter of interpretation and on the application of the principles that the accused must get every reasonable opportunity of establishing his innocence whereas S. 208 expressly gives an absolute right to the accused to cross-examine the witnesses for the prosecution before the charge and the Magistrate has no power to refuse to the accused the right of cross-examination if the latter insists on his right to cross-examine the witnesses for the prosecution. Section 256 gives a statutory right to the accused to cross-examine the witnesses for the prosecution after the charge is framed. There is no corresponding right in the accused if the enquiry is under Chap. 18; this makes it essential that S. 208 (2) must be strictly complied with. Merely because the accused in the initial proceeding has been permitted to cross-examine the witnesses before the charge it cannot be said that he has exercised his right under S. 208 (2). Therefore, in our opinion, that would not be a ground for refusing the right of cross-examination by the accused under the mandatory provision of S. 208.

[11] The distinction drawn by us is not a mere technical one. The objects of cross-examination before charge in a trial under Chap. 21 and in an enquiry under Chap. 18 are not necessarily the same, and the results of not availing oneself of the opportunity in full or at all are different. In a trial under Chap. 21, cross-examination before charge may conceivably lead to a discharge, but the charge will immediately be followed by a full opportunity of cross examination in the same Court and may lead to acquittal, which is a final and conclusive order. Hence, the accused may prefer to wait till the charge if any is framed, and to

confine his immediate cross-examination to eliciting statements from witnesses which will prevent the later development of the prosecution story, or to incidental matters, e. g. following up an admission made by a witness, before he can be got at by the other side. On the contrary, the opportunity of cross-examination not fully availed of in a proceeding under Chap. 18 will not recur again in that Court, and may mean a costly trial in another Court starting with a repetition of all that each witness has said in the Court of the committing Magistrate. If, therefore, an accused person feels that he has a reasonable chance of a discharge by the committing Magistrate, he is more likely to exploit his opportunity of cross-examination under S. 208 (2) than he would exploit, in a trial under Chap. 21, the chance of cross-examination before charge which the accepted practice in the State gives him. In these circumstances, it cannot be said, merely because the accused has cross-examined some or all of the witnesses before the charge in the proceeding under Chap. 21 that there has been substantial compliance with the provisions of S. 208, sub-s. (2). The question of substantial compliance does not arise. The cross-examination under S 252 is a matter of interpretation and practice, and the accused retains the right of full cross-examination after the charge is framed. But under S. 208 he has statutory right to cross-examine the witnesses for the prosecution at length. This express statutory provision is in recognition of the inherent right of a citizen not to be harassed in the Court of Session if he can satisfy the Court by cross examination that no case has been made out against him and that he should be discharged. It may be observed that the deposition of a witness if not cross-examined by the accused under S. 208 of the Code may be used against him under the proviso to S. 33 Evidence Act, if the other conditions laid down in the section are fulfilled but it has been held that such a deposition is not admissible under S. 33, Evidence Act, if the accused did not cross-examine the prosecution witnesses under S. 252 of the Code: vide *Emperor* v. *C. A. Mathews*, A. I. R. (16) 1929 Cal. 322 (31 Cr. L. J. 809). We are, therefore, of the opinion that, even if an opportunity was given to the accused to cross-examine the witnesses under S. 252 before the framing of the charge, he cannot be deprived of his right to cross-examine the witnesses if the procedure of Chap 18 of the Code is adopted. The framing of the charge under S. 210 by the Magistrate without complying with the provision of S. 208 is illegal. He can frame the charge only after giving a full opportunity to the accused to cross-examine the witnesses for the prosecution, because before the framing of the charge the accused is entitled to an opportunity to satisfy the Magistrate by cross-examination that the case is one for discharge and not for commitment.

[12] King J. held in the case of *Ram Ghulam* v. *Emperor*, 53 ALL. 692: A. I. R. (18) 1931 ALL. 434 : (32 Cr. L. J. 849) that as soon as a Magistrate decides under S. 347 to commit an accused for trial in the Court of Session, the proceedings in the trial shall be deemed to have been held under Chap. 18. The facts of that case were peculiar and have no application to the case before us. There, the accused had been completely tried for an offence under S. 363, Penal Code; prosecution witnesses had been examined and cross-examined in full and all the witnesses whom the accused wished to produce had been examined and cross-examined, and then the Magistrate decided that it was a case under S 366, Penal Code, and committed it to the Court of Session. It is not necessary to consider here whether the decision of King J. was correct. It will suffice to say that his Lordship did not intend it to govern all cases that might arise. On the contrary, the following passage in his judgment would appear to be in accordance with the view we have expressed above:

> "Under S. 347, Criminal P. C., the Magistrate could commit the accused 'under the provisions hereinbefore contained' i. e., the provisions contained in Chap. 18. He need not start proceedings *de novo* but he must not deprive the accused of any right which he might have exercised under Chap. 18 if the case had been treated as inquiry under that chapter from the outset."

[13] The question as to the mandatory nature of the provisions of some of the sections of Chap. 18 subsequently came for consideration before a Full Bench of the Allahabad High Court in the case of *Emperor* v. *Asghar*, 58 ALL. 671: (A. I. R. (23) 1936 ALL. 134: 37 Cr. L. J. 337 F. B.) in which Bajpai J. is reported to have observed at pages 675-76 of the report as follows:

> "A Magistrate is not empowered to pass an order of commitment without following the provisions contained in Chap 18 In order to justify the action of the Magistrate in the present case the word 'commit' in S. 347 should be confined to the mere writing and signing of a commitment order, ignoring completely the fact that the committal is to be made 'under the provisions' (the word is in the plural) 'herein before contained'. The committing order can be made only under S. 213 of the Code, a section which occurs in Chap. XVIII, and it is therefore clear that when acting under S 347 the Magistrate has to do something referable to Chap. 18, and when the legislature speaks of 'provisions' it is obvious to my mind that the entire procedure laid down in Chap. 18 has got to be followed."

Again at page 678, the same learned Judge observed:

> "I should not be deemed to hold that when a Magistrate proceeds to commit a case under S. 347 to the

> Court of Session while conducting a trial or holding any inquiry other than one under Chap. 18, proceedings under Chap. 18 are to be commenced *de novo*. If the Magistrate has already completed the evidence of the complainant and his witnesses, it is not necessary for him, to take that evidence afresh; all that is necessary is that in respect of the remaining proceedings the provisions of Chap. 18 should be followed and he should not deprive the accused of any right which he might have exercised under Chap. 18 if the case had been treated as an inquiry under that chapter from the outset I am in complete agreement on this point with the view expressed in the case of *Empress of India* v. *Ilahi Baksh*, 2 All. 910 and the case of *Emperor* v. *Ramghulam*, 53 All. 692: (A. I. R. (18) 1931 All. 434 : 32 Cr. L. J. 849).”

[14] Therefore, so far as the case of *Emperor* v. *Ram Ghulam*, 53 ALL. 692 : (A. I. R (18) 1931 ALL. 434: (32 Cr. L. J. 849) is concerned, the learned Judge has accepted the correctness only of the proposition laid down in the passage cited by us from the judgment of King J. in *Damodaram* v. *Emperor*, 52 Mad 995: (A.I.R. (16) 1929 Mad. 862 : 31 Cr. L. J 273). It has been held that a commitment under S. 347, Criminal P. C., can be made only after compliance with the provisions of Chap XVIII of the Code and it was pointed out that the words "commit the case under the provisions hereinbefore contained" used in S. 347 must relate to those provisions in Chap. XVIII of the Code which define the procedure to be adopted in inquiries into cases triable by the Court of Session. Curgenven J. observed in this case that the legislature has laid down provisions for procedure before commitment, some of which were obviously intended, and rightly intended for the benefit of accused persons. The decision was followed in *Lakshminarayana* v. *Suryanarayana*, A. I. R. (19) 1932 Mad. 502 : (33 Cr. L. J. 765). In *Jyostna Nath* v. *Emperor*, 51 Cal. 442 : (A.I.R (11) 1924 Cal. 780 : 26 Cr. L. J. 63), it was held :

> "When an application to cross-examine the prosecution witnesses, during an enquiry preliminary to commitment, is made before the charges are framed and before the Magistrate has decided to commit to the Court of Session, he is bound to allow such cross-examination. He has no discretion, in such a case, to disallow cross-examination under S. 347, Criminal P. C."

In *G. V. Raman* v. *Emperor*, 57 Cal. 44 : (A. I. R. (16) 1929 Cal. 593 : 30 Cr. L. J. 1107), it was pointed out that when a Magistrate follows the procedure of a warrant case with a view to try the case himself, and the accused exercises his right to reserve cross-examination till after charge, and if in the midst of the trial or immediately after finishing the evidence for the prosecution the Magistrate decides to commit the accused to the Sessions, he is not compelled under S. 347, Criminal P. C., to refuse to allow the accused to cross-examine the witnesses, and accused should not lose the right he had reserved before such decision of the Magistrate. The Bombay and the Lahore High Courts also seem to favour the same view. In *K. R. Bhat* v. *Emperor*, A. I. R. (18) 1931 Bom. 517 : (33 Cr. L. J 68), a Division Bench of the Bombay High Court held that if before the passing of an order of commitment the accused applies to the Magistrate for an opportunity to cross-examine prosecution witnesses and to examine the defence witnesses and the Magistrate declines to examine the witnesses on behalf of the accused or to allow cross-examination of the prosecution witnesses, the accused might approach the High Court for a direction to the Magistrate to follow the provisions of Chap. XVIII. In *Fazal* v. *Emperor*, I. L R. (1940) 21 Lah. 151 : (A. I. R. (27) 1940 Lah. 389 : 42 Cr. L. J. 29), the Lahore High Court has held that what is necessary is that when a Magistrate acts under S. 347, he should be careful not to prejudice the accused by depriving him of the opportunity provided by Ss. 208 and 212. Thus on a review of the different sections occurring in Chaps. XVIII and XXI of the Code, and the case law on the point, we are of the opinion that the Magistrate is wrong in framing the charges against the accused under S. 210 without giving them an opportunity to cross-examine the prosecution witnesses under the provisions of S. 208, cl. (2) of the Code.

[15] From what we have said above, it follows that the two charges under S. 5 (2) of Act II [2] of 1947 must be set aside. The Magistrate had no jurisdiction to frame these charges without complying with the provisions of S. 208, sub-s (2) of the Code. He must now comply with that section and then consider under Ss. 209 and 210 whether there are sufficient grounds for committing the accused persons to the Court of Session. Both these sections, we may mention, speak of the examination of the accused, "if necessary," to enable him to explain any circumstances appearing in evidence against him. A similar provision is to be found in Ss. 253 and 254 in Chap. XXI. This examination is to precede the framing of the charge In this connection we would also draw the attention of the learned Magistrate to S. 342 of the Code. The record does not show if the learned Magistrate applied his mind to this matter before the charges were framed.

[16] As it appears from the charges framed by the learned Magistrate that he is rather vague as to the meaning of S. 5 and the effect on the Penal Code of Act No. II [2] itself, we feel that it is necessary to say a few words on this subject. Act No. II [2], which is styled the Prevention of Corruption Act, 1947, is designed to make more effective the provisions for the prevention of bribery and corruption. Under

S. 161, Penal Code, it is an offence for a public servant to take a gratification other than legal remuneration in respect of an official act, and it is an offence under S. 165 for a public servant to obtain a valuable thing, without consideration, from a person concerned in a proceeding or business transacted by such public servant. It is not necessary for me (us?) to set out at length the elements which constitute these offences. Under the ordinary procedure both these offences are non-cognizable. By S. 3 of Act No. II [2], these offences are made cognizable, but it is provided that a police officer below the rank of Deputy Superintendent of Police shall not investigate any such offence without the order of a Magistrate of the first class or make any arrest, therefore, without a warrant. Section 4 of Act No. II [2] modifies the law of evidence with respect to trials for offences under these two sections of the Penal Code by providing for a presumption to be drawn against the accused if certain facts are established. Both these offences still remain offences under the Penal Code. Section 5 of the Act deals with an offence which it calls criminal misconduct in the discharge of duty. This offence is committed by a public servant

> "(a) if he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person, any gratification (other than leagal remuneration) as a motive or reward such as is mentioned in S. 161, Penal Code . . . .
>
> (d) if he, by corrupt or illegal means or by otherwise abusing his position as public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage."

We are omitting cls. (b) and (c), as the charges framed by the learned Magistrate seem to refer to cls. (a) and (d) only. We reproduce below one of the charges framed :

> "That you, between September 1947 and March 1948 being a public servant . . . directly accepted or agreed to accept from Ramji Lal and his servants a gratification other than legal remuneration as a motive for forbearing to do an official act, and by illegal and corrupt means or by otherwise abusing your position as a public servant obtained for yourself pecuniary advantage and thereby committed an offence punishable under S. 161, Penal Code, read with S. 5 (2) of Act II [2] of 1947 and within my cognizance."

[17] The first portion of this charge clearly is intended to reproduce cl. (a) of S. 5 (1) of Act No. II [2]. We do not understand how the word 'directly' has crept into the two charges instead of the word "habitually." There is considerable difference in the meaning of the two words, and the evidence necessary to establish that the accused did something "directly" will be entirely different from the evidence required to prove that they did it "habitually." If the Magistrate is really under the impression that the offence under cl. (a) requires proof not of "habitual" but of "direct" action by the accused persons, this charge may well have been framed on evidence which is insufficient to support a charge under cl. (a) of S. 5, sub-s. (1) of Act No. II [2]. It is further evident from the charge framed that the Magistrate regards the offence charged as one under S. 161, Penal Code. This is not correct. The reference to S. 161 in cl. (a) is merely to avoid repetition of the words which in S. 161, Penal Code, follow the words "motive" or "reward." That is to say, S. 161, Penal Code, is used merely for the purpose of defining the offence created by cl. (a). The offence so created is not an offence under S. 161 or under any other provision of the Indian Penal Code, it is an offence under Act No. II [2] and is made punishable by sub-s. (2) of S. 5 of the Act. Before we leave the subject of the charges, we may also observe that the charges are somewhat vague. This is particularly so in the portion of the charges referring to cl. (d) of sub-s. (1) of S. 5, which portion merely reproduces the words of cl. (d) without giving any particular whatever.

[18] Finally, it is to be considered what should happen to the other charges which have been framed by the learned Magistrate under the sections triable by him. It has been urged on behalf of the petitioners that these charges also should be cancelled. Different considerations apply, it is said, when a Magistrate frames charges in a case which he intends to try himself and when he frames charges in a case which he has decided should be committed to the Court of Session. In the former case, he is generally satisfied that the evidence is *prima facie* sufficient to support all the charges framed by him. In the latter case it may well happen that having framed a charge in respect of an offence triable exclusively by the Court of Session, he feels it proper to refrain from weighing the evidence on the minor charges and, therefore, frames charges for those offences also, although if he had to try the case himself, he might not have done so. The argument is not without substance, and in fairness to the accused persons and to the Magistrate himself, I think it would be proper to set aside those charges also. In doing this we express no opinion as to whether the charges were justified or not; there has been no occasion for us to go into the evidence in the case, and it would not be proper for us to express any opinion in the matter. The absence of comment by us on these charges in contrast with the comments we have made above on the charges under S. 5 (2) of Act No. II [2] must not be interpreted as implying an approval of them as properly drawn up. This was a matter which it is not necessary for us to consider and we have not done so. We discussed the charges

under S. 5 (2), because the Magistrate appeared to be under a misapprehension of the law as regards that section, and we wished to avoid the possibility that, owing to his misapprehension, he might frame charge under that section and commit the accused to the Court of Session, although the elements necessary for the offence charged might not be made out.

[19] It is unfortunate that, after a proceeding which has already lasted such a long time, it has been found necessary to reopen the cross-examination. It is unlikely, however, that the accused persons, who must already have been considerably harassed by the prolonged proceedings, will deliberately drag them out longer than is necessary. In fact, in the course of the argument, we were told by their lawyers that they would try to confine their cross-examination to not more than seventeen witnesses for the prosecution and would direct that cross-examination to the offences under S. 5 (2) of Act No. II [2].

[20] On the above grounds, we would allow these petitions, set aside the charges framed by the learned Magistrate and direct that the case proceed from the stage of S. 208 (2), Criminal P. C.

V.S.B. *Petitions allowed.*

A. I. R. (37) 1950 Patna 557 [*C. N. 147.*]

JHA C. J. AND REUBEN J.

Ram Ranbijaya Prasad Singh—Appellant v. The State of Bihar through Collector of Shahabad and others—Respondents.

A. F. O. D. No. 231 of 1945, D/- 7-8-1950, from decision of A. Sub. J., Arrah, D/- 16-5-1945.

(a) Civil P. C. (1908), Ss. 79, 80 —Government of India Act (1935), S. 179 — Suit against Province of Bihar filed in 1938 — Government impleaded as 'Secretary of State for India through Collector'— Validity of notice served on Collector.

Where in a suit instituted in September 1938 against the Province of Bihar on a cause of action arising previous to 1st April 1937, the Government was made party as 'Secretary of State in Council through the Collector of Shahabad' and the notice under S. 80, Civil P. C. was served on the Collector:

Held that (1) the notice could not be taken to be valid notice on the Province of Bihar under Ss. 79 and 80, Civil P. C., as adopted by the Adaptation Order, 1937; [Paras 6 8]

(2) that it was not a case of misdescription of the parties but of suing a wrong party: A. I. R. (12) 1925 Pat. 37, *Rel. on*; 46 C. W. N. 18, *Disting*; A. I. R. (12) 1925 Cal. 716 and A. I. R. (10) 1923 Bom. 452, *Ref.*; [Para 12]

(3) that as the notice informed the Collector that the suit was to be brought against the Secretary of State in Council, and it was possible for the plaintiff to sue either the Province or the Secretary of State, it could not be held that the relief to be claimed was sufficiently stated within the meaning of S. 80 of the Code: A. I. R. (36) 1949 Pat. 416, *Disting.* [Para 13]

Anno: Civil P. C., S. 79 N 8, S. 80 N 13.

(b) Bengal Cess Act (IX [9] of 1880), S. 93 – Jurisdiction of Collector—Mistake in valuation — Effect — Valuation cannot be challenged in civil Court.

The jurisdiction of the Collector is not affected because he makes a mistake in ascertaining the value, thus rendering the valuation invalid. The valuation made by the Collector is open to revision by the Commissioner or the Board of Revenue under S. 93 "and not otherwise". Where the proprietor fails to take action under this section for the correction of the mistake, he cannot challenge the valuation in the Civil Court.

Further, even supposing that the mistake affected the Collector's jurisdiction, the proprietor is precluded from bringing a civil suit on the principle that where the want of jurisdiction is not apparent on the face of the proceedings, but the absence of jurisdiction depends on a fact, in the knowledge of the party which he had an opportunity of bringing forward in the Court and he does not bring that fact forward but allows the Court to proceed with the judgment, he ought not to be permitted to impeach the jurisdiction of the Court in any collateral proceeding: A. I. R. (10) 1923 Pat. 322, *Rel. on.* [Paras 15, 16]

(c) Bengal Cess Act (IX [9] of 1880), S. 41 — Liability of proprietor to pay cess— Not dependent on assessment on tenure-holders.

Provided there is no defect in the roll affecting the proprietor's right to realise cess from the tenure-holder, the proprietor will ordinarily be entitled to realise cess from the tenure-holders in accordance with the valuation roll. There is nothing in the law, however, to make his own liability to pay cess to the Collector dependent upon his right to realise cess from the tenure-holders included in his estate. [Para 18]

(d) Bengal Cess Act (IX [9] of 1880), S. 93 — Powers of Collector —Classification of tenancies— Finality of Collector's valuation —Extent of.

The jurisdiction of the revenue authorities under the Cess Manual is to determine the valuation of the estates within the district and of the tenures and holdings included in those estates. There is only S. 26 under which the Collector's power goes beyond the determination of valuation. Subject to this limitation the Collector has no jurisdiction to determine finally the correct classification of the tenancies shown by him in the revaluation schedule or the particulars of the tenancies themselves. The finality to the valuation schedule given by S. 93 seems thus to be confined to the valuation only. [Para 23]

(e) Bengal Cess Act (IX [9] of 1880), Ss. 37, 41— Revaluation roll —Tenure omitted — Liability of it to be assessed to.

If a tenure has been omitted in revaluation, it escapes the liability for cess. Perhaps this advantage will not accrue to a cultivating raiyat, whose liability to cess appears under cl. (3) of S. 41 of the Act, to be independent of his inclusion in the valuation roll: A. I. R. (27) 1940 Pat. 180, *Foll.* [Para 24]

Mahabir Prasad and Kanhaiyajee — for Appellant.

Government Pleader and Kailash Roy, B. K. Sharma, Ishwarnandan Singh, Kamleshwari Prasad Sinha and Shreenath Singh — for Respondents.

Reuben J.—This appeal by the plaintiff is directed against a decree of the Additional Subordinate Judge, Arrah, dismissing Title Suit No. 27/3 of 1938-43.

[2] The appellant is the proprietor of three estates, Umarpur Diara, tauzi No. 1455, Sar-

wanpur, tauzi No. 14229, and Belsipah, tauzi No. 14230, borne on the revenue roll of the district of Shahabad. Since a long time there were disputes occurring between the Babus of Narhi, now represented by the defendants second party, and the proprietors of the Dumraon Raj, the predecessors-in-interest of the appellant. Finally, in 1907 an agreement was arrived at through the intervention of the local Government officers, by which the Narhi Babus agreed to pay Rs. 10,000, as rent to the Dumraon Raj as tenants of lands lying in villages Rai Kishunpatti, Sarwanpur, Palia, Belsipah, Kulharia and Sabpur, the amount to be realised by the Collector of Shahabad and to be paid by him to the proprietor of Dumraon Raj. The agreement was confirmed by a subsequent proprietor, Kesho Prasad Singh Bahadur, with certain modifications and is still in force. In the year 1932, in the course of revaluation proceedings under the Cess Act, 1880 (Bengal Act IX [9] of 1880), cess was assessed on tauzi No. 1455 on an asset value of Rs. 76,428-15-0, which included the sum of Rs. 10,000 payable as rent by the Narhi Babus.

[3] The present suit was brought by the appellant challenging the assessment as *ultra vires* on the grounds: (1) that the villages in respect of which the rent of Rupees 10,000 is payable do not lie wholly in tauzi No. 1455, but are distributed among the three tauzis of which the appellant is the proprietor, and (2) that cess was not assessed on the Narhi Babus and seeking to recover with interest an amount of Rs. 21,664-15-0 realised by the Government from the appellant on account of the cess demand for tauzi No. 1455 for the period June 1932 to January 1936. Among other reliefs, the appellant asked:

> "That a decree for refund of the amount with damages claimed and future damage be passed in favour of the plaintiff or decree for such amount as the Court thinks proper be passed against defendant 1 or defendant 2nd party."

The plaint was filed on 22nd September 1938 and the Government was impleaded as defendant 1 thus: "Secretary of State for India in Council through the Collector of Shahabad."

[4] Under S. 179, Government of India Act, 1935, and S. 79, Civil P. C., as adapted by the Government of India (Adaptation of Indian Laws) Order, 1937, the suit should have been filed either against the Province of Bihar or the Secretary of State. Under S. 80, Civil P. C., as adapted, the notice under S 80 was required to be served in the former case on a Secretary to the Provincial Government or the Collector of the district and, in the latter case, on a Secretary to the Central Government, the Political Secretary and a Secretary to the Provincial Government. In the present case, the notice under S. 80 was served on the Collector of Shahabad. The mistake in impleading the Government under the proper appellation was not corrected till 15th December 1944, when the hearing of the suit had actually been concluded and the case was being argued. The suit then proceeded against the Province of Bihar.

[5] In the result, the learned Subordinate Judge, while holding the assessment to be *ultra vires* by reason that the Collector included among the assets of the estate properties lying outside the limits of the estate, felt himself constrained to dismiss the suit *in limine* as not maintainable for want of notice under S. 80, Civil P. C.

[6] It has been strenuously contested before us that the notice under S. 80 which was served on the Collector of Shahabad must be taken as a valid notice on the Province of Bihar under S. 80 on the ground that, substantially, the plaintiff made clear his intention to sue the Province of Bihar, and that the written statement filed by the Collector showed that there was no misunderstanding on the point and no objection was taken by the Collector regarding the want of notice under S. 80.

[7] To deal with this contention, it is necessary to consider, first of all, what was the legal position at that time as to the correct appellation under which the Government should have been impleaded in the suit, because, in the course of argument before us, learned counsel for the appellant urged that, the cause of action having arisen previous to 1st April 1937, the date of the commencement of Part III, Government of India Act, 1935, the suit was governed by S. 79, Civil P. C., as it stood previous to that date and, therefore, the suit was rightly instituted against the Secretary of State in Council. He bases this contention on the words "subject to the provisions of Ss. 179 and 185, Government of India Act, 1935," which occur in the adapted S. 79 of the Code. He regards these words as taking outside the scope of S. 79 of the Code cases falling within S. 179, Constitution Act. I find myself unable to read the adapted S. 79 in this sense. To me it appears that the adapted section applied to all claims by or against the Crown, whether the suit could be brought under S. 179 of the Constitution Act or not. It was the general provision which prescribed the manner in which suits by or against the Crown should be brought. Such suits lay:

(1) if the Central Government was concerned, against the Governor-General-in-Council or the Federation, as the case might be;

(2) if the Provincial Government was concerned, against the Province ; and

(3) if the Crown representative was concerned against the Secretary of State.

[8] This was independent of the question whether the cause of action arose before or after 1st April 1937. Section 179 provided an additional manner of suing where the cause of action arose before 1st April 1937, namely that, if but for the Constitution Act the suit might have been brought against the Secretary of State in Council, it might now be brought against the Secretary of State. It is noticeable that the section makes a distinction between the Secretary of State in Council and the Secretary of State. Section 79 of the Code as it stood before the adaptation spoke of the Secretary of State for India in Council. It is unlikely, therefore, that the old procedure was intended to apply to suits instituted against the Secretary of State under S. 179. Even if the argument of learned counsel was accepted, it would not help him in the present case, because S. 80 as adapted makes no distinction between a suit instituted against the Secretary of State under cl. (c) of the adapted S. 79 of the Code and one instituted against the Secretary of State under S. 179 of the Constitution Act In either of such cases, the notice under S. 80 must be served on a Secretary to the Central Government, the Political Secretary and a Secretary to the Provincial Government. Admittedly, in this case the notice was served only on the Collector of Shahabad.

[9] To come back to the proposition first enunciated, I have mentioned that the suit was instituted against the Government under the appellation: "Secretary of State for India in Council through the Collector of Shahabad." It has been contended that the lawyer who used this expression when drafting the plaint had before him S. 179 of the Constitution Act and the adapted S. 79 of the Code and was attempting to give effect to these sections in the best way that he could, that he understood the suit as being outside the scope of S. 79 by reason of the cause of action having arisen prior to 1st April 1937 and did not consider the appellations given in S. 79 as a guide to the correct appellation in this case. His intention, it is said, was to draft a plaint against the Province of Bihar and, in the light of S. 179 of the Constitution Act, he did so by impleading the Secretary of State in Council, indicating the intention of proceeding against the Province by adding "through the Collector of Shahabad." Section 179, however, clearly draws a distinction between the Secretary of State and the Secretary of State in Council; see, for instance, sub-s. (2) of that section, which expressly substitutes one expression for the other in pending legal proceedings, and the lawyer could not have impleaded the "Secretary of State in Council" if he intended to give effect to S. 179. What he was evidently doing was that he was following the unadapted law, which provided for suits against the Secretary of State in Council. The impleading "through the Collector of Shahabad" does not help in any way. Under unadapted S. 80 of the Code, the notice on the Secretary of State for India in Council could be served on the Collector of the District and the practice was that action on behalf of the Secretary of State in the Court was generally taken through the Collector of the district. The expression used by the lawyer was quite consistent with the law as it stood prior to the adaptations.

[10] In marked contrast to the appellation used in the plaint is the appellation under which the written statement was filed by the Collector. It purports to be a written statement not on behalf of the Secretary of State for India in Council but on behalf of the Secretary of State for India, showing clearly that it was filed in consciousness of the changes introduced by the Constitution Act of 1935. These changes, as I have shown, provided for a suit in the circumstances of the present case either against the Province or against the Secretary of State. The Collector appeared and filed a written statement on behalf of the Secretary of State; that is to say, he treated the suit as one against the Secretary of State, not as one against the Province. In this written statement, the express point of the non-service of notice under S. 80 was not taken, the Collector apparently being satisfied by taking in general ground that the suit as framed was not maintainable. Perhaps this objection relates to the fact that the suit was framed against the Secretary of State in Council instead of being framed against the Secretary of State, a form in which the plaint remained, until on 15th December 1944 the Secretary of State disappeared altogether and the Province of Bihar came into the picture.

[11] Much of our time was taken by a discussion as to how far the Province was bound by this written statement and whether, in the absence of any mention of the want of notice under S. 80, it should be held that the notice had been waived. The argument was based on a mistake in the paper book. The impression given by the paper-book as it stands is that after the amendment made on 15th December 1944 the suit proceeded on the basis of the written statement filed by the Collector on behalf of the Secretary of State for India and printed at p. 20 of the paper-book. Actually, on looking into the original order-sheet of the Subordinate Judge, I

discovered a different state of things. The Subordinate Judge, treating the Secretary of State for India and Province of Bihar as two separate entities, directed the suit to be dismissed with costs as against the Secretary of State for India and the Province of Bihar to be substituted, and ordered the plaintiff to "take steps against new defendant." Thereupon, fresh summonses in the suit were issued and served upon the Province and, on 17th February 1945, the Province appeared and filed a written statement, more or less on the lines of the written statement already filed by the Collector of Shahabad on behalf of the Secretary of State but including an objection about the failure to serve a notice under S. 80. Through an oversight, which is understandable in view of the enormous size of the record caused by the large number of written statements filed by the members of the defendants second party, who number over six hundred, this written statement was overlooked in preparing the paper book. In view of this written statement, the contention about the waiver of notice under S. 80 was given up.

[12] Nevertheless, it was contended that the Secretary of State, on whom the notice was issued, represented the Province and the notice was a valid notice on the Province under S. 80. Learned counsel urged that, under S. 179, Constitution Act, the Secretary of State is merely the Province in another guise and not a separate entity. Again, I find myself unable to accept the contention. This section appears to me to relate to three entities; the Federation, the Province and the Secretary of State, the third of whom may in appropriate circumstances be sued instead of one or both of the first two. One indication of the existence of a distinction between these entities is contained in the effect of a decree in a suit against one or other of these entities. Where there is a decree of Court against the Federation or the Province, the decree will be enforceable as a matter of course against the revenues of the Federation or the Province as the case may be. Where, however, the decree is against the Secretary of State, it will be for the Secretary of State to determine out of which revenues Federal or Provincial, the decree shall be satisfied. In doing so he is not confined to the test which, under S. 179, Constitution Act, and S. 79 of the Code, will decide whether the suit should be against the Federation or the Province. How then can it be said that he merely represents the Province and is not a separate entity? Reliance has been placed by learned counsel on *Kanailal Kripasankar* v. *Governor-General in Council*, 46 C. W. N. 18, as an authority that this is merely a case of a misdescription of the defendant and that the defect in the plaint was removed with retrospective effect by the substitution of the Province of Bihar for the Secretary of State for India in Council. There, as here, the suit was instituted against the Secretary of State in Council in ignorance of the adaptation of S. 79, Civil P. C. It is not clear from the report when the cause of action in the case arose whether before or after 1st April 1937. Henderson J. emphasised that from the commencement it was clear that the plaintiff was seeking relief against the Central Government. He stressed the fact that, in the first written statement signed by the Collector, "there was no suggestion that there was any dual personality" and the case proceeded as a case of misdescription and the Governor-General in Council was actually awarded and had accepted substantial costs on this basis at the time when the plaint was amended. Henderson J. pointed out that it was only in the second written statement that the objection of a dual personality was raised. These features are absent here. As I have shown, the first written statement clearly relates to the changed law and is filed on behalf of the Secretary of State, one of the two entities who could have been sued in this case. The present case appears rather to be on par with the *East Indian Railway Co.* v. *Ram Lakhan Ram*, 6 P. L. T. 415 : (A. I. R. (12) 1925 Pat. 37), in which Das J. observed :

> "But in my opinion, there is all the difference between the misdescribing a party intended to be sued and suing a wrong party,"

a decision which was followed in *Agent, Bengal Nagpur Railway* v. *Behari Lal Dutt*, 52 Cal. 783 : (A. I. R. (12) 1925 Cal. 716), distinguishing another decision relied upon by learned counsel before us, namely, *The Saraspur Manufacturing Co. Ltd.* v. *B. B. & C. I. Rly. Co.*, 47 Bom. 785 : (A. I. R. (10) 1923 Bom. 452).

[13] Admitting for the sake of argument that the Province of Bihar is a separate entity from the Secretary of State, it was contended that nevertheless the notice under S. 80 issued in this case is a sufficient notice to the province under the provisions of S. 80. Reliance was placed in this connection on *Bholaram Shibdhan, Firm* v. *Governor-General in Council*, A. I. R. (36) 1949 Pat. 416, in which it was held that S. 80 does not require the notice to be addressed to the Governor-General in Council and it is sufficient if the notice is directed to the official authorised by S. 80 to receive the notice. Here, it is urged, the Collector was empowered to receive the notice on behalf of the Province of Bihar. The answer to the argument is to be found in the case of *Governor-General in Council* v. *T. M. Krishnaswami Pillai*, A. I. R. (33) 1946 Mad. 366 : (I. L. R. (1947) Mad. 36) which was

distinguished in the case just cited. In that case, the notice was held not to comply with the requirements of S. 80 by reason of not stating the relief which the intending plaintiff would claim, the ground being that the notice spoke of a suit to be instituted "against the Secretary of State." That was a case, I should emphasise in which the cause of action arose after 1st April 1937, so that the suit lay only against the Governor-General in Council. Nevertheless, the Secretary of State and the Governor-General in Council were taken to be two different entities. In the case before us, as the notice Ex. 8 informs the Collector that the suit is to be brought against the Secretary of State in Council, and it was possible for the plaintiff to sue either the Province or the Secretary of State. In these circumstances, it cannot be held that the relief to be claimed was sufficiently stated within the meaning of S. 80 of the Code.

[14] On the merits, also, it appears to me that the suit must fail as against the Province of Bihar. The provisions for the assessment of cess are contained in the Cess Act, 1880 (Bengal Act IX [9] of 1880). The Act makes liable to the payment of cess all immovable property situate in any district or part thereof, the term "immovable property" including land, and all benefits to arise out of land (Ss. 5 and 4). As regards land, this cess is to be assessed on the "annual value", such annual value to be ascertained as prescribed in the Act (S. 6). By "annual value" is meant the total rent which is payable or, if no rent is actually payable would on a reasonable assessment be payable during the year by all the "cultivating raiyats" of the land, estate or tenure, or by other persons in the actual use and occupation thereof (S. 4). The term "cultivating *raiyat*," which is relevant in connection with the defence of the defendants second party, means a person cultivating the land and paying rent therefor not exceeding Rs. 100 per annum (S. 4). It appears from this that the "annual value" is intended to be the total of the rents which are payable or would, on reasonable assessment, be payable by persons actually cultivating the land. The revaluation in this case was made under Chap. II of the Act. Ordinarily, proceedings under this Chapter commence with an order by the Board of Revenue directing revaluation to be made (S. 12). Thereupon, the Collector of the District is required to issue a proclamation requiring every holder of an estate or tenure which is liable to pay an annual amount of revenue or an annual amount of rent exceeding one hundred rupees, and every holder of a revenue free estate or rent-free tenure, the gross annual rental of which exceeds one hundred rupees, severally to lodge at the office of the Collector within one month a return of all lands comprised in his estate or tenure giving certain particulars (S. 14). The particulars are: (1) details of lands in the actual cultivation and occupation of the person submitting the return with an estimate of the annual value, (2) details of lands held by cultivating *raiyats* paying rent direct to the person submitting the return, their names to be given separately stating the area occupied by each and the rent paid by him and assessable to cess, (3) details of the tenure-holders paying rent directly to the person submitting the return, giving details as in case (2), and (4) similar details of lands included in the estate or tenure held rent-free by persons other than the person submitting the return. If no return is made in obedience to the proclamation, the Collector is required to cause a notice to be served on the defaulting proprietors or tenure-holders (S. 16). If there is still a default, the Collector is empowered to determine the annual value of the estate or tenure by such ways and means as to him seem expedient (S. 21). When all the preliminaries have been completed, the Collector shall cause to be prepared from the returns furnished to him and from the valuations made by himself in accordance with the Act a valuation roll of each estate within the district and of the tenures therein comprised, noting thereon for each estate the amount of revenue annually payable to Government (S. 34). These rolls are then to be published as prescribed in the Act (S. 35). The valuation made by the Collector is open to revision by the Commissioner and the Board of Revenue (S. 93) and to a certain extent by the Collector himself (S. 37). Subject to this, the revaluation shall remain in force for a term of five years and thereafter until another revaluation and assessment in substitution therefor shall come into force (S. 36).

[15] Apart from certain order-sheets, there is no evidence before us of the different steps taken in the course of the revaluation with which we are concerned. Acting on the usual presumption of the regularity of official acts, we may take it that the Collector in making the revaluation followed the requirements of the Act. Exhibit B-1 (pages 108-112 of Part II of the paper book) is the cess revaluation schedule relating to tauzi No. 1455. It shows the annual value of the estate as Rs. 76,476-13-0, an amount which was subsequently reduced in revision to Rs. 76,428-15-0. This amount includes, on account of a tenure shown as held by the Narhi Babus, the sum of Rs. 10,000 as the annual rent. According to the plaintiff and the defendants second party, a portion of the lands in respect

of which the rent is paid falls within the tauzis 14229 and 14230, and the rent therefor has been wrongly included within the annual value of tauzi 1455. Admittedly, however, the plaintiff in his return showed the entire amount of Rs. 10,000 as rent received in and appertaining to tauzi 1455. In the circumstances, it is not open to him to challenge the correctness of the valuation on this account. Even if it was open to him to do so, I do not think that the mistake is one which would affect the jurisdiction of the Collector and render the valuation invalid. Under the provisions of the law, the Collector was authorised to ascertain the annual value of the plaintiff's estate. All that the objection comes to is that that value has been incorrectly ascertained. It cannot be seriously urged that the Collector's jurisdiction is affected because he made a mistake in ascertaining the value. Section 93 of the Act provides that the valuation made by the Collector is open to revision by the Commissioner or the Board of Revenue "and not otherwise". It was open to the plaintiff to take action under this section for the correction of the mistake. Not having done so there, he cannot challenge the valuation in the civil Court.

[16] Supposing even that the mistake affects the jurisdiction of the Collector, I may usefully cite a passage from *Dwaraka Prasad* v. *Jai Barham*, A. I. R. (9) 1922 Pat. 322: (67 I. C. 686) which *mutatis mutandis* appears to apply to the present case:

> "In my opinion, when there is no want of jurisdiction in the Court, to try a suit, that is to say, when the want of jurisdiction is not apparent on the face of the proceedings, but the absence of jurisdiction depends on a fact, in the knowledge of the party which he had an opportunity of bringing forward in the Court, then if he does not bring that fact forward but allows the Court to proceed with the judgment, he ought not to be permitted to impeach the jurisdiction of the Court in any collateral proceeding."

[17] Finally, the hollowness of the objection raised by the plaintiff on this ground is made clear if we consider the effect of the mistake which has been made. The plaintiff concedes that the Collector has the jurisdiction to include in the valuation of touzis Nos. 14229 and 14230 the portions of the annual rent of Rs. 10,000 wrongly included in the valuation of tauzi No. 1455. Under S. 41 of the Act, the holder of an estate is liable to pay to the Collector cess, calculated on the annual value of the land comprised in the estate at the rate determined under the Act for the year in question, less a deduction to the calculated at one-half of the said rate for every rupee of the revenue entered in the valuation roll of such estate as payable in respect thereof. The proprietor, therefore, would have been liable to pay to Government exactly the same total amount of cess in respect of tauzis Nos. 14229 and 14230 as the excess cess which he has now to pay in respect of tauzi No. 1455. In effect, therefore, he has not been prejudicially affected by the mistake in the ascertainment of the annual value of t[illegible] No. 1455.

[18] As regards the other ground raised, namely, that the assessment is invalid as against the proprietor so long as the cess is not assessed on the tenure-holders, no authority has been cited for it. Actually the objection seems to be based on a misapprehension as to the effect of the valuation roll. Section 41 of the Act is clear that there is necessarily an assessment of revenue on the tenure-holders at the same time as the assessment is made on the proprietor. It provides as regards the holder of a tenure that he shall yearly pay to the holder of the estate or tenure, within which the land held by him is included, the entire amount of the local cess calculated on the annual value of the land comprised in his tenure at the rate determined under the Act for the year in question less a deduction to be calculated at one-half of this rate for every rupee of the rent payable by him for the tenure. Provided, therefore, that there is no defect in the roll affecting the proprietor's right to realise cess from the tenure-holder, the proprietor will ordinarily be entitled to realise cess from the tenure holders in accordance with the valuation roll. There is nothing in the law, however, to make his own liability to pay cess to the Collector dependent upon his right to realise cess from the tenure-holders included in his estate.

[19] On the above grounds, I consider that the suit had no merits as against the Province of Bihar and has been rightly dismissed.

[20] The question next arises as to whether the plaintiff is entitled to any relief as against the Narhi Babus.

[21] His first difficulty lies in the vagueness of the plaint as regards the particulars of the claim against the Narhi Babus. The plaintiff, when he filed his suit, was under the impression that no cess had been assessed upon them. He, therefore, made merely a vague claim against them for a decree in the nature of a contribution decree. Actually, no question of contribution arises. The right of the proprietor to realise cess from tenure-holders and cultivating raiyats included in his estate is not dependent upon his payments or non-payment of the cess due by him to the Government, and the remedy of the plaintiff was by way of an ordinary suit for the recovery of arrears of cess. In the absence of particulars, we have been asked to treat this suit as seeking a decree for arrears of cess corresponding to the cess recovered by the Collector

from the plaintiff, that is to say, for the period from June 1932 to January 1936. On behalf of Narhi Babus, it has been strenuously argued that it is not for the Court to spell out in this manner what is the relief asked for by the plaintiff and that the defendants will be seriously prejudiced by being made liable for a demand, the particulars of which were not apparent to them from the pleadings.

[22] In my opinion, it is not necessary to consider this point as the case can be disposed of on a broader ground which will settle once for all between the parties the question of the right of the plaintiff to realise cess from the Narhi Babus in accordance with the cess revaluation schedule. The contention of the Narhi Babus is that, so far as they are concerned, they are unaffected by the revaluation schedule, as it relates to a tenure of which they are not the tenure-holders. The cess revaluation schedule shows the Narhi Babus as tenure-holders of one tenure paying a total rent of Rs. 10,000 per annum. It is contended that in fact there is no such tenure; the sum of Rs. 10,000 merely represents the total amount payable to the proprietor by the Collector of Shahabad on account of the rents realised by him in respect of a number of separate tenancies held by different sets of the Narhi Babus under the plaintiff. In support of this contention, reference is made to the deed Ex 2, by which the proprietor of the Dumraon Raj confirmed the arrangements made in 1907. By the agreement in 1907, the then proprietor accepted the Narhi Babus as tenants and agreed not to enhance the rents payable by them in accordance with the agreement "until the said tenants shall have acquired occupancy rights" and not to eject them for any reason except for non-payment of rent due from them, and he further undertook

> "to grant leases to the persons accepted as tenants containing these conditions and defining the area for which each lease is granted."

On their side, the Narhi Babus agreed to

> "accept the terms which may be arrived at both with regard to the extent of their respective holdings and conditions of their tenancy by the joint decision of the Collectors of Ballia, Shahabad and Ghazipur."

The deed of confirmation recites that, in accordance with the agreement of 1907, the Board of Revenue as Court of Wards in charge of the Dumraon Raj subsequently

> "did, during the same year 1908, establish the Narhi Babus as occupancy tenants in the aforesaid land of Umarpur Diara",

and contains covenants (1) by the Secretary of State, to pay to the proprietor from time to time the annual rents due from the Narhi Babus, (2) by the proprietor, to accept the rents so paid and not to claim any such rents from the Narhi Babus so long as they are paid by the Secretary of State within six months of the *rabi kisht* falling due for each year, and (3) by the Narhi Babus, to pay to the Secretary of State

> "any rents due from them or any of them, their successors or assigns as tenants of the second party in Umarpur Diara."

All this suggests that, in fact, the sum of Rs. 10,000 represents the total of the rents payable for a number of tenancies. According to the defendants second party, the largest rent payable in respect of any one of these tenancies is less than Rs. 100, and it is claimed that the Narhi Babus are cultivating *raiyats* within the meaning of S. 4 of the Act and each of them is only liable to pay cess at the rate of one-half of the cess calculated at the rate determined under the Act for the year in question on the rent payable by him for his tenancy (S. 41 of the Act).

[23] In answer to the above contention, it has been argued that the cess revaluation schedule is binding upon the Narhi Babus. Our attention is drawn to Ex. A-1, the order-sheet in the cess revaluation proceedings which shows that, on the failure of the Narhi Babus to lodge a return, special notices were issued to them on 1st August 1931 and, on their continued failure to lodge a return, the valuation was made by the Collector on the basis of a report by an *amin* who visited the spot. Thereafter, on 21st March 1932, a petition was filed on their behalf and they were heard at length on 29th March 1932, when apparently the only objections pressed were (1) that their total liability on account of rent *and cess* was confined to Rs. 10,000 and (2) that a portion of land had been washed away. The argument is that, the Narhi Babus having appeared and not having objected before the Collector that there were several tenancies and not one tenure, they cannot be permitted to raise the objection now. The point is of some difficulty, but I think that the contention must be rejected. It appears to me that the jurisdiction of the revenue authorities under the cess manual is to determine the valuation of the estates within the district and of the tenures and holdings included in those estates. Under S. 6, the cess is to be assessed at the "annual value" of lands and on the "annual nett profits" from mines and quarries "ascertained respectively as in this Act prescribed". Under S. 12, the Board of Revenue may order a 'valuation' or a 'revaluation' [*vide* also Ss. 13 and 15]. Under Ss. 21 and 25, the Collector has power in the absence of a return to determine "the annual value", [*vide* also S. 22]. Under S. 34, the Collector shall cause a "valuation roll" to be prepared, and under S. 36, it is the "valuation and revaluation" so made which remain in force for the period prescribed. There is only one section under which the Collector's power goes beyond

the determination of valuation. This is S. 26, which relates to a person shown in any return as a cultivating *raiyat* to whom a notice has been issued by the Collector under the provisions of S. 24. These provisions deal with holders of small tenancies who have sublet a portion of their tenancies and are, therefore, not cultivating raiyats within the meaning of S. 4. Subject to this limitation, it would appear that the Collector has no jurisdiction to determine finally the correct classification of the tenancies shown by him in the revaluation schedule or the particulars of the tenancies themselves. The finality to the valuation schedule given by S. 93 seems thus to be confined to the valuation. This is, of course, subject to what I have said about S. 26. My conclusion seems to be supported by S. 107 which provides that nothing in Part II of the Act and nothing done in accordance with the Act shall be deemed to effect the right of any person in respect of any immovable property or any interest therein except as otherwise expressly provided in the Act.

[24] Now, let us see what is the problem before us. We are given an assessment schedule which shows a tenure in respect of which a lump rental of Rs. 10,000 is payable. The evidence suggests that there are, in fact, several tenancies, the total rent of which is represented by this sum of Rs. 10,000 and we have not before us the materials to determine whether those tenancies or which of them, are tenures or holdings within the meaning of S. 4 of the Act. In the circumstances, can the tenancies be made liable for cess on the basis of the revaluation schedule? The only authority I have been able to discover which in any way supports a positive answer is *Braja Behari Dass* v. *Ram Narayan Rai*, A. I. R. (25) 1938 Pat. 362 : (17 Pat. 436) in which Agarwala and Varma JJ., approving a decision of Ross J., reported in *Kesho Prasad Singh* v. *Ram Swarup Ahir*, 90 I. C. 621 : (A. I. R. (13) 1926 Pat. 175), rejected the contention of the defendant-respondents that, although they were assessed as tenure-holders, they were really cultivating raiyats. There was no suggestion before their Lordships, nor does there appear to have been a suggestion before Ross J., that apart from this question of classification the tenancy was otherwise than it appeared in the valuation roll. Here, however, the case is not merely one of classification, but that there is no such tenancy as is shown in the valuation roll. The nearest approach to this case which I have been able to find occurs in *Kameshwar Singh* v. *Janki Raman*, A.I.R. (33) 1946 Pat. 200 : (24 Pat. 705), in which the facts appear to have been similar to those in *Abdul Hasan* v. *Taj Ali*, 6 Pat 13 : (A. I. R. (14) 1927 Pat. 270). In both cases what was shown in the valuation roll as a tenure consisted at the relevant period of a number of tenancies. In *Abdul Hasan's case*, (6 Pat. 13 : A. I. R. (14) 1927 Pat. 270), their Lordships remanded the case for investigation whether the defendant was a "cultivating raiyat" observing:

> "In deciding whether the defendants are liable to pay as tenure holders or not, we have to consider the definitions given in the Cess Act and find out who is liable and if a person cultivates the land himself and pays rent not exceeding Rs. 100 he is a cultivating raiyat whatever may be the character of his holding under the Bengal Tenancy Act."

In *Kameshwar Singh's case*, (A. I. R. (33) 1946 Pat. 200 : 24 Pat. 705), following the decision in the earlier case and distinguishing the cases of *Braja Behari Das*, A. I. R. (25) 1938 Pat. 362 : 17 Pat. 436) and *Kesho Prasad Singh*, (90 I. C. 621 : A. I. R. (13) 1926 Pat. 175), it was held that cess was recoverable on the basis of the facts as existing at the relevant time, that is as from cultivating raiyats. These were both cases of a change occurring subsequent to the framing of the valuation roll. In the case before us, the facts as shown in the valuation roll appear to be incorrect, and there seems to have been no such tenure at the time when the valuation roll was framed. The principle applicable is deducible from *Rani Harsamukhi Dasi* v. *Agadhu Mohapatra*, A. I. R. (27) 1940 Pat. 180 : (18 Pat. 723), where Harries C. J., and Manohar Lall J., decided that, if the tenure in question has been omitted in revaluation, it escapes the liability for cess. Perhaps this advantage will not accrue to a cultivating raiyat, whose liability to cess appears under cl. (3) of S. 41 of the Act, to be independent of his inclusion in the valuation roll.

[25] On the above grounds, I would hold that this suit also fails as against the defendants second party.

[26] In the result, I would dismiss the appeal with costs throughout to the State of Bihar. As Narhi Babus escape for the period in suit from their liability to pay cess, I see no reason to give them costs.

[27] **Jha C. J.**—I agree.

D.R.R. *Appeal dismissed.*

A. I. R. (37) 1950 Patna 564 *[C. N. 148.]*

RAMASWAMI J.

Ghuletan Dube and others—Petitioners v. *Kamlapati Sukla—Opposite Party.*

Criminal Revn. No. 556 of 1950, D/- 25th August 1950, from order of A. S. J., Shahabad, D/- 14th February 1950.

Penal Code (1860), Ss. 441 and 447—Criminal trespass—Assertion of claim of right.

A person who enters upon land in the possession of another in the exercise of a *bona fide* claim of right cannot be convicted of criminal trespass because the entry was not made with any such intent as to constitute an offence. But mere assertion of claim of right cannot in itself be a sufficient answer to a charge of criminal trespass. [Para 2]

Anno: Penal Code, Ss. 441 and 447, N. 5.

Mrs. D. Lall—for Petitioners.

Angad Ojha—for Opposite Party.

Judgment.—The question for decision in this case is whether the petitioners could be lawfully convicted of the charge under Ss. 447 and 323, Penal Code in view of the allegation that there was a *bona fide* claim of right. For the prosecution it was alleged that on 16th June 1949 the petitioners encroached on Plot 166 by raising pillars. Complainant Kamlapati protested whereupon the petitioners assaulted him. It was pleaded in defence that the encroachment was made several years back and the case had been falsely instituted. The lower Courts have nevertheless accepted the prosecution case as correct and convicted the petitioners.

[2] In support of this rule learned counsel pointed out that the petitioners have a house on Plots 163 and 165 which are adjacent to plot 166 which belonged to the complainant. It was also pointed out that the encroached portion of plot 166 was on same level as Plots 163 and 165 on which the petitioners have built their house and that the land west of the encroached portion was in lower level. It was, therefore, contended that the petitioners were erecting pillars in mistaken belief and so the petitioners could not be convicted of criminal trespass. In my opinion it is impossible to accept the argument of the learned counsel in this case. It cannot be disputed that a person who enters upon land in the possession of another in the exercise of a *bona fide* claim of right cannot be convicted of criminal trespass because the entry was not made with any such intent as to constitute an offence. But mere assertion of claim of right cannot in itself be a sufficient answer to a charge of criminal trespass. It is the duty of criminal Court to determine upon the material of each case what was the intention of the alleged offender and if it arrives at the conclusion that he was not acting in the exercise of a *bona fide* claim of right then it cannot refuse to convict the offender. In the present case it is important to notice that two persons made measurement of the alleged encroachment; and Amin deposed that the encroachment was 16′ × 6′ and the local board overseer who was deputed by the Court at the instance of the accused reported that the encroached portion was 11′ × 8′. In view of large area of encroachment it is impossible to hold that there was a *bona fide* intent on the part of the petitioners in erecting pillars on the alleged date. It is also important to observe that during the trial of the case the petitioners never suggested that they had claimed the land in dispute in good faith; on the contrary, the defence was that the encroachment was old and the complainant had no possession of the area encroached upon. This defence has been disbelieved by the lower Courts upon the evidence available. In my opinion there is no merit in this application which is accordingly dismissed.

V.S.B. *Application dismissed.*

A. I. R. (37) 1950 Patna 565 [*C. N. 149.*]

SINHA AND RAI JJ.

Harihar Prasad and another—Petitioners v. Prasad Mahton and others — Opposite Party.

Civil Revn. No. 673 of 1949, D/-28-2-1950.

Tenancy Laws—Bihar Tenancy Act (VIII [8] of 1885), S. 170—Rent decree—Execution—Claim under O. 21, R. 58 by third party for release of portion of holding on ground of purchase from tenants—Bar of S. 170—Civil P. C., O. 21, R. 58.

In execution of decree for arrears of rent in respect of a holding, a writ of attachment and sale proclamation was issued. A third party applied under O. 21, R. 58, Civil P. C., for release of a portion of the holding purchased by him from the tenants and contended that as he had not been impleaded in the rent suit, the decree for rent passed in favour of the landlords would have the effect of a "money decree," and hence he was entitled to have his claim adjudicated under O. 21, R. 58, Civil P. C., and get a release of the portion purchased by him from attachment and sale:

Held, that S. 170 was a complete bar to the investigation of the claim set up by the third party. [Para 6]

Anno. C. P. C., O. 21, R. 58, N. 12.

Lakshman Saran Sinha — for Petitioners; H. P. Sinha and P. Jha—for Opposite Party.

Rai J.—This revision petition has been filed by the decree-holders against the order dated 26-4-1949, passed by the Munsif, 2nd Court, Gaya, whereby he has held that Prasad Mahton, opposite party 1, is entitled to press his petition under O. 21, R. 58, Civil P. C., in the execution proceeding started by the petitioners.

[2] The petitioners who are 16 annas landlords claim to have obtained on 8-12-1947, a decree for rent against Sohrai Gope, the tenant recorded in their serishta in respect of a holding having an area of 10.29 acres. They executed the decree in Ex. Case No. 496 of 1948. After service of writ of attachment and sale proclamation Prasad Mahton, opposite party 1, filed an application under O. 21, R. 58, Civil P. C., for release of 4.93 acres out of the holding in question. He claimed to have purchased the area by a registered sale-deed dated 9-8-1947. His case was that as he had not been impleaded in the rent suit, the decree for rent passed in favour of the landlords would have the effect of

a "money decree," and hence he was entitled to have his claim adjudicated under O. 21, R. 58, Civil P. C., and get a release of the area purchased by him from attachment and sale. According to him, S. 170, Bihar Tenancy Act was no bar to such an investigation. The Executing Court has accepted his contention. Hence, the revision petition to this Court by the decree-holders.

[3] Mr. Lakshman Saran Sinha, the learned counsel for the petitioners, urged that S. 170, Bihar Tenancy Act is a complete bar to [illegible]posite investigation of the claim set up by [illegible]s of this party 1. He relied on several deci[illegible], namely, the Court in support of his conte[illegible] v. *Pirthi Nara*- cases of *Deonandan Pr*[illegible] (20) 1933 Pat. 32); *Sur*- *yan*, 11 Pat. 790: ([illegible] *Singh*, 15 Pat. 614: (A. I. R. *pat Singh* v. *S*[illegible]480); *Chhater Kumari Devi* v. (23) 1936 [illegible] *Prasad*, 15 Pat. 812 : (A. I. R. (24) *Bh*[illegible]Pat. 278) and *Alakhnandan Prosad* v. *Mt. Bibi Salma*, A.I.R. (24) 1937 Pat. 341 : (169 I. C. 729). He referred us to the provisions of S. 170, Cl. (1), Bihar Tenancy Act which runs as follows:

> "Rules 58 to 63 (both inclusive) and 89 of Order XXI of the Code of Civil Procedure, 1908, shall not apply to a tenure or holding or portion of a holding attached in execution of a decree for arrears due in respect of the tenure or holding."

According to him, as the decree obtained by the landlords was in respect of the entire holding, S. 170, cl. (1) was a bar to any investigation under O. 21, R. 58, Civil P. C.

[4] This matter has been considered in the various decisions cited on behalf of the petitioners. In the case of *Deonandan Prasad* v. *Pirthi Narayan*, 11 Pat. 790 : (A. I. R. (20) 1933 Pat. 32) a Division Bench of this Court followed the decision of a Full Bench of the Calcutta High Court reported in *Amrita Lal* v. *Nemai Chand*, 28 Cal. 382: (5 C. W. N. 474 F.B.). In the Full Bench case of the Calcutta High Court Banerjee J. who gave the dissenting judgment, held the same view as the majority Judges so far as the question for consideration in the present case was concerned. Banerjee J. in the said Full Bench case held:

> "Where the claim is of this nature, namely, that the claimant admits that the tenure or holding is held under the decree-holder, that arrears of rent are due thereon, and that the decree is in respect of such arrears, but contends that the decree ought not to be allowed to be executed by the attachment and sale of the tenure, because it was obtained against the wrong person, that the claimant was the person entitled to the tenure or holding, and that, unless and until the landlord sues him and obtains a decree against him, the tenure or holding cannot be sold. Where that is the nature of the claim S. 170 will bar the claim upon the claimant's own case."

The learned Judges who decided the case reported in *Deonandan Prasad* v. *Pirthi Narayan*, 11 Pat. 790: (A. I. R. (20) 1933 Pat. 32) **reviewing the law on the subject held as follows:**

> "And as regards this class of cases all the learned Judges of the Full Bench were agreed that S. 170, Bengal Tenancy Act barred a claim under S. 278 (now O. 21, R. 58), Civil P. C. In this class of cases the tenure or holding will pass in execution if the landlord proceeds under the special provisions of the Bengal Tenancy Act, even though some of the persons interested in the tenure or holding may not have been impleaded as defendants; and it was recognised on all hands that the Act clearly excluded the operation in such cases of the general law as regards the putting forward of claims to attached properties by third parties in execution proceedings."

The decision in the case of *Surpat Singh* v. *Shital Singh*, 15 Pat. 614 : (A. I. R. (23) 1936 Pat. 480), also held the same view. In that case Agarwala J. while following the Full Bench case reported in *Amrita Lal* v. *Nemai Chand*, 28 Cal. 382 : (5 C. W. N. 474 F. B.), and other cases of this Court including the cases of *Dwarka Singh* v. *Nema Singh*, 10 P. L. T. 118 : (A. I. R. (16) 1929 Pat. 195) and *Deonandan Prasad* v. *Pirthi Narayan*, 11 Pat. 790 : (A. I. R (20) 1933 Pat. 32) held that the claim under O. 21, R. 58, Civil P. C. was barred. His Lordship in that judgment considered the very question which is under consideration in the present case, namely, whether the provisions of S. 170, Bihar Tenancy Act would bar an investigation under O. 21, R. 58 in a case where the decree obtained by the landlords is not generally known as a "rent decree" but a "money decree." The decisions in the other cases of the Patna High Court as referred to by Mr. Lakshman Saran Sinha also lay down the same principle.

[5] Mr. Hareshwar Prasad Sinha, the learned counsel for the opposite party, has, however, contended that S. 170, Bihar Tenancy Act was not a bar to the investigation of the claim of his client. He contended that his client having purchased a portion of the original holding before the suit for rent was instituted would be deemed to have been recognized as a raiyat; and as he was not impleaded in the suit for rent, the decree obtained therein would have the effect of a "money decree." He relied upon the case of *Maharaj Singh* v. *Anath Nath Bose*, A. I. R. (33) 1946 Pat. 292 : (25 Pat. 199) in support of his contention. In this case the facts were different, and as I read the decision, it is not against the view taken by the decisions of this Court relied upon by learned counsel for the petitioners. In this case what had happened was that a co-sharer landlord had filed a suit for rent in respect of a portion of a holding which had fallen to his share by a civil court partition. It was held in that case that the holding would not be deemed to have been split up so

far as the raiyat was concerned who was not a party to the civil court partition. The decree, in that view of the matter, was in law for arrears of rent of a portion of the original holding, and as such, it was held in that case that S. 170, Bihar Tenancy Act was no bar to an investigation of a claim under O. 21, R. 58, Civil P. C. during the execution of such a decree. Meredith J. (as he then was) who delivered the judgment after considering the various decisions including those of the Full Bench case reported in *Amrita Lal* v. *Nemai Chand*, 28 Cal. 382 : (5 C. W. N 474 F. B.), *Deonandan Prasad* v. *Pirthi Narayan*, 11 Pat. 790 : (A. I. R. (20) 1933 Pat. 32), *Surpat Singh* v. *Shital Singh*, 15 Pat. 614 : (A. I. R. (23) 1936 Pat. 480) and *Chhater Kumari Devi* v. *Bhagwati Prasad*, 15 Pat. 812 : (A. I. R. (24) 1937 Pat. 278) held as follows:

> "Mr. Lal has cited a number of other cases, but so far as I can see the proposition laid down in the case just cited have never been dissented from in any case in this Court. The distinction made is a clear one, and in fact, so far as I can see there is no conflict of opinion on the point, and so far as this Court is concerned, the matter settled. *Surpat Singh* v. *Shital Singh*, 15 Pat. 614 : (A. I. R. (23) 1936 Pat. 480) is another case on the point. There prior purchases from the tenants applied under O. 21, R. 58, for release of the holding, and contended that the landlord's decree was only a money decree. The Munsif upheld the contention. It was held in revision that S. 170, Bihar Tenancy Act, was a bar to the application of O. 21, R. 58, but their Lordships explained that the reason why it was a bar was because the tenants did not deny that the decree-holder was the landlord, or that there were actually arrears due for the holding for the years in suit in respect of which the rent decree was passed, but they attacked the decree on the ground that it had been wrongly obtained against the original tenant who had sold the holding to the claimants. They did not dissent from the decision in *Deonandan Prasad* v. *Pirthi Narayan*, 11 Pat. 790 : (A. I. R. (20) 1933 Pat. 32) but rather referred to it with approval."

Thus, this judgment does not in any way differ from the decisions relied upon by the learned counsel for the petitioners. In fact, the facts and circumstances in the case of *Maharaj Singh* v. *Anath Nath Bose*, A. I. R. (33) 1946 Pat. 292 : (25 Pat. 199) as mentioned above were different, and the decision in that case was, in fact, arrived at on the finding that, in the eye of law, the decree would be deemed to be a decree in respect of a portion of the holding.

[6] In the present case also the objector does not deny that all the landlords had been impleaded in the suit for rent. He also does not deny that the decree for rent was in respect of the whole holding. In this view of the matter, in my judgment, the view taken by the Court below was not correct. It has erred materially in the exercise of its jurisdiction by assuming jurisdiction to investigate a claim case under O. 21, R. 58, which is forbidden by the provisions of S. 170, Bihar Tenancy Act.

[7] The order of the Court below is, therefore, set aside and the rule made absolute. The petitioners are entitled to their costs of this Court. Hearing fee one gold mohur.

[8] **Sinha J.** — I agree.

G.M.J. *Rule made absolute.*

A. I. R. (37) 1950 Patna 567 [*C. N. 150.*]

AGARWALA C. J.

Chaturbhuj Ojha — Petitioner v. *The King.*

Criminal Revn. No. 1304 of 1949, D/- 27-10-1949.

Criminal P. C. (1898), S. 195 — Bengal, Agra and Assam Civil Courts Act (XII [12] of 1887), S. 21 (3) — Offence under S. 210, Penal Code in Munsif's Court—Receiving of appeal from Munsif's assigned to Additional District Judge under S. 21 (3) — Complaint by latter Court under S. 195, Criminal P. C. — Validity.

The Court of the Additional District Judge is not the Court to which appeals ordinarily lie from the Court of the Munsif as such appeals ordinarily lie to the Court of the District Judge. But where the receiving of such appeals is assigned to an Additional District Judge under S. 21 (3), Civil Courts Act, it is a Court to which the Munsif's Court is subordinate under S. 195 (3) and hence the Additional District Judge can order prosecution of a person who has committed an offence under S. 210, Penal Code, in relation to proceedings in the Munsif's Court. [Para 3]

Anno. Criminal P. C., S. 195, N. 18, 19.

Sailesh Chandra Singha — for the Petitioner; Standing Counsel — for the Crown.

Order.—This is an application against an order of Additional District Judge of Muzaffarpur directing the prosecution of the petitioner for an offence under S. 210, Penal Code.

[2] The facts are that a final decree in a partition suit directed the different sets of defendants to pay separate costs to the petitioner, the amount recoverable from each defendant being specified in the decree. From defendant 1 the decree-holder was entitled to recover Rs. 65-3-9 and proportionate costs but no interest was allowed. The decree-holder applied for execution showing the amount which he claimed against different sets of judgment-debtors but also including a claim for interest. In execution the property of judgment-debtor 1 was put up to sale and purchased by a stranger for Rs. 300. This judgment-debtor made a deposit of Rupees 297-15-0 under O. 21, R. 89. Out of this amount the decree-holder withdrew Rs. 290-15-6 which included Rs. 15 as the costs of the sale proclamation although his total dues against this judgment-debtor amounted to less than Rs. 100 including proportionate costs. Judgment-debtor 1 protested against the decree holder withdrawing so much from the amount that he had deposited, but the objection was contested by the petitioner,

The executing Court, however, directed a refund of the money. The petitioner then appealed against the order of executing Court. The appeal was heard by the Additional District Judge and was dismissed by him. The Additional District Judge then called upon the petitioner to show cause why he should not be prosecuted under S. 210, Penal Code, and after hearing the cause shown has directed his prosecution. It is against that order that this Court has been moved, and it is contended that the Addition the District Judge had no jurisdiction to or (1) (b), petitioner's prosecution. Section urt shall take Criminal P. C., directs that no under S. 210 when cognizance of any offen have been committed such offence is alleged to any proceeding in any Court, in or in relation complaint in writing of such except on some other Court to which such Court is subordinate. The offence was committed in relation to a proceeding in the Court of the Munsif who, however, did not act under the section. The question, therefore, is whether the Court of the Additional District Judge is the Court to which the Munsif's Court is subordinate. Sub-section (3) of S. 195 declares that for the purposes of this section a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees of such former Court.

[3] The question, therefore, resolves itself into this. Is the Court of the Additional District Judge the Court to which appeals ordinarily lie from the Court of the Munsif? Section 3, Civil Courts Act, 1887, declares that there should be four classes of civil Courts, namely, (1) the Court of the District Judge, (2) the Court of the Additional Judge (3) the Court of the Subordinate Judge, and (4) the Court of the Munsif. This section, it will be observed, makes a distinction between the Court of the District Judge and the Court of the Additional Judge. The functions of the Additional District Judge are prescribed by sub-s. (2) of S. 8 which declares that Additional District Judges shall discharge any of the functions of a District Judge which the District Judge may assign to them and in the discharge of those functions, they shall exercise the same powers as the District Judge. The Court of the Additional District Judge, therefore, is not the Court to which appeals ordinarily lie from the Court of the Munsif. Such appeals ordinarily lie to the Court of the District Judge who may however, under S. 8 (2) assign them to the Additional District Judge. But S. 21 (3) provides that where the functions of receiving any appeals which lie to the District Judge under sub-s. (1) or sub-s. (2) (that is to say, appeals from Subordinate Judges and Munsifs) has been assigned to an Additional Judge, the appeals may be preferred to the Additional Judge. If, therefore, the District Judge of Muzaffarpur has assigned to the Additional Judge the function of receiving appeals from the Munsifs, then such appeals will ordinarily lie to the Additional Judge. Whether this has been done in the district of Muzaffarpur does not appear from the record of this case because the petitioner did not raise this point when he was called upon to show cause why the Additional District Judge should not direct his prosecution. Had there been any substance in the point I have no doubt it would have been taken. As it was not taken there is no material on which to come to decision on the record of this case. I decline to entertain it now.

[4] The rule is discharged.

D.R.R. *Rule discharged.*

END

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Dated 25.11.1980